CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 1754 of 2010

[Arising out of Order-in-Original No. 08/2010 dated 07/05/2010 passed by the Commissioner of Central Excise, Mangalore.]

CAMPCO CHOCOLATE FACTORY
KEMMINJE,
PUTTUR.

Appellant(s)

VERSUS

Commissioner of Central Excise
7TH FLOOR, TRADE CENTRE,
BUNTS HOSTEL RD.,
MANGALORE – 575 003.
KARNATAKA

Respondent(s)

WITH

Central Excise Appeal No. 1650 of 2011

[Arising out of Order-in-Original No.03/2011 dated 22/03/2011 passed by the Commissioner of Central Excise, Mangalore.]

CAMPCO CHOCOLATE FACTORY
KEMMINJE,
PUTTUR – 574202.
KARNATAKA

Appellant(s)

VERSUS

Commissioner of Central Excise
7TH FLOOR, TRADE CENTRE,
BUNTS HOSTEL RD.,
MANGALORE – 575 003.
KARNATAKA

Respondent(s)

WITH

Central Excise Appeal No. 25081 of 2013

[Arising out of Order-in-Original No. 20/2012 dated 28/09/2012 passed by Commissioner of Central Excise, MANGALORE.]

Campco Chocolate Factory
Kemminje,
PUTTUR
KARNATAKA

Appellant(s)

VERSUS

Commissioner of Central Excise
7TH FLOOR, TRADE CENTRE,
BUNTS HOSTEL RD.,
MANGALORE – 575 003.
KARNATAKA

Respondent(s)

WITH

Central Excise Appeal No. 26842 of 2013

[Arising out of Order-in-Original No. 07/2013 dated 12/03/2013 passed by Commissioner of Central Excise, MANGALORE.]

Campco Chocolate Factory
Kemminje,
PUTTUR - 575003
KARNATAKA

Appellant(s)

VERSUS

Commissioner of Central Excise
7TH FLOOR, TRADE CENTRE,
BUNTS HOSTEL RD.,
MANGALORE – 575 003.
KARNATAKA

Respondent(s)

WITH

Central Excise Appeal No. 21934 of 2014

[Arising out of Order-in-Original No. MLE-EXCUS-000-COM-MS-013-14 dated 26/02/2014 passed by Commissioner of Central Excise, MANGALORE.]

Campco Chocolate Factory
Kemminje P O Darbe,
PUTTUR.

Appellant(s)

VERSUS

Commissioner of Central Excise
7TH FLOOR, TRADE CENTRE,
BUNTS HOSTEL RD.,
MANGALORE – 575 003.
KARNATAKA

Respondent(s)

WITH

Central Excise Appeal No. 20308 of 2015

[Arising out of Order-in-Original No. MLR-EXCUS-000-

COM-MS-010-14-15 dated 19/11/2014 passed by Commissioner of Central Excise and Service Tax, MANGALORE.]

Campco Chocolate Factory
Kemminje, P.O. Darbe,
Puttur
KARNATAKA

Appellant(s)

VERSUS

Commissioner of Central Excise
7^{TH} FLOOR, TRADE CENTRE,
BUNTS HOSTEL RD.,
MANGALORE – 575 003.
KARNATAKA

Respondent(s)

WITH

Central Excise Appeal No. 21231 of 2016

[Arising out of Order-in-Original No. MLR-EXCUS-000-COM-MS-0036-15-16 dated 23/03/2016 passed by Commissioner of Central Excise and Service Tax, MANGALORE.]

Campco Chocolate Factory
Kemminje
PUTTUR
KARNATAKA

Appellant(s)

VERSUS

Commissioner of Central Excise
7^{TH} FLOOR, TRADE CENTRE,
BUNTS HOSTEL RD.,
MANGALORE – 575 003.
KARNATAKA

Respondent(s)

AND

Central Excise Appeal No. 20713 of 2017

[Arising out of No. MLR-EXCUS-000-COM-MS-19-16-17 dated 10/02/2017 passed by Commissioner of Central Excise and Service Tax, MANGALORE]

Campco Chocolate Factory
Kemminje
PUTTUR
KARNATAKA

Appellant(s)

VERSUS

Commissioner of Central Excise
7TH FLOOR, TRADE CENTRE,
BUNTS HOSTEL RD.,
MANGALORE – 575 003.
KARNATAKA

Respondent(s)

Appearance:

S/Shri V. Lakshmi Kumaran,
Ravi Raghavan and
Mohd. Ibrahim, Advocates
LAKSHMI KUMARAN & SRIDHARAN
WORLD TRADE CENTRE NO.404-406,
4TH FLOOR, SOUTH WING BRIGADE
GATEWAY CAMPUS NO.26/1,
DR. RAJKUMAR ROAD,
BANGALORE - 560 055
KARNATAKA

For the Appellant

Shri P.R.V. Ramanan,
Special Counsel

For the Respondent

Date of Hearing: 11/03/2020
Date of Decision: 14/07/2020

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No.20394-20401/2020

Per: P. ANJANI KUMAR

Brief facts of the case are that the appellants, M/s. Campco Chocolate Factory, Kemminje, Puttur (hereinafter referred to as the 'Appellants'), are engaged in the manufacture of 'Nestle Milky bar and Eclairs' 'Cream Sweet', 'Milma milk beats', 'Nandini creamy bite', 'White Chocomas', 'White compound chips', 'Milma Eclairs', 'Nandini Eclairs', 'Coffee Eclairs' etc; 'Nestle Milky bar and Eclairs' were manufactured by the Appellants on job work basis for supply to Nestle India Ltd availing Notifications No.6 /2002-CE dated 1.3.2002 as amended from time to time; they were also availing the benefit of Notifications No 3/2006 dated 1/3/2006 and 12/2012 dated 17/3/2012; classification 'Nestle Milky bar and Eclairs' under heading

1704.90 is not disputed by rival parties; the appellants claim that these products was also disclosed in the monthly ER-1 returns filed by the Appellants from time to time.

