CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT No. I

Excise Appeal No. 40719 of 2015

(Arising out of Order-in-Original No. 19/2014(Commr.) dated 31.12.2014 passed by Commissioner of Customs, Central Excise and Service Tax, No. 6/7, ATD Street, Race Course Road, Coimbatore - 641 018)

M/s. Bakers Product (India) **...Appellant**
No. 1/1, Lakshmi Nagar,
Edayarpalayam,
Coimbatore – 641 025.

Versus

Commissioner of GST and Central Excise **...Respondent**
Coimbatore Commissionerate,
No. 6/7, ATD Street, Race Course Road,
Coimbatore – 641 018.

And

Excise Appeal No. 40720 of 2015

(Arising out of Order-in-Original No. 19/2014(Commr.) dated 31.12.2014 passed by Commissioner of Customs, Central Excise and Service Tax, No. 6/7, ATD Street, Race Course Road, Coimbatore - 641 018)

Mr. Naresh Kumar Vij, **...Appellant**
Authorised Signatory,
Bakers Product (India),
No. 1/1, Lakshmi Nagar,
Edayarpalayam,
Coimbatore – 641 025.

Versus

Commissioner of GST and Central Excise **...Respondent**
Coimbatore Commissionerate,
No. 6/7, ATD Street, Race Course Road,
Coimbatore – 641 018.

APPEARANCE:

For the Appellants : Mr. M. Karthikeyan, Advocate
For the Respondent : Ms. O.M. Reena, Authorised Representative

CORAM:
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)
HON'BLE MR. AJAYAN T.V., MEMBER (JUDICIAL)

FINAL ORDER Nos. 40450-40451 / 2025

DATE OF HEARING : 01.01.2025
DATE OF DECISION : 17.04.2025

Per Mr. VASA SESHAGIRI RAO

Excise Appeal No. E/ 40719/2015 has been filed by M/s. Bakers Product (India) (hereinafter referred to as 'Appellant-A1') assailing the impugned Order-in-Original No. 19/2014 (Commr.) dated 31.12.2014 passed by the Commissioner of Customs, Central Excise and Service Tax, Coimbatore for confirming the demands of excise duty on clearances made during the periods 01.04.2009 to 14.08.2013, 15.08.2013 to 31.10.2013 and 01.11.2013 to 28.02.2014 under Section 11A(4) of the Central Excise Act, 1944 (ACT) along with applicable interest besides imposing penalties under Section 11 AC *ibid* / Rules 26 of Central Excise Rules, 2002(Rules) and appropriating amounts paid towards duty.

1.2 Excise Appeal No. E/40720/2015 has been filed by Mr. Naresh Kumar Vij, Authorised Signatory of M/s. Bakers Product (India) (hereinafter referred to as Appellant-A2) assailing the above impugned order for imposing penalty under Rule 26 *ibid*.

1.3 The details of the duty demand and penalty involved in the subject appeals are tabulated below: -

Appeal E/40719/2015-DB – Bakers Product (India)

Sl.No	SCN / SOD No	Date	Period	Duty (Rs)	Penalty under Section 11AC
1	04/2014	07.05.2014	01.04.2009 to 14.08.2013	1,11,34,013	1,11,34,013
2	08/2014	04.09.2014	15.08.2013 to 31.10.2013	19,64,263	19,64,263
3	11/2014	26.11.2014	01.11.2013 to 28.02.2014	15,33,873	15,33,873

Appeal E/40720/2015-DB – Nares Kumar Vij

Sl.No	SCN / SOD No	Date	Period	Penalty under Rule 26
1	04/2014	07.05.2014	01.04.2009 to 14.08.2013	1,11,34,013
2	08/2014	04.09.2014	15.08.2013 to 31.10.2013	19,64,263
3	11/2014	26.11.2014	01.11.2013 to 28.02.2014	15,33,873

1.4 The said appeals involving the same impugned Order-in-Original No. 19/2014 (Commr.) dated 31.12.2014 are being taken up together for common disposal.

2.1 The Appellant was engaged in the manufacture of baking powder, Custard Powder, Maize Starch, icing sugar, drinking chocolate and cocoa powder and cleared under brand name 'Bakers', "Mickeys", "Bapco" and "NK" and also in loose packs without any brand name. Upon investigation by the department, it was alleged that the

Appellant was using the brand name of others such as ‘Bakers’, “Mickeys”, “Bapco’’ and therefore liable to pay excise duty on their clearances. SSI exemption was allowed for clearances under their own brand name “NK” and other unbranded products. A show cause Notice dated 07.05.2014 was issued proposing to demand duty invoking extended period along with applicable interest and proposing to impose fine under Section 34 *ibid* and penalties under Section 11 AC *ibid*/ Rules 25 and 26 *ibid*, besides appropriating amount already paid towards duty demand. Subsequently, Statement of demands dated 04.09.2014 and 26.11.2014 were issued for further periods 15.08.2013 to 31.10.2013 and 01.11.2013 to 28.02.2014 proposing demand of duty and to impose penalties, invoking extended period. The adjudicating authority vide the impugned order confirmed the demands proposed in the SCN’s/ SOD’s and imposed penalties on Appellant A1 and Personal penalties on Appellant A2. Aggrieved, the Appellants are on appeal before this forum.

