

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 25175 of 2013

(Arising out of Order-in-Appeal No. 621/2012 dated 08.11.2012
passed by the Commissioner of Central Excise (Appeals),
Mangalore.)

Commissioner of Central Excise,
S1 & S2, Vinaya Marga,
Siddartha Nagar,
Mysore – 570 011.

Appellant(s)

VERSUS

**M/s. Anurag Foods &
Appliances,**
No. 03, Industrial suburb,
Mysore – 570 008.

Respondent(s)

APPEARANCE:

Mr. Sanjay Venkat, Superintendent (AR) for the Appellant.

None for the Respondent.

**CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER
(TECHNICAL)**

Final Order No. 21180 /2024

DATE OF HEARING: 27.11.2024

DATE OF DECISION: 27.11.2024

PER : D.M. MISRA

None present for the respondent. The matter had been listed on 03.07.2024, 05.08.2024, 05.09.2024, 24.10.2024, and today i.e., 27.11.2024. The notices sent to the respondent had been returned undelivered. The learned Authorized Representative (AR) for the Revenue submits that even though the Revenue tried to contact the respondent through their Range

Office, since the unit had been closed, the notice of hearing could not be delivered. It is contended that further adjournment will not yield any result and requested to decide the appeal on the basis of the available records.

2. The learned Authorized Representative (AR) for the Revenue submits that the present appeal filed by the Department relates to eight show-cause notices issued for the period from February 2003 to February 2008 and rests on classification of the product sold by the respondent as 'My Coffee' and 'My Tea' declaring its classification under Tariff Subheading 2108.99 and consequently, availing the SSI exemption. He submits that the said product known as tea and coffee premixes are manufactured in the factory of the respondent which contained coffee, sugar and whitener. He submits that respondent had cleared the said product during the relevant period by availing the benefit of SSI exemption Notification No.3/2008-CE dated 01.03.2008. He submits that the issue of classification has been decided in favour of the Department by this Tribunal in respondent's own case vide Order No.945/2008 dated 04.09.2008. Further, he submits that the Writ Petition filed against the said Order of the Tribunal by the respondent has been dismissed by the Hon'ble Karnataka High Court. He submits that the learned Commissioner (A) exceeded beyond the scope of show-cause notice to the extent of observing that the premixing of the product 'My Coffee' and 'My Tea' does not amount to manufacture, the product is not dutiable. He submits that this was not the issue before him all along raised by the Department and also the issue raised by the respondent relates to classification of the product under competing entry 2108.99 as claimed by the respondent whereas the Revenue proposes its classification under 2101.10 and

2101.20. Therefore, the order of the learned Commissioner (A) is bad in law and cannot be sustained.

3. We have carefully considered the records of the case and submissions advanced by the learned AR for the Revenue. We find that eight show-causes notices were issued for the period from February 2003 to February 2008. These show-cause notices have been issued on the same line as issued earlier proposing the classification of product 'My Coffee' and 'My Tea' under Chapter Subheading 2101.10 2101.20, respectively and also proposing to deny the benefit of SSI exemption Notification No.3/2008-CE dated 01.03.2008, since the said goods are not considered as specified goods under the said Notification. The show-cause notices also refers to the pendency of the appeal before CESTAT filed by the Revenue against the Order-in-Appeal No.242/2004-CE dated 25.5.2004 whereby the learned Commissioner (A) has taken a view as claimed by the respondent.

4. We find that this Tribunal after analysing the arguments of the Revenue as well as the respondent, decided the classification of the products 'My Coffee' and 'My Tea' under Chapter Subheading 2101.10 and 2101.20, respectively reported as **CCE, Mysore vs. Anurag Foods and Appliances Ltd.: 2009 (234) ELT 641 (Tri.-Chennai)**. The Tribunal held as follows:

"6. We have carefully gone through the case records and submissions by both sides. In the final orders of the Tribunal relied upon by the Id. Counsel for the respondents, the issue decided was the exigibility to excise duty of a product similar to the impugned items. Before the lower authorities this issue was not raised by the appellants. The question as to whether a product is a manufactured one for the purpose of excise is a question of fact. Therefore, in the absence of any evidence on record for this question having been taken up at any stage earlier, we are not

inclined to examine this issue. As regards the issue of classification of the impugned goods, we find that the original authority relied on a case law which dealt with the classification of a product different from the impugned goods. Therefore, the original authority should not have followed the ratio of that decision. The relevant entries in the Central Excise Tariff are reproduced below :

21.01	:	Extracts, essences and concentrates, of coffee or tea, and preparations with a basis of these products or with a basis of coffee or tea; roasted chicory and other roasted coffee substitutes, and extracts, essences and concentrates thereof.
2101.10	:	Extracts, essences and concentrates, of coffee and preparations with a basis of these extracts, essences or concentrates or with a basis of coffee.
2101.20	:	Extracts, essences and concentrates, of coffee and preparations with a basis of these extracts, essences or concentrates or with a basis of coffee.
2108.99	:	Others.