2. Revenue, is of the view that the appellants are not eligible to avail the concessional duty under the aforesaid Notifications' on Nestle Milky bar since the aforesaid products are 'White chocolates' which are specifically excluded from the description against Sl.No.15 /19 of the Tables annexed to the said Notifications; Revenue, vide letter dated 09.09.2008, sought the Appellants to furnish the details of ingredients used for the manufacture of Nestle White Chocolate and Nestle Milky Eclairs and to inform whether they availed Notifications No. 6/2002-CE, 3/2006-CE and 12/2012-CE. vide letter, OC No 414/2008, called upon appellants to furnish the details of the ingredients used for the manufacture of white chocolate and Nestle Milky bar Eclairs. Appellants vide their letter dated 22.11.2008 confirmed that Nestle Milky bar Eclairs manufactured by them does not contain any cocoa butter/ cocoa powder or cocoa content in any other form and vide letter dated 17.02.2009 provided the details of the ingredients used in the manufacture of white chocolate and submitted that they have discontinued the production of the same from 01.07.2008. It was also informed that ingredients of Nestle Milky bar Eclairs have changed from January 2008. A Show Cause Notice, C. No. IV/9/131/2009 Hqrs- Adjn dated 7.10.2009, demanding differential duty of Rs.6,64, 08,403/- on the clearances of Nestle Milky bar Eclairs and Nestle Milky bar, during the period from September 2004 to June 2009 was issued on the ground that the appellants had used cocoa butter in the manufacture of Nestle Milky Bar Eclairs therefore no eligible to the benefit of the Notification. The Commissioner vide Order-in-Original No. 08/2010 dated 07.05.2010 confirmed the demand as proposed in the Show Cause Notice.
Periodical demands were raised for subsequent periods and confirmed. The demands confirmed as below. Hence, these appeals.

SI. No.	Appeal No.	Period	Show Cause dated	Order-in-Original No. / date
1.	E/1754/2010	September 2004 to June 2009	07.10.2009	08/2010 dated 12.05.2010
2.	E/16250/2011	July, 2009 to December, 2009	03.08.2010	03/2011 dated 23.03.2011
		January, 2010 to September, 2010	19.01.2011	
3.	E/25081/2013	October, 2010 to August, 2011	03.11.2011	20/2012 dated 28.09.2012

4.	E/26842/2013	September, 2011 to May, 2012	18.09.2012	7/2013 dated 27.02.2013 / 12.03.2013
5.	E/21934/2014	June, 2012 to March, 2013	24.06.2013	MLR-EXCUS-000-COM-MS-013-13-14 dated 26.02.2014
6.	E/20308/2015	April, 2013 to January, 2014	06.05.2014	MLR–EXCUS–000–COM–MS–010–14–15 dated 19.11.2014
7.	E/21231/2016	February, 2014 to March, 2014	06.02.2015	MLR–EXCUS–000–COM–MS–0036–15–16 dated 23.03.2016
		October, 2014 to November, 2014	08.10.2015	
		December, 2014 to January, 2015	08.12.2015	
		February, 2015 to March, 2015	10.12.2015	
8.	E/20713/2017	01.04.2015 to 30.04.2015	02.05.2016	MLR–EXCUS–000–COM–MS–19–16–17 dated 10.02.2017
		May, 2015 to December, 2015	02.06.2016	

3. Shri Laxmikumaran, Learned Senior Counsel for appellants, submits that impugned products are not 'chocolate'; in any case not white chocolate and hence exemption under notification no.6/02-ce (Sl.No.247) and no.3/06-CE Sl.No.16) cannot be denied; Sl.No.247 of Notification No.6/2002-CE as amended and Sl.No.16 of Notification No.3/06-CE prescribes concessional rate of excise duty for *'sugar confectionery (excluding white chocolate), not containing cocoa'* falling under sub-heading 1704.90; there is no dispute in the present case that the products in question are sugar confectionery falling under sub-heading 1704.90; only dispute raised by the Department is that the products in question are excluded from the purview of the Notification since the same are 'white chocolate' inasmuch as they contain 'cocoa butter'.

3.1. Appellants submit that Sl.No.247 of Notification No.6/02-CE admittedly excludes 'white chocolate' from its purview; Notification has no definition for the expression 'white chocolate'; Central Excise Tariff also has no chapter note or section note which defines the expression 'white chocolate'; in the absence of any statutory definition, one has to apply the commercial parlance test to find out as to how the product in question is commercially known, understood and bought and sold by the people who are dealing in those products as held in (i) *Indo International Industries Vs CST* reported in *1981 (8) ELT 325 (SC)* and (ii) *Asian Paints India Ltd Vs CCE* reported in *1988 (35) ELT 3 (SC)*; the products in question are known, bought and sold and commercially recognized as Eclairs which is nothing but a boiled sugar confectionary; further, the process of manufacture of the product and the various statutory provisions under the PFA Act and the Rules also would show that the product is nothing but a boiled sugar confectionary only; the product in question does not have any of the characters which would be present and attributable to a chocolate and is not commercially known or bought and sold in the market or dealt with or understood as white chocolate by anybody; neither the wrappers nor the advertisements nor the invoices refer to the products as white chocolate but as "sugar boiled confectionery". Industrial Chocolate Manufacture and Use by S.T. Beckett under the Chapter Traditional Chocolate gives a flow chart of chocolate making; as per the book first process in chocolate making is fermentation of cocoa; in the present case, the products in question are not manufactured from cocoa at all. Therefore, the exemption under the aforesaid Notifications cannot be denied to the products in question.

4. Learned Senior Counsel submits that Rule 5 of the Food Adulteration Rules, 1955 (PFA Rules) specifies the standards and specifications for the various food products; appendix B to the Rules specifies the definitions and standards of quality of the various products; products in question manufactured by the Appellants are covered under this category A.25.01 as "sugar boiled confectionery"; product in question, therefore, continues to satisfy the definition of sugar boiled confectionary, notwithstanding the filling element being in the centre; cocoa butter, if any, has been used only as a filling element in the Eclairs Milky bar and does not alter the character of the product anywhere and the product continues to retain its character as a Milky bar only; the usage of cocoa butter does not make the same cannot fall under the category of chocolate; there are very many products available in the market in which the filling element in the middle of two layers of biscuits or wafers contains white chocolate; for that reason, the products do not become chocolate and they continue to retain their character as biscuits or wafers. Clause A.25.03 of this Appendix B (PFA Rules) deals with specifications and standards for different types of chocolates; products in question in the present case certainly do not meet the standards and as such cannot be classified as white chocolates.

5. Learned Senior Counsel submits that Cocoa butter is not used as an ingredient in 'Nestle Milky bar Eclairs' from 01.01.2008; the ingredients till December 2007 and after wards are as follows.

Till 31.12.2008	from 01.01.2008
(a) Liquid Glucose (b) Sugar (c) Milk Solids (d) Hydrogenated Refined Vegetable Oil (e) Cocoa Butter (f) Salt (g) Soya Lecithin (h) Glycerol Mono Stearate	(a) Liquid Glucose (b) Sugar (c) Milk Solids (d) Hydrogenated Vegetable oils (e) Salt (f)Soya Lecithin (g) Glycerol Mono Stearate

6. Learned Senior counsel submits that effective from 1.1.2008, the appellants have stopped using cocoa butter in the manufacture of 'Nestle Milky bar Eclairs' as also evidenced from the letter dated 17.2.2009 by the Appellants; the affidavit dated 30.03.2010 sworn by the Deputy General Manager of Appellants and the wrapper of the Nestle Milky bar Eclairs manufactured by the Appellants right from January 2008. Similar is the position in respect of 'Nestle Milky bar'; the ingredients are (a) Sugar (b) Hydrogenated Vegetable oils (c) Milk Solids (d)Soya Lecithin (e) Added Artificial flavouring substance; Undisputedly, cocoa butter was never used as an ingredient in the manufacture of the above product i.e. Nestle Milky bar as is evident from the manufacturing process of Nestle Milky bar.