3. The Ld. Counsel Shri M. Karthikeyan representing the Appellants reiterated the Grounds of Appeal and submitted the following.

3.1 In respect of demand of duty on clearances of Baking Powder, it was averred that the action of the adjudicating authority denying Cenvat credit for the past clearances was not in accordance with the prevailing law and therefore, the appellant may be allowed the benefit of Cenvat credit. The appellant while accepting the duty liability on this product had requested for the benefit of Cenvat credit of duty paid on raw materials. It was pointed out that the benefit of credit has been denied to them on the grounds of non-compliance with the requirement of Rules 9(5), 9(6) and 9(7) of the CENVAT Credit Rules, 2004, which speaks about the maintenance of records and submission of returns. In this regard reliance was placed on the following case laws wherein it has been categorically held that the benefit of credit can be extended to a manufacturer even in clandestine clearance cases, for the period prior to registration.

i. *Well Known Polysters Ltd. [2011-TIOL-989-CESTAT-AHM]*
ii. *Icon Industries [2018 (7) TMI 1526 Del HC]*
iii. *Embassy Property Development [2024 (1) TMI 983 CESTAT Blr]*

3.2 In respect of demand of duty on clearances of Custard Powder, the appellant contended that the said product was covered under Sl.No.19 of Notification No.

1/2011 – CE dated 01.03.2011 and as per this Notification, the effective rate is 1% from 1.3.2011 up to 16.3.2012 and 2% with effect from 17.03.2012 and accordingly the amount of duty payable had to be reworked whereas the impugned order confirmed the demand of excise duty on the commodity at the rate of 8% under Notification No. 02/2008 dated 01.03.2009.

3.3 In respect of demand of duty on Icing Sugar, it was averred that The impugned order had demanded duty at the rate of 5%/6% as per Notification No. 02/2011 CE dated 01.03.2011 on Icing sugar whereas it is the appellant's case that the demand at the said rate is applicable only in cases where Cenvat credit is availed and Since, the appellant had not claimed Cenvat credit, it is submitted that the applicable rate of duty is 1% upto 16.03.2012 and 2% from 17.03.2012 in terms of Notification No. 01/2011 CE dated 01.03.2011. It was submitted that since the Adjudicating Authority has not given any finding on this aspect, the impugned order deserves to be set aside.

3.4 In respect of demand of duty on Corn Flour, it was submitted that the demand of Rs.63,70,120/- was confirmed on the ground that the appellant has cleared dutiable maize starch under the guise of corn flour which attract nil rate of duty. It was pointed out that the goods manufactured and cleared by them were not maize starch but corn flour on the following grounds: -

- Common parlance test is satisfied in as much as the market recognizes the said product as corn flour

- The appellant purchased duty paid maize starch and subjects it to drying, sieving and packing. In as much as the appellant followed the same process prior to and post the imposition of central excise duty on maize starch, it is submitted that goods manufactured and cleared by them is corn flour.

- There is no allegation in the impugned notice and order that the appellant has manufactured and cleared maize starch prior to March 2010 when there was no duty on maize starch.

- There is no allegation that the impugned product does not satisfy the provisions of Chapter Note 2 of Chapter 11 so as to be excluded from the classification of 11022000.

- No sample has been drawn by the department to disprove the classification adopted by the appellant.

- Similar manufacturers of corn flour were not paying excise duty.

Notwithstanding the above, it was put forth that even presuming without admitting that the corn flour cleared by the appellant is only maize starch and it merits classification under CETH 1108 as proposed by the dept and not under CETH 1102, then the allegation that the appellant had utilised brand name of another person is not at all sustainable inasmuch as none of the brands in question are registered for Maize Starch.

3.5 It was further submitted that the said SODs were not sustainable in law in as much as they have obtained Central Excise registration on 15.08.2013 and have also filed returns under the Central Excise Act. This being the fact, the alleged contraventions namely Non-registration, Non-payment of duty and removal of goods without proper Invoices and non-filing of returns declaring the actual production, removal and other relevant particulars contained in para 15 of the Show Cause Notice dated 07.05.2014 issued by the Commissioner were not maintainable with effect from 15.08.2013. As such the Statements of Demand dated 04.09.2014 and 26.11.2014 could not have been issued to the appellant as the basic condition of Sub Section 7A of Section 11A namely "the grounds relied upon for the subsequent period are the same as are mentioned in the earlier notice or notices" is not satisfied. Hence it was averred that the two Statements of Demand were required to be set aside and no Central Excise duty could be demanded on this ground.

3.6 The appellant submitted that the cum tax benefit should be extended to them for the period under dispute relying upon the decision in the case of *Maruti Udyog Ltd.*

3.7 It was contended that there was no suppression of facts with intent to evade payment of tax in as much the appellants sales ledger, which is the basis for payment of sales tax and for computation of Income for the Balance Sheet and annual accounts, forms the basis for the duty demanded in the Show cause notice and duty confirmed in the impugned order.

4. The Ld. Authorised Representative Ms. O.M. Reena for the Department affirmed the findings in the impugned order and submitted that the Appellants had manufactured and cleared excisable goods bearing other's brand name without registration, payment of duty and without filing ER 1 returns and hence the demands confirmed were sustainable and extended period invokable and penalty imposable on the Appellant under Section 11 AC. Hence, it was prayed for dismissal of the appeals filed by the Appellants.