In the impugned order, the Commissioner (A) held that coffee included coffee extracts also. Therefore, the product 'My Coffee' which consists of coffee extracts, chicory, milk powder and sugar was held to be a preparation consisting of 'coffee, milk powder sugar and any other added ingredients' mentioned in chapter note 9(g). As per this chapter note, such products are included under Heading No. 2108. The Commissioner (A) accordingly classified the impugned product under CSH 2108.99. The same reasoning applied to classification of 'My Tea' and was held to be classifiable under CSH 2108.99. The Commissioner found 'Badam Feast', a mixture of almond, milk powder, cardamom and sucrose held to be classifiable under CSH 2108.99 in *MTR Food Products* (supra) to be similar to 'My Coffee' and 'My Tea'.

6.1 In *Nestle India Ltd. v. CCE - 2004* (169) E.L.T. 22 (Tri.-Del.), this Tribunal held that Heading 21.08 did not cease to be a residuary heading merely because a chapter note mentioned some of the items covered by that heading. It was well settled that a product was to be classified under a residuary heading only if it was exhaustively shown that no specific

entry covered it. The Apex Court had held in the case of *Indian Metals and Ferro Alloys Ltd. v. Collector of C.Ex.* - 1991 (51) E.L.T. 165 (S.C.) as under :

"16. One more aspect of the issue should be adverted to before we conclude. The assessee is relying upon a specific entry in the Tariff Schedule while the department seeks to bring the goods to charge under the residuary item No. 68. It is a settled principal that unless the department can establish that the goods in question can, by no conceivable process of reasoning, be bought under any of the specific items mentioned in the tariff, resort cannot be had to be residuary item;"

Following the above decision the Tribunal had held in the *Nestle India Ltd.* case (supra), that the preparations consisting of coffee extract were covered by the entry 2101.10. Therefore, the specific entry had to be preferred to residuary entry. Accordingly, the classification of the preparation of coffee extract examined in the said decision was held to be CSH 2101.10.

7. In the instant case, the Heading 21.01 in its sub-headings 10 and 20 covered preparations with a basis of coffee and tea respectively. Therefore, 'My Coffee' and 'My Tea' have to be classified under CSH 2101.10 and 2101.20 respectively in preference to the residuary entry chose by the Commissioner (A). We order so and allow the appeal filed by the Revenue.

8. As regards the objections raised by the respondents that the impugned goods are not manufactured products and that the Commissioner (A) had not rendered a finding if the impugned goods were edible preparations, we find that the question whether 'My Coffee' and 'My Tea' are manufactured goods is not an issue before us and, as to the edibility of these goods, Commissioner (A) has found them to be preparations of Coffee and Tea. In the result, we dismiss the cross-objections filed by the respondent. The appeal is disposed of."

The said judgment of the Tribunal was latter affirmed by Hon'ble Supreme Court as reported **Anurag Foods and Appliances**

Ltd. vs. Commissioner: 2020 (371) E.L.T. A244 (S.C.).

Similar view has been expressed by the Tribunal in the case of **Eubiotics Pharmaceuticals vs. CCE: 2017 (6) GSTL 302 (Tri.-Hyd.)** upholding the classification and also denying the benefit of SSI Notification No. 3/2008-CE dated 01.03.2008. Further, we find merit in the contention of the learned AR for the Revenue that the learned Commissioner (A) has travelled beyond the scope of show-cause notices by recording observations on the issue of 'manufacture', which has never been raised in the show-cause notices nor part of the adjudication order; the issue all along been classification of the product which presupposes the activity as 'manufacture' and consequently, admissibility of SSI benefit under Notification No.3/2008-CE dated 01.03.2008. Since the classification has been decided in favour of the Revenue in their own case and upheld by the Hon'ble Apex Court, we do not find any merit in the order of the learned Commissioner (A). Consequently, the impugned order is set aside and the appeal filed by the Revenue is allowed.

(Dictated and pronounced in Open Court.)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

rv