7. Learned Senior counsel submits that the products in question contains vegetable fat and hence cannot be treated as white chocolate; as per PFA Rules, chocolate shall not contain any vegetable oil other than cocoa butter; white chocolate also should not contain any vegetable fat other than cocoa butter; he places reliance on Nestle (India) Ltd. vs. CCE reported at 2000 (124) ELT 898 affirmed by the Supreme court in 2005 (182) ELT A164 (SC) wherein it was held that the product containing vegetable oil cannot be marketed as chocolate and that if an item is to be treated as chocolate under the Central Excise Tariff Act, it cannot contain vegetable oil since the use of the same in chocolate is prohibited under PFA Rules; reference to PFA Rules is supported by the decision of Punjab and Haryana High Court in the case of Food Specialties Limited vs UOI reported in 1991 (51) ELT 310 approved by the Apex Court 1998 (97) ELT 402 (SC); as hydrogenated vegetable oilis an ingredient in eclairs and Milky bar, they are out of purview of white chocolate, they cannot be treated as white chocolate for the purpose of Central Excise Tariff and Sl. No. 247 of Notification No. 6/2002 dated 1.3.2002 as well as Sl. No. 16 of Notification No.3/2006-CE and exemption cannot be denied; Further, the issue is squarely covered by the decision of the Hon'ble Tribunal, Allahabad in the case of Marko Foods Vs CCE, Kanpur reported in 2019 (370) E.L.T. 603 (Tri. - All.) wherein, a similar issue and product i.e., Parle 2-in-1 Eclairs" and "Kismi Toffee and Bar", was held to be boiled sweets containing no cocoa butter and having 8% fat content, are not "white chocolate" under Tariff Item 1704 90 30 of Central Excise Tariff and held that the said goods are eligible to benefit of Notification Nos.6/2002-CE, 3/2006-C.E. and 12/2012-C.E.

8. Learned Senior counsel submits that reliance placed on the HSN Explanatory note to Heading No.1806 to come to the conclusion that vegetable oil can be used as ingredient in chocolate is wholly irrelevant and inapplicable to the present case since there is no dispute that the Nestle Milky bar Eclairs is classifiable under Heading No.1704 of Central Excise Tariff and not under Heading No.1806; General Note (b) to Chapter 18 of HSN states that the Chapter excluded White chocolate (heading 17.04); further, note (a) below the HSN Explanatory note to Heading No.1806 states that the heading does not include white chocolate (composed of cocoa butter, sugar and powdered milk) (heading 17.04); also the HSN explanatory note to Heading No.1704 does not mention that vegetable oils can be used as an ingredient in white chocolate, unlike the HSN explanatory note to Heading No.1806.

9. Learned Senior counsel submits that the burden of classification is on the Revenue and the said burden is to be discharged based on material evidence and not merely based on unsupported assertions; it is also settled legal position that when an assessee is fully covered by the terms of the notification and the Revenue seeks to dis-allow the benefit of the notification by invoking the exclusionary clause, the burden is on the Revenue to show that the product of the assessee is covered by the exclusion clause; he relies on CC Vs K. Mohan & Co. Exports 1989 (43) ELT 811 (SC) and Nanya Imports & Exports Enterprises Vs CC 2006 (197) ELT 154 (SC). Revenue has not discharged this burden cast on it by leading in any material evidence, except for a mere assertion based on HSN explanatory notes; there is no averment in the impugned Order to the effect that in the commercial parlance the products in question are known and bought and sold and understood as 'white chocolate'; thus, for lack of evidence, the impugned Order is not unsustainable.

10. Learned Senior counsel submits that prior to the decision in the case of Nestle India Ltd in 2008; the courts have consistently held that products containing hydrogenated vegetable oil are not classifiable as white chocolate under Chapter Heading 17.04; cases as shown below.

Sl. No.	**Decision**	**Date of the decision**
1.	Food Specialties Ltd. Vs. UOI 1991 (51) ELT 310 (P&H)	27.03.1990
2.	UOI Vs. Food Specialties Ltd. 1998 (97) ELT 402 (SC)	11.12.1997
3.	Nestle (India) Ltd. Vs. CCE, Mumbai 2000 (124) ELT 888 (Tribunal)	21.05.1999
4.	Affirmation by Supreme Court 2005 (182) ELT A164 (SC)	15.02.2005
5.	CCE, Mumbai Vs. Britannia Industries Ltd 2005 (183) ELT 257 (Tri.-Mumbai)	05.01.2005
6.	Little Star Foods Pvt. Ltd. Vs. CCE, Hyderabad 2006 (199) ELT 451 (Tri.-Bang.)	23.03.2006
7.	Nestle India Ltd. Vs. CCE, Goa 2008 (227) ELT 631 (Tri.-Mumbai)	04.07.2008

11. He submits that it was the legal position as settled, by the decisions contained in Sl. No. 1 to 6 of the above table until 04.07.2008, that products containing hydrogenated vegetable oil are not classifiable as white chocolate under Chapter Heading 17.04; CESTAT, in Nestle India Ltd Vs CCE, Goa dated 04.07.2008, deviated from the above legal position; the present Show Cause Notice has been issued only in the light of the above decision; therefore, invocation of longer period alleging suppression is not maintainable as the Appellants were under the bona fide belief that the impugned products are not white chocolate; even in the decision Tribunal followed in the impugned order had held that it was a case of pure interpretation of the tariff entries vis-à-vis the exemption Notification; appeal filed by the Revenue against the portion of the order of the tribunal has been dismissed by the Apex Court vide their order dated 02.02.2009 reported in 2009 (237) ELT A102 (SC); therefore, appellants couldn't be alleged to be guilty of suppression of facts in the nature of the product; duty was demanded on goods cleared during the period from September 2004 to June 2009 and the Show Cause Notice is dated 7.10.2009; the demand for the period prior to September 2008 is barred by limitation. He submits that so far as Nestle Milky bar is concerned, the Appellants have never used cocoa butter as one of the ingredients; hence the question of suppressing the fact of use of cocoa butter in this product does not arise; therefore, in so far as the duty demand on Nestle Milky bar is concerned, the extended period of limitation is not invokable at all; moreover, right from the day when the Appellants commenced manufacture of the products in question, the Appellants have filed the monthly ER-1 returns declaring the clearance of the various products by their description, classification and notification claimed; thus, all the necessary facts relevant for the Department to make up its mind regarding the correct classification and eligibility to exemption of these products was in the knowledge of the Department; further, a mere perusal of the ER-1 returns filed by the Appellants would have revealed that the products in question are being cleared under Sl.No.247 of the notification; as the department failed to ask relevant question at the relevant time, suppression cannot be alleged.