5. We have carefully considered the submissions made by both sides and perused the records. The disputed issues in the appeal are whether the appellant is liable to pay excise duty on Baking Powder, Custard Powder, Icing Sugar and Corn Flour packed and sold by them.

6. The issues which arise for consideration in this appeal are: -

i. Whether the appellant is entitled for cenvat credit of excise duty paid on maize starch for manufacture of Baking powder?

ii. Whether the appellant is entitled for concessional rate of duty @ 1% or 2% for Custard powder and Icing sugar?

iii. Whether the demand of excise duty on corn flour treating it as maize starch is sustainable?

iv. Whether suppression of facts with intent to evade payment of duty exist for invocation of extended period for the demand and imposition of penalty? and

v. Whether penalty under Rule 26 is imposable on the partners of the firm?

7. We find from the records that the appellant has admitted the duty liability on Baking powder, Custard powder and Icing sugar and their claim is limited to entitlement of cenvat credit for Baking powder and eligibility of concessional rate of duty of 1% or 2% as the case may be for Custard powder and Icing sugar.

8.1 The Cenvat Credit has been denied by the Adjudicating Authority on the ground that the appellant is requesting for undue benefits as per their own wishes even for the period for which they have not obtained Excise Registration; that the appellant has not fulfilled the requirements as mandated in Rule 9(5), (6) and (7) of Cenvat Credit Rules, 2004; that the Adjudicating Authority is required to 'adjudge' the eligibility of the Cenvat Credit or otherwise only after the availment of the Cenvat Credit and there is no provision in the law to make pre-judicial observations, prior to occurrence of an event; that there is no provision in the law for availment of Cenvat Credit from a retrospective effect date and that too during a period during which the assessee had not even registered with the Department.

8.2 It is seen from the records that the appellant manufactured baking powder by blending sodium bi carbonate, sodium aluminium sulphate and maize starch. They had claimed Cenvat Credit mainly for only one raw material namely Maize starch and to certain extent for sodium aluminium as against the duty demand of Rs.18,66,889/- for the period from 2009-10 to 2013-14. It is seen from para 5.1 (iii) of the Order-in-Original that the appellant has purchased duty paid Maize starch from Riddi Siddhi Limited, Gujarat Ambuja Exports Limited, *etc.* and the appellant has furnished the invoice wise details for claiming the Cenvat Credit. Thus, the duty paid nature of the inputs is not doubted by the Department. The only ground for denial of credit is that it cannot be extended for the period prior to Excise Registration.

8.3 It is a settled principle in law that the benefit of credit cannot be denied to a manufacturer for the period prior to Registration. In the case of *Well Known Polyesters Ltd. [2011 (267) ELT 221 (Tri.-Ahmd.)]*, it is held as follows:-

> *"5. The first issue is whether the appellant was eligible for the cenvat credit when they have not taken registration and the cenvat credit taken by them for the period 1-11-2008 to October 2009 can be allowed. For this purpose, the appellant had relied upon the decision of the Tribunal in the case of J.R. Herbal Care India Limited v. CCE, Noida 2010(253) E.L.T.321 (Tri-Del). In this case the appellant had received the capital goods while availing SSI exemption without taking registration. Cenvat credit was taken on the capital goods for the years 2003-04 and 2004-05 but taken in the year 2005-06. This was allowed by the Tribunal. The Tribunal took a view that there is no provision in the rules that credit was not available to unregistered manufacturers. Manufacturers exempted from the registration do not cease to be a manufacturer of excisable goods. This case squarely covers the issue in this case also. Therefore, in respect of the goods manufactured during the period when the appellant was not registered, credit can be taken subsequently also. This view is further supported by the consistent stand taken by various judicial forums in the case of clandestine removals, even if the duty is paid subsequently, cenvat credit on inputs used will be available to the*

> *assessee/manufacturer subject to the conditions that proper documents showing the payment of duty are available. In the case of SSI Units also, wherever SSI benefits have been denied, cenvat credit has been allowed. Therefore, in this case also the action of the appellants in taking credit on 09-10-2009 has to be upheld."*

8.4 In a catena of decisions, the Courts and the Tribunal have consistently allowed Cenvat credit on inputs and input services prior to registration. For instance, in the following cases, cenvat credit was allowed for the past period during which the appellant had not obtained registration: -

i. *Icon Industries [2018 (363) ELT 114 (Del.)],*
ii. *Embassy Property Development [2024 (1) TMI 983 CESTAT Bangalore]*

8.5 In the case of *ICON Industries Vs CCE, Delhi-I [2018 (363) ELT 114 (Del.)]* it was held by the Hon'ble Delhi High Court as follows: -

> *"15. In view of the above findings, there is no dispute that the inputs used i.e. PVR resin was by the assessee M/s. Icon Industries; in fact, the basic duty liability and penalty have been imposed on the basis of these findings. However, it is equally a matter of record that certain quantity of PVR resin too was used as a raw material. There may be no doubt that with respect to other inputs the assessee did not possess any document. However,*

that ought not have blinded the authority taking note of material which did exist on record (in the form of the payments made towards CVD) which can be legitimately claimed as input credit by the assessee. The record as it stands today also points to the assessee being given the benefit of SSI status and its consequential entitlement to such exemptions as are permissible. Given these circumstances and findings, the denial of Cenvat credit benefit to the assessee, was not justified. The impugned order of the Tribunal is therefore set aside. The respondent-Central Excise Authorities are directed to proceed to grant such Cenvat credit as is permissible to the appellant/assessee, having regard to the documents which are on record and which may be relevant and can be produced by it for the purpose. The question of law is answered in favour of the assessee and against the Revenue.

16. The appeal is allowed in the above terms."

Hence, we have no hesitation in holding that the denial of cenvat credit is not tenable and hold that the appellant is entitled for Cenvat credit as claimed by them on the raw materials used in the manufacture of Baking Powder.

9.1 The next issue is relating to duty demand on Custard powder and Icing sugar manufactured by the appellant. The department has demanded duty on both the products as detailed below:-

Sl. No	Description	Tariff Item	Period	Rate of duty
1	Custard powder	2106 90 80	01.0.2009 to 26.02.2010	8%
			27.02.2010 to 16.03.2012	10%
			17.03.2012 to 14.08.2013	12%
2	Icing Sugar	2106 90 99	Upto 28.02.20011	Exempted
			01.03.2011 to 16.03.2012	5%
			17.03.2012 onwards	6%

As already mentioned, the appellant did not dispute the excisability of Custard powder and Icing sugar, but they claimed the effective rate of 1% from 01.03.2011 to 16.03.2012 and 2% from 17.03.2012 as per Notification No.01/2011-CE dated 01.03.2011 as amended. Even though the adjudicating authority has recorded the above claims of the appellant, he has not given any findings while passing the order but simply confirmed the duty as proposed in the show cause notice.

9.2 The relevant entries of the Notification No.01/2011-CE dated 01.03.2011 as claimed by the appellant are reproduced below: -

> ***" Effective rate of duty of 1% on specified goods when no Cenvat credit availed on inputs or input services***
>
> *In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the excisable goods of the description specified in column (3) of the Table below and falling under Chapter, heading, sub-heading or*

tariff item of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), specified in the corresponding entry in column (2) of the said Table, from so much of the duty of excise leviable thereon under the said Central Excise Act, as is in excess of the amount calculated at the rate of 1% ad valorem :

Provided that nothing contained in this notification shall apply to the goods in respect of which credit of duty on inputs or tax on input services has been taken under the provisions of the CENVAT Credit Rules, 2004.

TABLE

S. No.	**Chapter or heading or sub-heading or tariff item of the First Schedule**	**Description of the excisable goods**
(1)	(2)	(3)
17	2104	Soups and broths and preparations thereof
18	2105 00 00	All goods
19	**2106 90**	**All kinds of food mixes, including instant food mixes**

It may be seen from the above entries that all kinds of food mixes including instant food mix attract 1% rate subject to non availment of cenvat credit. The appellant in their reply claimed that the custard powder manufactured by them is a food mix which are to be mixed with milk and is ready to use. Further, there is no doubt about the non availment of cenvat credit on input or input service used for the manufacture of the subject product.

9.3 It is noticed that Custard powder is specifically classifiable under Tariff Item 2106 90 80 of Central Excise Tariff and the show cause notice also adopted the same and hence we find force in the claim of the appellant and accordingly the custard powder manufactured by the appellant is entitled for 1% rate prescribed under Sl.No. 19 of Notification No. 01/2011-CE dated 01.03.2011 upto 16.03.2012 and then 2% with effect from 17.03.2012.

9.4 With regard to the claim of concessional rate for icing sugar, we observe that there is no merit in the claim of appellant as it is neither a food mix nor ready to eat packaged food as specified in Sl. No. 22 of the above notification.

9.5 There is a demand of duty on Drinking Chocolate manufactured amounting to Rs.33,415/- for the period from 2009-10 to 2013-14. The Appellant has not submitted any arguments relating to the dutiability or otherwise on this commodity. As such, it is taken that the duty on the commodity has been accepted by the appellant.

10.1 **Demand of duty on corn flour**: The appellant purchased edible grade Maize starch in bulk and after subjecting the same to drying in open air and sieving, packed the same in various retail packs like 1 kg, 2kg packs under the brand name Bakers and Mickeys and 25 and 50 Kg loose packs without brand name and marketed the same as corn flour.

10.2 Whereas the Department alleged that it is nothing but Maize starch classifiable under Heading 1108. By referring to the sub heading note to Heading 1108 which specifies that in relation to the products of sub-heading 1108 11 or 1108 12 or 1108 13 or 1108 14 or 1108 19, *labelling or relabelling of containers or repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to 'manufacture'*, the Department alleged that the activities undertaken by the appellant amount to manufacture and hence chargeable to duty under Tariff Item 11008 12 00. Further, it was alleged that the appellant is not eligible for SSI exemption as they used other man's brand name.

10.3 The appellant contended that the market recognises this product as corn flour only and they marketed it as corn flour only right from the beginning of their business. The appellant has also produced copies of purchase orders in support of their claim. They also claimed that even during the period when Maize starch was attracting nil rate of duty, they marketed the product as corn flour only.