12. Learned Senior Counsel further submits that the decision in the case of ***M/s Nestle India Ltd*** is not applicable to the present case as the issue therein was as to whether Nestle Milky bar Choo containing Cocoa Butter can be classified under CETH 18.06 as 'White Chocolate' even when the same contains Hydrogenated Vegetable Oil; in the instant case there is no dispute regarding classification under Heading No.1704; Tribunal had held in the said case that the presence of Hydrogenated Vegetable Oil shall not take the goods out of the purview of White Chocolate so long as the said goods contain cocoa butter; further, there is no HSN explanatory note under 17.04 vegetable oils can be used as an ingredient in white chocolate, unlike the

HSN explanatory note to Heading No.1806; therefore, the very basis of the order of the CESTAT is totally incorrect; Hon'ble CESTAT in the earlier case of Nestle India reported at 2000 (124) ELT 898 (affirmed by the Supreme Court) held that if a product contains vegetable oil/fat it cannot be treated as chocolate ; it is an admitted fact that *Nestle Milky bar* Éclairs manufactured and cleared by the Appellants during the impugned period does not contain cocoa butter and in the absence of same, it cannot be considered as Chocolate, leave alone White Chocolate. Presence of Hydrogenated Vegetable Oil and absence of cocoa butter should leave no scope for considering impugned products as 'Chocolate' at all, much less White Chocolate.

13. Learned Senior Counsel submits that without prejudice to above, the quantification of duty demand is incorrect; Notification 2006-CE (NT) dated 1-3-2006 issued under Section 4A of the Act has prescribed an abatement @ 40% for white chocolate falling under Heading 1704.90; if the Department treats the products in question as white chocolate and demands differential duty, the higher abatement @ 40% should be extended from the MRP and accordingly differential duty demand is to be calculated.

14. Learned Senior Counsel submits that penal provisions under Section 11AC of the Act and Rule 25 of the Rules are not invokable as the Appellants have not suppressed any facts much less with an intention to evade payment of duty; whether the goods manufactured by the Appellants are eligible for the exemption or are excluded from the purview of the notification is a matter of interpretation of law; when short-payment of duty is made due to the difference of bona fide interpretation of law, then no penalty is to be imposed. He relied on the ratio of the following cases.

- White Machines Vs. CCE, Delhi-I - 2002 (149) ELT 210
- CCE, Indore Vs. Syncom Formulation (I) Ltd. - 2002 (150) ELT 1228
- Jay Kay Exports Vs. CC(Port), Calcutta - 2003 (161) ELT 443
- G.V. Exim Pvt. Ltd. Vs. CC(Airport), Kolkata - 2003 (160) ELT 900
- JJ Foam Pvt. Ltd. Vs. CCE, Ghaziabad- 2004 (165) ELT 309
- S. Narendra Kumar & Co. Vs. CCE, Mumbai-II- 2003 (156) ELT 1001

15. Learned Senior Counsel made following submissions, pursuant to the hearing held on 11.03.2020, stating that

- as per Indian Standards Specification – IS 1163: 1992 *3.1.5 - 'White Chocolate means a homogeneous product made from Cocoa butter, milk solids including milk fat and sugar' and as per* 'Encyclopedia of Food Science and Technology by Frederick J. Francis – University of Massachusetts *White Chocolate has been defined by the European Economic Community (EEC) Directive 75/155/EEC as free of colouring matter and consisting of cocoa butter (not less than 20%), sucrose (not more than 55%); milk or solids obtained by partially or totally dehydrated whole milk, skimmed milk, or cream (not less than 14%); and butter or butter fact (not less than 3.5%).*
- as per above, it is clear that '*White Chocolate'* means product made from cocoa butter, milk solids including milk fat and sugar; thus, the presence of Cocoa butter is a determinative factor in deciding the product as White chocolate.
- therefore, the expression "composed of" used in HSN Explanatory Notes to Chapter 17 while defining white chocolate shall be read as "essentially consisting of".
- in the present case Cocoa butter is not used as an ingredient in 'Nestle Milky bar Eclairs' from 01.01.2008; undisputedly, cocoa butter was never used as an ingredient in the manufacture of the 'Nestle Milky bar'; therefore, the above products cannot be classified as white chocolates and therefore to be excluded from the purview of the Notification.
- as regards the demand of duty on 'Nestle Milky bar Eclairs' for the period prior to 01.01.2008, it is submitted that what is excluded from the purview of exemption is white chocolate and not a product containing white chocolate; 'Nestle Milky bar Eclairs' is a sugar boiled confectionary with a Centre filling which is disputed to be white chocolate; as 'Nestle Milky bar Eclairs' is a sugar boiled confectionary and not a white chocolate, the same is not excluded from the purview of the exemption Notification; demand on 'Nestle Milky bar Eclairs' for the period prior to 01.01.2008 is also liable to be set aside on this count.

16. Learned Special Counsel, Shri P. R.V. Ramanan appearing for the department submits that the classification of these products under heading 1704.90 is accepted by both the appellant and the department; Revenue is, however, of the view that the appellant is not eligible to avail of the concessional duty under the aforesaid Notifications since the aforesaid products are 'White chocolates' which are specifically excluded from the description against s.no.15 /19 of the Tables annexed to the said Notifications.

17. Issues involved in these appeals are (i). Whether the confectionery products cleared by the appellant under Chapter 1704.90 are 'white chocolate' or not; (ii). Whether or not the said products are eligible to avail of the concessional duty under the aforesaid Notifications and (iii). As to whether in respect of earlier period, the invocation of extended period of limitation and levy of Interest and imposition or penalties are justified. Referring to the appellants claim that main ingredients of 'Nestle Milky bar and Eclairs' were sugar, liquid glucose, skimmed milk powder, hydrogenated vegetable fat, cocoa butter, salt, soya lecithin, GM Stearate up to 1/1/2008 and that from 1/1/2008, cocoa butter was not used while other Ingredients continue to be used, learned Special Counsel reiterates the findings as at paras 14 to 23.02, 24 to 29 and Paras 30 to 33 of the OIO No.8/2010 dated 7/12 -5-2010; the appellants did not produce any correspondence with Nestle about the change in composition.

18. Learned Special Counsel submits that Revenue places reliance on the decision of the Hon'ble Tribunal in the case of Nestle India Limited Vs CCE, Goa 2008 (2271 E LT 631 (Tri-Mumbai) which was maintained by the Hon'ble SC; conclusions that can be drawn from the above decision are;

- Nestle not only recognizes Milky bar Choo' as white chocolate but markets the same as white chocolate;
- White chocolate may not always be derived from cocoa; in some cases, cocoa butter may be replaced by hydrogenated vegetable fats;
- for the purpose of CET, the presence of hydrogenated vegetable fats in the products does not mean that they cannot be regarded as white chocolates;

- The contention that since the products cannot be considered as white chocolate under PEA rules, the same should apply to classification under CET and for interpreting the subject notification is not acceptable.

19. Learned Special Counsel submits that Revenue has reservations about Allahabad Bench of the tribunal, in the case of Marko Foods Vs CCL Kanpur, held that somewhat similar products (Parle 2-in-1 Eclairs' and Kismi Toffee and Bar) are sugar confectionery and neither chocolate nor bubblegum and eligible for the exemption under Notifications No 3/06 and 12/12; the decision was based on two grounds that from the Explanatory notes to Chapter 17 of HSN it is clear that white chocolate should contain cocoa butter and that as per the Food Safety and Standards (rood Products Standard and Food Additives) Regulations, 2011, fat content in white chocolate should be 25% whereas as per the Test report fat content in these products is only 8%. He submits that the decision has no precedence value for the following reasons.

- Firstly, this decision has not considered the decision in the case of 'Nestle', which has been maintained by the Apex Court and accepted by 'Nestle';
- Secondly, HS Explanatory Notes for heading 17.04 nowhere states that the presence of cocoa butter is mandatory in a white chocolate; white chocolate, containing cocoa butter but not containing more than mere traces of cocoa would be included within heading 17.04; accordingly, even white chocolate containing more than mere traces of cocoa would get covered under heading 18.06; white chocolate without any traces of cocoa i.e. even without cocoa butter does exist (as per CESTAT order in Nestle) and it goes without saying that such white chocolate would get covered under heading 17.04 and continue to be known as white chocolate;
- Thirdly, the inapplicability of the provisions of Food Safety and Standards (Food Products Standard and Food Additives) Regulations, 2011 to CET and the notification issued thereunder has been discussed in great detail which again has not been noticed by the Allahabad Bench.
- Fourthly, Hon'ble Apex Court in the case of Commissioner of Central Excise, New Delhi Vs Connaught Plaza Restaurant (P) Ltd, 2012 (286) ELT 321 (SC), observed that:

> *43. We are unable to persuade ourselves to agree with the submission. It is a settled principle in excise classification that the definition of one statute having a different object, purpose and scheme cannot be applied mechanically to another statute. As aforesaid, the object of the Excise Act is to raise revenue for which various goods are differently classified in the Act. The conditions or restrictions contemplated by one statute having a different object and purpose should not be lightly and mechanically imported and applied to a fiscal statute for non-levy of excise duty, thereby causing a loss of revenue. The provisions of PFA, dedicated to food adulteration, would require a technical and scientific understanding of "ice-cream and thus, may require different standards for a good to be marketed as 'ice-cream. These provisions are for ensuring quality control and have nothing to do with the class of goods which are subject to excise duty under a particular tariff entry under the Tariff Act. These provisions are not a standard for interpreting goods mentioned in the Tariff Act, the purpose and object of which is completely different. –*

In view of the above, decision in is per incuriam and is no good precedent to follow; the products in question are nothing but white chocolate and denial of the benefit of exemption under the Notifications 3/2006 and 12/2012 is just, legal and proper.

20. On the issue of invocation of extended period of limitation, Learned special Counsel submits that the appellants disclosed to the department about the ingredients used in the products in question only on 17/2/2009, while the 'Nestle' decision was rendered in July, 2008; since they were manufacturing 'Milky bar and Eclairs' on Job work basis for Nestle they ought to have been aware of the decision; Yet they continued to avail of the duty exemption, which constitutes deliberate default attracting the extended period of limitation for the period from 9/2004 to 6/2009 in respect of Nestle Milky ban Eclairs; same reasoning is applicable in respect of appellants' own products for the period from 9/2006 to 7/2011; for the remaining period, SCNs have been issued from time to time and confirmed without having to invoke the extended period of limitation; interest under section 11AA on the amount confirmed is payable; penalties imposed correctly on their part resulting in the contravention of Central excise law.

21. Heard both sides and perused the records of the case. The precise issues that require to be addressed by us in the instant appeals are (i) whether the confectionary products "Nestle Milky Bar and Eclairs" cleared by the appellants classified under CETH 1704.90 can be considered to be white chocolate so as to be eligible for exemption under Notification 6/2002-CE dated 01.03.2002 (SI. No. 247) and Notification No. 3/2006-CE dated 01.03.2006 (SI. No. 16) and whether the invocation of extended period, (in respect of Appeal No. E/1754/2010) and imposition of penalties are tenable.

21.1. The crux of the argument on the part of the appellants is that white chocolate is not defined under Central Excise Tariff or Notifications and therefore necessarily, the treatment of the impugned goods should be as per the other acts or technical literature or commercial parlance; the impugned products contain hydrogenated vegetable oils and as per PFA Act, use of HVO in manufacturing of chocolates is not permissible and therefore the product cannot be held to be chocolate, leaving alone white chocolate; they have informed the Department that cocoa butter was never an ingredient Milky bar and w.e.f. 01.01.2008 usage of cocoa butter was discontinued in the manufacture of 'Eclairs'.

21.2. Per contra, Revenue is of the opinion that in terms of HSN Explanatory Notes and the Tariff Headings, the impugned products can be classified under CETH 1704.90; prohibitions or conditions laid down under other acts are not a criteria for determining the classification of a product under Central Excise Tariff and that as per the packing material, the samples of which were supplied by the appellants themselves vide their Letter dated 25.03.2009, the ingredients included liquid glucose, sugar, milk solids, partially hydrogenated oils, cocoa butter, salt and emulsifiers (soya lecithin and 471); as the product contains cocoa butter, the same is classifiable as 'white chocolate' and Tribunal in the case of Nestle India Ltd. Vs CCE, Goa, 2008 (227) ELT 631 (Tri. Mum.) held a similar product manufactured by Nestle to be white chocolate.

22. We find that both the Revenue as well as the appellant do not dispute the classification of the impugned products under CETH 1704. The only difference in the argument is based on the presence or absence of ingredients like cocoa butter and hydrogenated vegetable oils. We find that reference to the Tariff Headings and Chapter/Section Notes and HSN Explanatory Notes is required to have a better appreciation of the issue.