10.4 We find from the records that the above claim of the appellant has not been refuted by the revenue at any stage. Further, when the appellant highlighted the "common parlance test" by relying upon the Supreme Court decision in the case of *Wockhardt Life Sciences [2012 (277) ELT 299 (SC)]* and the *Calcutta Springs Ltd.* case *[2008 (229) ELT 161 (SC)],* the adjudicating authority has simply brushed aside the above claim by saying that the facts of the present case are different from the above cases and hence distinguishable

10.5 Apart from the above arguments, the appellant *vide* their reply to Show Cause Notice contended that the Barnd Name "Bakers" is registered for Corn Flour only and no prudent person manufacturing maize starch would approach the Registrar of Trade Mark and get Bakers Trade Mark for Corn Flour. Further, they contended in the reply that if it is maize starch as claimed by the Department then there is no brand name for maize starch and in such case duty demand on the ground of other man's brand name does not survive. However, the Adjudicating Authority has not examined the above points but simply confirmed the demand.

10.6 Regarding demand of duty on Maize Starch, Appellant intends to classify its product as Corn Flour under CTH 1102 of CETA. However, department seeks to demand duty on repacked Maize Starch by classifying under CETH 11081200 attracting rate of duty @4% in terms of Notification no. 09/2010-CE. In this regard it would be expedient to examine the products classifiable under Chapter 11 of CETA.

> *"Products of the milling industry; malt; starches; inulin; wheat gluten*
>
> *General notes to HSN explanatory notes of Chapter 11 states :*
>
> *(1) Products from the milling of the cereals of Chapter 10 and of sweet corn of Chapter 7, other than milling residues of heading 23.02. In this context, the products from the milling of wheat, rye, barley, oats, maize (corn) (including whole cobs ground with or without their husks), grain sorghum, rice and buckwheat falling in this Chapter are to be distinguished from the residues of heading 23.02 in accordance with the criteria as to starch and ash content laid down in Chapter Note 2(A).*

Within the Chapter, as regards the cereals mentioned by name above, the flours of heading 11.01 or 11.02 are to be distinguished from the products of heading 11.03 or 11.04 in accordance with the criterion as to passage through a sieve laid down in Chapter Note 2(B). At the same time, all cereal groats and meal of heading 11.03 must fulfil the relevant criterion as to passage through a sieve laid down in Chapter Note 3.

(2) Products also obtained from the cereals of Chapter 10 by submitting them to the processes provided for in the various headings of the Chapter, such as malting or the extraction of starch or wheat gluten.

(3) Products obtained by submitting raw materials of other Chapters (dried leguminous vegetables, potatoes, fruit, etc.) to processes similar to those indicated in paragraph (1) or (2) above.

This Chapter excludes, inter alia :

(a) Roasted malt put up as coffee substitutes (heading 09.01 or 21.01).

(b) Cereal husks (heading 12.13).

(c) Prepared flours, groats, meals or starches of heading 19.01."

It is seen from the above that Chapter 11 covers products obtained from milling of cereals, dried leguminous vegetables, potatoes, fruits etc. The further classification depends on the raw materials and the fineness of the products i.e. flour vs groats or meals when passed through sieve. It specifically excluded prepared flours of Heading 1901.

CTH 1102 :

1102		**CEREAL FLOURS OTHER THAN THAT OF WHEAT OR MESLIN**
1102 20 00	-	Maize (corn) flour
1102 90	-	*Other :*
1102 90 10	---	Rye flour
1102 90 90	---	Other

CTH 1108 :

1108		**Starches; inulin**
		-Starches:
1108 11 00	--	Wheat starch
1108 12 00	--	Maize (Corn) starch
1108 13 00	--	Potato starch
1108 14 00	--	Manioc (cassava) starch
1108 19	--	Other:
1108 19 10	---	Sago
1108 19 90	---	Other
1108 20 00	-	Inulin

HSN Explanatory notes to CTH 1102 states :

11.02	**-**	**Cereal flours other than of wheat or meslin**
1102.20	-	Maize (corn) flour
13 02.90	-	Other

This heading covers flours (i.e., the pulverised products obtained by milling the cereals of Chapter 10) other than flours of wheat or meslin.

Products of the milling of rye, barley, oats, maize (corn) (including whole cobs ground with or without their husks) grain sorghum, rice or buckwheat are classified in this heading as flours if they fulfil the requirements as to starch content and ash content set out in paragraph (A) of Chapter Note 2 (see General Explanatory Note) and comply with the criterion of passage through a standard sieve as required by paragraph (B) of that Note.

Flours of this heading may be improved by the addition of very small quantities of mineral phosphates, anti-oxidants, emulsifiers, vitamins or prepared baking powders (selfraising flour). The heading also covers "swelling" (pregelatinised) flours which have been heat treated to pregelatinize the starch. They are used for making preparations of heading 19.01, bakery improvers or animal feeds or in certain industries such as the textile or paper industries or in metallurgy (for the preparation of foundry core binders). Flours which have been further processed or had other substances added with a view to their use as food preparations are excluded (generally heading 19.01).

10.7 It is seen that CTH 1102 covers flours which are pulverized products obtained by milling the cereals other than wheat or meslin including rice, maize etc. However, flours which are further processed or had substances added with a view to use as food preparation are excluded and classified under CTH 1901. As seen in the explanatory notes to Chapter 11 above, flours of cereals and flours of dried leguminous vegetable and lentils are classified under Chapter 11 if they are obtained only by milling of these raw materials and no further processing has taken place and no addition of other substances with a view for their use as food preparations. If that was the case, they would be classified under CTH 1901, and such products are excluded from Chapter 11. Explanatory notes to Chapter 1901 also state that it covers food preparations with a basis of flour or meal or starch or malt extract where other substances may be added to main ingredients such as milk, sugar, eggs fat, oil etc. Unprocessed flour obtained only by milling and sieving of cereals, dried leguminous vegetable including peas, lentils etc. are to be classified under Chapter 11 alone. In the instant case, the product is cleared as a flour processed from Maize which is classifiable under CTH 1102. As per Rule 3 (a) of the General Rules for the Interpretation, the heading which provides the most specific description shall be preferred to headings providing a more general description. Hence corn flour merits classification under CETH 1102.20.

10.8 Appellant has cleared corn flour which comprised of maize starch, purchased in bulk from maize starch millers and repacked after sieving, sifting and drying. The duty demand was not in terms of brand dispute and hence SSI exemption ought to have been extended to the Appellant which was denied in the impugned order. Although passage through a sieve is not mentioned in the tariff, Appellant has more than satisfied the requirement specified in HSN. The department seeks classification under Chapter 1108 on the basis that the appellant clears maize starch as such after re-packing. However, the department lacks in any convincing material to establish the same. The classification of corn flour has been settled in the case of *CCE, Mumbai-III vs. Corn Products Company (India) [1999 (108) ELT 673*]. This case was maintained in Supreme Court as *Commissioner vs. Corn Products Co. (India) Ltd. [2000 (121) E.L.T. 223]*. Also, the case of *Weikfield Products Co. Pvt. Ltd. vs. CCE, Pune [1999 (106) ELT 69]* also supports the appellant for classification of corn flour.

10.9 Further, we have examined the arguments of the parties and it is apparent that the appellant marketed the product as corn flour only. The Department has not substantiated anything to disprove the claim of the appellant. At this juncture, we would like to refer to the decision of the Hon'ble Supreme Court in the case of *M/s. H.P.L. Chemicals Ltd. Vs. Commissioner of Central Excise, Chandigarh [2006 (197) ELT 324 (SC)]* which has held as follows, and the ratio of which is squarely applicable to the facts of the case on the issue of classification:-

> *"**29**. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assessee, the Department has*

to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue. On the one hand, from the trade and market enquiries made by the Department, from the report of the Chemical Examiner, CRCL and from HSN, it is quite clear that the goods are classifiable as "Denatured Salt" falling under Chapter Heading No. 25.01. The Department has not shown that the subject product is not bought or sold or is not known or is dealt with in the market as Denatured Salt. Department's own Chemical Examiner after examining the chemical composition has not said that it is not denatured salt. On the other hand, after examining the chemical composition has opined that the subject matter is to be treated as Sodium Chloride.

***30**. It has been held by this Court in number of judgments that burden of proof is on the Revenue in the matter of classification. In Union of India and Others v. Garware Nylons Limited and Others-1996 (10) SCC 413, in Para 15 this Court held as under :-*

> *"15. In our view, the conclusion reached by the High Court is fully in accord with the decisions of this Court and the same is justified in law. The burden of proof is on the taxing authorities to show that the particular case or item lit question is taxable in the manner claimed by them. Mere assertion in that regard is of no avail. It has been held by this Court that there should be material to enter appropriate finding in that regard and the material may be either oral or documentary. It is for the taxing authority to lay evidence in that behalf even before the first adjudicating authority. Especially in a case as this, where the claim of the assessee is borne out by the trade enquiries received by them and also the affidavits filed by persons dealing with the subject-matter, a heavy burden lay upon the Revenue to disprove the said*

> *materials by adducing proper evidence. Unfortunately, no such attempt was made. As stated, the evidence led in this case conclusively goes to show that Nylon Twine manufactured by the assessee has been treated as a kind of Nylon Yarn by the people conversant with the trade. It is commonly considered as Nylon Yarn. Hence, it is to be classified under Item 18 of the Act. The Revenue has failed to establish the contrary….."*

31. Similarly, in Hindustan Ferodo Limited v. Collector of Central Excise, Bombay, 1997 (2) SCC 677, it is held in Para 4 as under :-

> *"It is not in dispute before us, as it cannot be, that the onus of establishing that the said rings fell within Item 22-F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, that the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed".*

10.10 We would also like to refer to the larger bench decision in the case *Brindavan Beverages [2019 (29) GSTL 418 (Tri- LB)]* wherein it is held that the burden is on the revenue to support their classification: -

*"**56**. …………..The burden is clearly on the Revenue to support its contention with evidence. This is what was observed by the Supreme Court in Hindustan Ferodo Ltd. v. Collector of Central Excise, Bombay, reported in 1997 (89) E.LT. 16 (S.C.), and Union of India v. Garware Nylons Ltd., reported in 1996 (87) E.LT. 12 (S.C.). Paragraph 15 of the judgment of the Supreme Court in Garware Nylons Ltd. is reproduced below: -*