Tariff Heading Chapter 17 Sugar and Sugar Confectionery

1704	**Sugar Confectionery (including white chocolate), not containing cocoa**		
1704 10 00	-Chewing gum, whether or not sugar coated	Kg.	16%
1704 90	-Other:	Kg.	16%
1704 90 10	---Jelly confectionery	Kg.	16%
1704 90 20	---Boiled sweets, whether or not filled	Kg.	16%
1704 90 30	---Toffees, caramels and similar sweets	Kg.	16%
1704 90 90	---Other	Kg.	16%

22.1. HSN Explanatory Notes for Chapter 17 relevant for the current issue are as follows:

SECTION IV- PREPARED FOODSTUFFS; BEVERAGES, SPIRITS AND VINEGAR; TOBACCO AND MANUFACTURED TOBACCO SUBSTITUTES

CHAPTER 17

SUGARS AND SUGAR CONFECTIONERY

GENERAL

The Chapter does not include:

(a)Sugar Confectionery containing cocoa or chocolate (other than white chocolate) in any proportion and sweetened cocoa powder (heading 18.06).
(b) Sweetened food preparation of Chapter 19,20,21 or 22,
(c) Sweetened forage (heading 23.09)
(d) Chemically pure sugars (other than sucrose, lactose, maltose, glucose and fructose) and aqueous solutions thereof (heading 29.40)
(e) Medicaments containing sugar (Chapter 30).

CHAPTER 17- SUGARS AND SUGARS CONFECTIONERY

HEADING 17.04 SUGAR CONFECTIONERY (INCLUDING WHITE CHOCOLATE);

Not CONTAINING COCOA

170410- Chewing gum, whether or not sugar-coated
1704.90 Other
This heading covers most of the sugar preparations which are marketed in a solid or semi-solid form, generally suitable for

immediate consumption and collectively referred to as sweetmeats, confectionery or candies, inter alia

(i)---
(ii)----
(iii)----
(iv)----
(v)-----
(vi) White chocolate composed of sugar, cocoa butter, milk powder and flavoring agents, but not containing more than mere traces of cocoa (cocoa butter is not regarded as cocoa)

22.2. As per Tariff Entry 1704 refers to sugar confectionery (including white chocolate) not containing cocoa. Chapter 17 does not include sugar confectionery containing cocoa or chocolate (other than white chocolate) in any proportion and sweetened cocoa powder (heading 18.06). HSN Explanatory Notes to Heading 170490 other says that the heading covers most of the sugar preparations which are marketed in a solid or semi-solid form, generally suitable for immediate consumption and collectively referred to as sweetmeats, confectionery or candies. It includes *inter alia* white chocolate composed of sugar, cocoa butter, milk powder and flavoring agents but not containing more than mere traces of cocoa (cocoa butter is not regarded as cocoa). It is clear from the above that white chocolate can be classified under Chapter 17 and white chocolate composes sugar, cocoa butter, milk powder and flavoring agents, but not containing more than mere traces of cocoa.

23. Going by the above, it is evident that the entire case hinges on the fact whether or not cocoa butter is used in the manufacture of the impugned products and whether or not the use of HVO would affect the classification under Central Excise Tariff. We find that the appellants have pleaded that the concerned Notification has no definition for the expression 'white chocolate'; Central Excise Tariff also has no chapter note or section note which defines the expression 'white chocolate'; in the absence of any statutory definition, one has to apply the commercial parlance test to find out as to how the product in question is commercially known, understood and bought and sold by the people who are dealing in those products as held in (i) *Indo International Industries Vs CST* (supra) and (ii) *Asian Paints India*

Ltd Vs CCE (supra); the products in question are known, bought and sold and commercially recognized as Eclairs which is nothing but a boiled sugar confectionary; further, the process of manufacture of the product and the various statutory provisions under the PFA Act and the Rules also would show that the product is nothing but a boiled sugar confectionary only; the product in question does not have any of the characters which would be present and attributable to a chocolate and is not commercially known or bought and sold in the market or dealt with or understood as white chocolate by anybody; neither the wrappers nor the advertisements nor the invoices refer to the products as white chocolate but as "sugar boiled confectionery". As seen above, we note that HSN Explanatory Notes of the Tariff do provide a definition for the disputed 'White Chocolate'; Explanatory Notes under Heading 1704.90- Others, go to specify that the Heading includes, *inter alia*

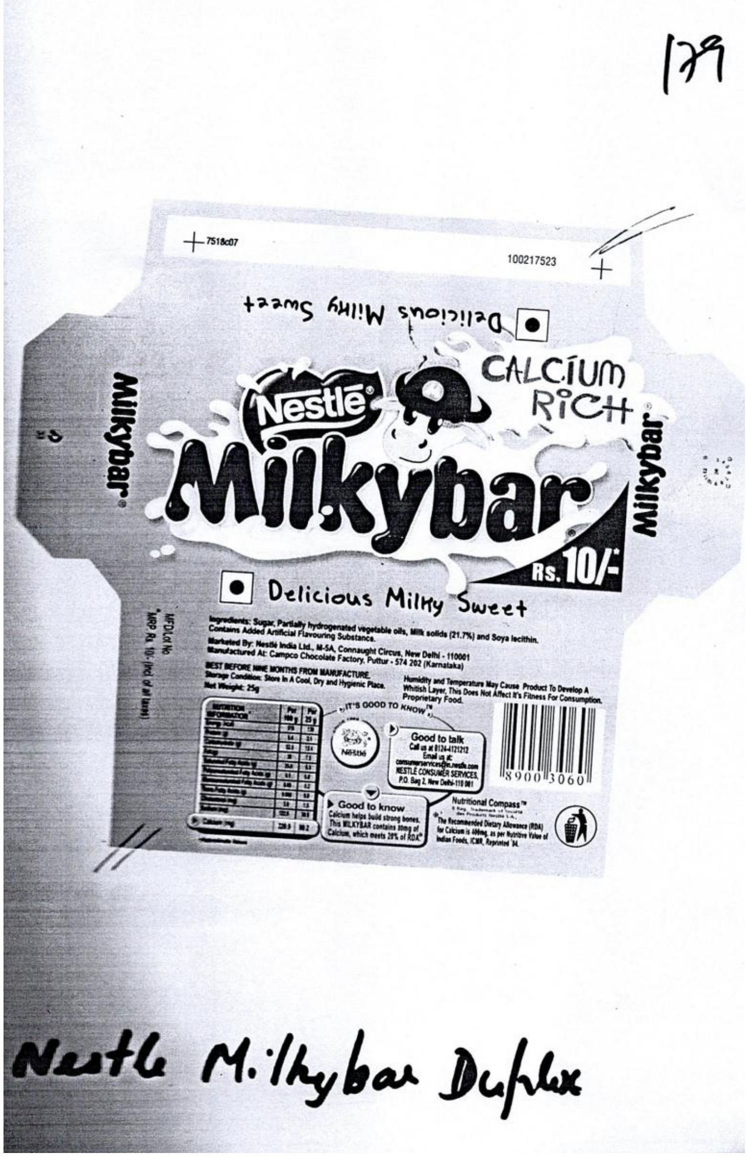
> *"(vi) White chocolate composed of sugar, cocoa butter, milk powder and flavoring agents, but not containing more than mere traces of cocoa (cocoa butter is not regarded as cocoa)."*

In view of the above, it is evident that definition of 'White Chocolate' is provided in the Explanatory Notes and therefore to this extent, we find that the submissions of learned Senior Counsel are not correct and the case laws relied upon to say that in the absence of statutory definition, commercial/trade parlance understanding has no relevance.