"15. In our view, the conclusion reached by the High Court is fully in accord with the decisions of this Court and the same is justified in law. The burden of proof is on the taxing authorities to show that the particular case or item in question is taxable in the manner claimed by them. Mere assertion in that regard is of no avail. It has been held by this Court that there should be material to enter appropriate finding in that regard and the material may be either oral or documentary. It is for the taxing authority to lay evidence in that behalf even before the first adjudicating authority. Especially in a case as this, where the claim of the assessee is borne out by the trade inquiries received by them and also the affidavits filed by persons dealing with the subject matter, a heavy burden lay upon the revenue to disprove the said materials by adducing proper evidence. Unfortunately, no such attempt was made. As stated, the evidence led in this case conclusively goes to show that Nylon Twine manufactured by the assessees has been treated as a kind of Nylon yarn by the people conversant with the trade. It is commonly considered as Nylon Yarn. Hence, it is to be classified under Item 18 of the Act. The Revenue has failed to establish the contrary."

***57**. No documentary evidence has been placed by the Revenue to establish that the products are commercially bought and sold and known by the people dealing in the products as 'Lemonades'."*

Whereas we find that the Department did not adduce any evidence that the subject product is marketed as Maize starch only or understood by the trade as Maize starch. In the absence of any evidence, we hold that the reclassification adopted by the department is not justifiable.

10.11 Apart from the trade practice, the appellant also claimed that the product under dispute satisfy the specifications mentioned in Chapter Note 2B of Chapter 11 which is reproduced below: -

2.- (A) Products from the milling of the cereals listed in the table below fall in this Chapter if they have, by weight on the dry product :

(a) a starch content (determined by the modified Ewers polarimetric method) exceeding that indicated in Column (2); and

(b) an ash content (after deduction of any added minerals) not exceeding that indicated in Column (3).

Otherwise, they fall in heading 23.02. However, germ of cereals, whole, rolled, flaked or ground, is always classified in heading 11.04.

(B) Products falling in this Chapter under the above provisions shall be classified in heading 11.01 or 11.02 if the percentage passing through a woven metal wire cloth sieve with the aperture indicated in Column (4) or (5) is not less, by weight, than that shown against the cereal concerned.

Otherwise, they fall in heading 11.03 or 11.04.

Cereal (1)	Starch content (2)	Ash content (3)	Rate of passage through a sieve with an aperture of	
			315 micrometres (microns) (4)	500 micrometres (microns) (5)
Wheat and rye	45 %	2.5 %	80 %	-
Barley	45 %	3 %	80 %	-
Oats	45 %	5 %	80 %	-
Maize (corn) and grain sorghum	45 %	2 %	-	90 %
Rice	45 %	1.6 %	80 %	-
Buckwheat	45 %	4 %	80 %	-

Further, the Heading 1102 of Central Excise Tariff specifically covers Corn Flour under Tariff Item 1102 20 00 as Maize (Corn Flour) and the relevant heading is reproduced below:-

Tariff Item		Description of goods	Unit	Rate of duty
(1)		(2)	(3)	(4)
1101 00 00		WHEAT OR MESLIN FLOUR	kg.	Nil
1102		CEREAL FLOURS OTHER THAN THAT OF WHEAT OR MESLIN		
1102 10 00		Omitted		
1102 20 00	-	Maize (corn) flour	kg.	Nil
1102 90	-	Other:		
1102 90 10	---	Rye flour	kg.	Nil
1102 90 90	---	Other	kg.	Nil

It is evidenced from the records that the appellant market the product as corn flour and it is specifically covered under Tariff Item 1102 20 00, and hence we have no hesitation in accepting the classification adopted by the appellant.

10.12 In view of the above discussions, we are of the considered view that the demand of duty on Corn Flour is not legally sustainable and hence set aside. As the demand itself is not sustainable, the question of imposition of penalty does not arise. So, ordered accordingly.

Invocation of Extended Period: -

11.1 The next issue to be decided is regarding the invocation of larger period of limitation to demand the duty and imposition of penalty under Section 11 AC of the Central Excise Act, 1944.

11.2 As already observed, the issues involved in the appeal are about the excisability and classification of the subject products. We have no doubt that these issues are contentious and involve interpretation of the chapter notes, the relevant Tariff entries and the applicability of effective rates of duty prescribed under a Notification.

11.3 It is a well settled principle that invocation of larger period is not a rule but an exception, wherein, there should be ample justification to invoke the same. That too, while dealing with an indirect tax, it has to be exercised with utmost caution. The appellant contended that the show cause notice was issued on the basis of the details which are accounted in their books of accounts and it proves that there is no suppression of facts. They had not taken out Central Excise Registration on a *bonafide* belief that their products do not attract excise duty. It is seen that the main demand pertains to Corn Flour clearances which are not dutiable as held above. In respect of Baking Powder after allowing the Cenvat credit, the duty demanded of Rs.18,66,889/- will be drastically reduced. Further, after according the concessional rate of duty on Custard Powder and Icing Sugars also, the duty demand would not be significant. Their view that they are not required to take