24. Now, the case hinges on the only issue that is whether or not the impugned products merit classification as white chocolate in terms of the HSN Explanatory Notes. It is the averment of the appellants that they have not used cocoa butter at all in Milky bar and have discontinued the use of same in Eclairs w.e.f. 01.01.2008. Learned Commissioner refers to sample of packing material (polybag and jar labels) of Nestle Milky bar Eclairs a letter submitted by the appellants on 25.03.2009, observes that the packing material shows that the ingredients are Liquid Glucose, Sugar, Milk Solids, Partially Hydrogenated Vegetable Oils, Cocoa Butter, Salt and Emulsifiers (soya Lecithin & 471). On going through the available case records, it is seen that the above letter of the appellants refers to a letter dated 23.03.2009 written by the Department wherein it was specifically asked to supply the wrappers/packing materials in respect of Milky bar Eclairs before January 2008. In this context, we find that it is not correct on the part of the Adjudicating Authority to rely upon the said wrappers pertaining to the period before January 2008 to conclude that the impugned goods contained cocoa butter during the period in dispute. The appellants submitted before the Adjudicating Authority an affidavit dated 30.03.2010 sworn by Sh. Suresh Bhandari, Deputy General Manager of the appellants. The affidavit clearly states that the averment in the SCN that the wrapper furnished vide letter dated 25.03.2009 is the wrapper of Nestle Milky bar Eclairs for the period after 1st January 2008 is factually incorrect and contrary to the facts on record; they have stopped using cocoa butter as an ingredient in the impugned product.

25. Learned Commissioner, while depending on wrappers for the period before 01.01.2008, observes that perusal of the correspondence between the Department and the appellants lead to the conclusion that the appellants have taken lot of time and after much deliberations proffered the details required by the Department and after much consideration submitted the affidavit. Learned Commissioner does not, however, give any specific evidence to show that the impugned products contain cocoa butter and therefore are not eligible for the exemption contained in the Notification cite d above. It is not also the case of the Department that an enquiry has been conducted by way of drawl of samples from factory or market resulting in recovery of literature which showed that the impugned products contained cocoa butter. We also find that the Department has not got any test or chemical analysis to confirm the presence of cocoa butter in the impugned products, which alone would have been helpful in establishing the facts about the ingredients. The same not having been done, it is not open for the Adjudicating Authority to decide the case on the basis of the writings on the wrappers/packing material which are claimed and reasonably established to belong to the period before 01.01.2008. It is also not correct on the part of the Commissioner to base his findings on the purported delay that occurred in the reply furnished by the appellants. Appellants vide their letter dated 22.11.2008 confirmed that Nestle Milky bar Eclairs manufactured by them does not contain any cocoa butter/ cocoa powder or cocoa content in any other form. Moreover, the Department was also aware of the judgment of Mumbai Bench of the Tribunal in the case of Nestle in 2008. SCN came to be issued in October 2009. There was delay on the part of the Department also and moreover, no samples were drawn and test conducted. Therefore, we find that the Department has not discharged the burden of proof that the impugned products contained cocoa butter and thus were not eligible for exemption in terms of the Notification cited above.

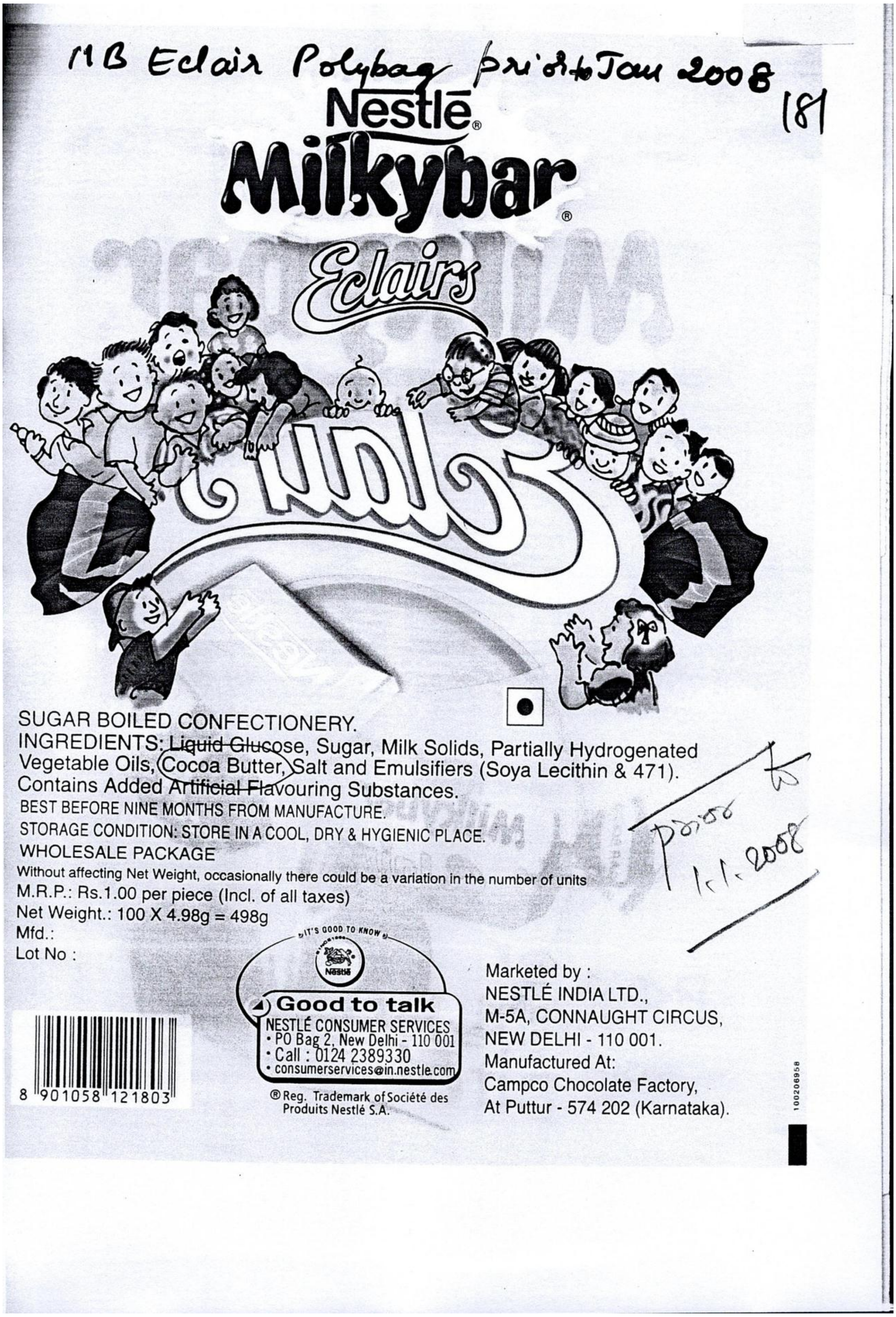
26. On going through the affidavit signed by the appellants and exhibits at pages 179, 181, 183, we find that the ingredients contained in Nestle Milky bar before and after 01.01.2008 are sugar, partially hydrogenated vegetable oils, milk solids and soya lecithin contains added artificial flavoring substance. Exhibit at Page 179 is extracted as below:



26.1. The ingredients of Nestle Milky bar Eclairs before and after 01.01.2008 are as follows:

Before 01.01.2008	after 01.01.2008
(a) Liquid Glucose (b) Sugar (c) Milk Solids (d) Partially Hydrogenated Vegetable Oils (e) Cocoa Butter (f) Salt (g) Emulsifiers (Soya Lecithin & 471)	(a) Liquid Glucose (b) Sugar (c) Milk Solids (d) Hydrogenated Vegetable oils (e) Salt (f)Emulsifiers (Soya Lecithin & 471)

The extracts at pages 181 & 183 are as follows:


MB Eclair Polybag prior to Jan 2008
18
Nestlé®
Milkybar®
Eclairs
SUGAR BOILED CONFECTIONERY.
INGREDIENTS: ~~Liquid Glu~~cose, Sugar, Milk Solids, Partially Hydrogenated Vegetable Oils, Cocoa Butter, Salt and Emulsifiers (Soya Lecithin & 471).
Contains Added ~~Artificial Fla~~vouring Substances.
BEST BEFORE NINE MONTHS FROM MANUFACTURE.
STORAGE CONDITION: STORE IN A COOL, DRY & HYGIENIC PLACE.
WHOLESALE PACKAGE
Without affecting Net Weight, occasionally there could be a variation in the number of units
M.R.P.: Rs.1.00 per piece (Incl. of all taxes)
Net Weight.: 100 X 4.98g = 498g
Mfd.:
Lot No :
prior to 1.1.2008
IT'S GOOD TO KNOW
Nestlé
Good to talk
NESTLÉ CONSUMER SERVICES
• PO Bag 2, New Delhi - 110 001
• Call : 0124 2389330
• consumerservices@in.nestle.com
® Reg. Trademark of Société des Produits Nestlé S.A.
Marketed by :
NESTLÉ INDIA LTD.,
M-5A, CONNAUGHT CIRCUS,
NEW DELHI - 110 001.
Manufactured At:
Campco Chocolate Factory,
At Puttur - 574 202 (Karnataka).
8 901058 121803
100206958

27. We find that Revenue has relied upon the case of Nestle decided in 2008 (supra). Learned Senior Counsel for the appellants submits that it has been brought to the notice of the Adjudicating Authority that the following points distinguish the issue decided by Co-ordinate Bench in the above matter stating that Tribunal entirely relied upon HSN Explanatory Notes to Heading No. 1806 to come to the conclusion that vegetable oil can be used as an ingredient in the Milky bar choo falling under 1704. HSN Notes under CETH 1806 are not relevant as there is no dispute that the impugned products are classifiable under 1704;Tribunal ignored Prevention of Food Adulteration Rules, 1955; as per Rule 5 (Item No. A 25.03) chocolates shall not contain any vegetable fat other than cocoa butter; CESTAT has overlooked the precedence of its own judgment in another case of Nestle, 2000 (124) ELT 898 which was affirmed by Hon'ble Supreme Court 2005 (184) ELT A164 wherein Tribunal relied upon PFA Rules to hold that the preparation containing vegetable fat/oil cannot be treated as chocolate. On going through the judgment of the Coordinate Bench, we find that the brief point for consideration before the Bench was whether the prohibition provided under PFA Rules would in itself debar a particular item to be classified under a particular Heading or sub-Heading of Central Excise Tariff. The Bench has correctly concluded that classification needs to be arrived on the basis of respective headings in the Tariff, Section/Chapter Notes and HSN Explanatory Notes. The Bench observes that:

> ***"29.*** *Ld. Counsel for the appellant made a submission that earlier the appellant was not using partially hydrogenated vegetable oil in 'Nestle Milky bar', another product manufactured by it in Mangalore Commissionerate. Hence the appellant was classifying it as White Chocolate. But now the appellant is using partially hydrogenated vegetable oil in it and hence it is not being classified as white chocolate. In support of this submission, he had shown, two wrappers of 'Nestle Milky bar' indicating the use of various ingredients. He also produced the copies of the invoices indicating payment of duty @ 16% in the former case and @ 8% in the latter case. We are not aware of the circumstances and the background in which it is being done and what is the stand of the Mangalore Commissionerate in this regard. Further, the classification of Nestle Milky bar and the applicability of the exemption Notification No. 6/2002-C.E. as amended or Notification No. 3/2006-C.E. is not an issue before us. Hence, we refrain from offering any comments in the matter. We have already held that the presence of the partially hydrogenated vegetable oil in Milky bar Choo will not take it out of the purview of White Chocolate and we have given detailed reasons and justifications for holding so".*

28. We find that the instant case, the issue which remains to be decided is as to whether the impugned products contained cocoa butter so as to be categorised as White Chocolate under CETH 1704 and thus rendering them ineligible for exemption contained in the Notifications 6/2002-CE, 3/2006-C.E. and 12/2012-CE. Therefore, we find that the facts of the present case are different from those dealt by the Coordinate Bench in the case of Nestle Products decided in 2008 (supra) and therefore, we find that the ratio of the decision has no precedent value as far as this case is concerned. Moreover, we find that Tribunal, Allahabad in the case of Marko Foods Vs CCE, Kanpur reported in 2019 (370) E.L.T. 603 (Tri. - All.) held that a similar product i.e., Parle 2-in-1 Eclairs" and "Kismi Toffee and Bar", to be boiled sweets containing no cocoa butter and having 8% fat content, are not "white chocolate" under Tariff Item 1704 90 30 of Central Excise Tariff and held that the said goods are eligible to benefit of Notification Nos.6/2002-CE, 3/2006-C.E. and 12/2012-C.E. In view of the discussion above, we find that the Department has not conclusively established that the appellant's claim that the impugned products did not contain cocoa butter during the impugned period with any indisputable proof or test report. Therefore, we find that the impugned goods i.e. Nestle Milky bar and Nestle Milky bar Eclairs are not excluded for the purpose of exemption contained in the Notifications cited above.

29. In view of the above, all the appeals are allowed with consequential relief, if any, as per law.

(Order was pronounced in Open Court on 14/07/2020)

S.S GARG
JUDICIAL MEMBER

P. ANJANI KUMAR
TECHNICAL MEMBER

PK