Central Excise Registration under a genuine plea that their products do not attract excise duty as they are related to agriculture and food products appears to be acceptable. In the cases of *Collector of Central Excise, Mumbai -III Vs. Corn Products Co. (India) Ltd. [1999 (108) ELT 673 (Tribunal)]* and *Weikfield Products Co. (I) Pvt. Ltd. Vs. Collector of Central Excise, Pune [1999 (106) ELT 69 (Tribunal)]* wherein it was held that sieving of duty paid starch and selling the same under the name 'Corn Flour' was ruled as not amounting to manufacture. In this context, we find the reliance of the case laws by the Appellant are relevant and are discussed below: -

i. In the case of *Chemphar Drugs & Liniments [1989 (2) TMI 116-SC)*], the Apex Court held: -

> *"8. Aggrieved thereby, the revenue has come up in appeal to this Court. In our opinion, the order of the Tribunal must be sustained. In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the*

manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal came to the conclusion that the facts referred to hereinbefore do not warrant any inference of fraud. The assessee declared the goods on the basis of their belief of the interpretation of the provisions of the law that the exempted goods were not required to be included and these did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal found that the explanation was plausible, and also noted that the Department had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the declaration was filed by the respondent. The respondent did not include the value of the product other than those falling under Tariff Item 14E manufactured by the respondent and this was in the knowledge, according to the Tribunal, of the authorities. These findings of the Tribunal have not been challenged before us or before the Tribunal itself as being based on no evidence."

ii. The Hon'ble Supreme Court in the case of *Pushpam Pharmaceuticals Company [1995 (3) TMI 100-SC]* held as follows: -

"4. Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it

being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

iii. In a recent decision of *Northern Operating Systems Pvt. Ltd. [2022 (50) TMI 967-SC]*, the Hon'ble Apex Court has held as follows: -

*"**62**. The revenue's argument that the assessee had indulged in wilful suppression, in this court's considered view, is insubstantial. The view of a previous three judge ruling, in Cosmic Dye Chemical v. Collector of Central Excise* ***(1995) 6 SCC 117*** *- in the context of Section 11A of the Central Excise Act, 1944, which is in identical terms with Section 73 of the Finance Act, 1994 was that:*

> *"Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "wilful"*

> *preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful."*

> ***63**. This decision was followed in Uniworth Textiles v. Commissioner of Central Excise **(2013) 9 SCC 753** where it was observed that "(t)he conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts" is "untenable". This view was also followed in Escorts v. Commissioner of Central Excise **(2015) 9 SCC 109**, Commissioner of Customs v. Magus Metals **(2017) 16 SCC 491** and other judgments."*

Further, it has been a well settled law, that in matters relating to technical interpretation and classifications, suppression of fact / wilful misstatement has to be used with utmost caution and justification. Since, we have held that the classification adopted by the department is not sustainable and the other products attract concessional rate as contended by the appellant, the allegation of intention to evade payment of duty does not survive.

11.4 Accordingly, the demand for the normal period of one year alone would survive. However, it is noticed that though the notice was issued on 07.05.2014, a corrigendum was issued on 14.11.2014 by modifying various paras of the notice thereby resulting in increasing the duty amount demanded and hence, the corrigendum date would be taken as the date of show cause notice. Consequently, the entire demand made in the Show Cause Notice No. 04/2014 dated 07.05.2014 as amended by corrigendum dated 14.11.2014 is beyond the time limit of one year as demand of duty covered the period from 2009-10 to 14.08.2013 and therefore, the entire demand made in this notice is hit by time limit. However, the demand made in the periodical notices are within the time limit.

12.1 With regard to the penalty, we hold that once extended period is not invokable, the question of imposing mandatory penalty under Section 11AC does not arise. Further, when the entire demand under Notice No. 04/2014 dated 07.05.2014 is set aside, the question of imposing any penalty does not arise.

12.2 During the period covered under the periodical notices, Section 11AC prescribes equal amount of penalty only in cases of suppression with intention to evade and in the cases of periodical notices no such penalty can be imposed. Accordingly, we set aside the penalty imposed under Section 11AC for the periodical notices.

12.3 When the penalty on the firm is set aside for the reasons stated above, imposition of penalty on the partner of the appellant firm is also not justified.

13. In view of the foregoing, we uphold the dutiability of baking powder, Custard powder, Icing Sugar and Drinking Chocolate. The appellant is entitled for Cenvat credit of excise duty paid on the inputs used in the manufacture of baking powder as claimed by them. However, since the entire demand pertaining to Notice No. 04/2014 is set aside, the question of extending Cenvat Credit for the period covered under this notice does not arise. We also hold that the appellant is entitled for concessional rate of 1% for custard powder as prescribed under Sl.No. 19 of Notification No. 01/2011-CE dated 01.03.2011 upto 16.03.2012 and then 2% with effect from

17.03.2012. Further, we set aside the demand made in respect of Corn Flour for the reasons elaborated above.

14. Thus, the Appeal No. E/40719/2015 is partly allowed on above terms with consequential relief, if any, as per the law. In respect of Appeal No. E/40720/2015 filed by Mr. Naresh Kumar Vij, the penalties imposed are set aside and the appeal is allowed with consequential relief, if any, as per the law.

(Order pronounced in open court on 17.04.2025)

Sd/-
(AJAYAN T.V.)
MEMBER (JUDICIAL)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

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