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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/979 /2005 - EX[DB] Date **07/03/2011**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
HINDUSTAN LEVER LTD.
DAIRY COMPLEX , KASGANJ ROAD,
ETAH U.P. 207001

HINDUSTAN LEVER LTD. Appellant

Vs

C.C.E. LUCKNOW Respondent

I am directed to transmit herewith a certified copy of **Final order No. 239 / 2011 EX[DB]** dated 25.02.2011 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
C.C.E. LUCKNOW
7-A, ASHOK MARG, LUCKNOW.

2. Adv. / Consult
MR.ASHOK SAGAR
D-426, DEFENCE COLONY, NEW DELHI.

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32. New Rohtak Road. New Delhi - 110005
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file
15. HON'BLE PRESIDENT

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing:2.11.2010

Date of decision:~~2.11.2010~~ 25/2/2011

Excise Appeal No.979 of 2005-Excise

[Arising out of Order-in-Appeal No.463-CE/2004 dated 17.12.2004 passed by the Commissioner of Central Excise, Lucknow].

For approval and signature:

Hon'ble Justice Shri R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

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1. Whether Press Reporters may be allowed to see CESTAT (Procedure) Rules, 1982.

2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?

3. Whether Their Lordships wish to see the fair copy of the Order?

4. Whether Order is to be circulated to the Departmental authorities?

M/s.Hindustan Lever Limited — Appellant

Vs.

CCE, Lucknow — Respondent

Appearance: Rep. by Shri Ashok Sagar, Advocate on behalf of the appellants.
Rep. by Shri Nitin Anand, SDR on behalf of the respondent/Department.

CORAM: **Hon'ble Justice Shri R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Judicial)

FINAL Order No. 239/2011-EX/Dated

Per Rakesh Kumar

The facts giving rise to this appeal are, in brief, as under:-

1.1 The appellant manufacture "Milkana Dairy Whitener "and "Milkana Dairy Powder light and sweet" falling under Chapter 4 of the Central Excise Tariff. The period of dispute is from 2.6.98 to 17.7.98. During this period, the appellants classified these products under sub-heading 0401.19 of the Central Excise tariff and cleared the same at nil rate of duty as the tariff rate of duty prescribed for the goods falling under sub-heading 0401.19 of the tariff is nil. The Department was of the view that the products being manufactured by the appellant are skimmed milk power and hence classifiable under sub-heading no.0401.13 of the Tariff and liable for central excise duty at the rate of 8% adv. Accordingly, a show cause notice dated 22.12.98 was issued to the appellants for –

(a) classification of the products, in question, under sub-heading no.0401.13 of the Tariff; (b) recovery of central excise duty amounting to Rs.29,45,699/- from the appellant under Section 11 A(1) of the Central Excise Act, 1944, and (c) imposition of penalty on the appellant under Rule 173Q(1) of the Central Excise Rules, 1944.

1.2 The show cause notice was adjudicated by the Dy. Commissioner of Central Excise, Aligarh vide order-in-original dated 30.11.2000 by which – (a) central excise duty demand of Rs.29,45,699/- was confirmed against the appellant under Section 11 A(1) of the Central Excise Act; and (b) penalty of Rs.10 Lakh was imposed on the appellants under Rule 173 Q of the Central Excise Rules. The duty demand was confirmed against the appellants by holding that the goods, in question, are correctly classifiable under sub-heading no.0401.13 of the Tariff.

1.3 On appeal to the Commissioner (Appeals), the Commissioner (Appeals) vide order-in-appeal dated 17.12.2004 upheld the classification of the goods under sub-heading no.0401.13 of the tariff and also upheld the duty demand but set aside the order of penalty on the ground that there was no malafide on the part of the appellant and in this case, the appellants filed classification list claiming classification of the goods, in question, under heading no.0401.19 of the tariff and have cleared the goods on that basis and that this is purely a case of classification dispute.

1.4 Against this order of the Commissioner (Appeals), the present appeal has been filed challenging the Commissioner (Appeals)'s order upholding the classification of the goods under sub-heading no.0401.13 of the Tariff and also the duty demand.

2. Heard both sides.

3. Shri Ashok Agarwal, Advocate, ld.Counsel for the appellant pleaded that the products, in question, –"Milkana Dairy Whitener" and "Milkana Dairy Powder Light & Sweet" are used with tea and coffee as dairy whitener and are different from the skimmed/partially skimmed

milk powder covered under sub-heading no.0401.13, that while the Dairy Whitener contains sugar, the skimmed/partially skimmed milk powder covered by heading no.0401.13 does not contain any sugar, that commercially the dairy whiteners and skimmed/partially skimmed milk powder are considered two different products and in this regard, the evidence in form of affidavits of three housewives viz. Mrs. Meena Pandey, Mrs. Usha Pachori and Mrs. Priya Bhatnagar and other affidavits filed by a retailer and filed by Dr. Satish Kulkarni, Scientist at National Dairy Research Institute had been produced but were not considered by the lower authorities, that from the affidavits of these persons, it is clear that in commercial and trade parlance, milkana dairy whitener used for making tea and coffee is totally different from the skimmed/partially skimmed milk powder; that the Commissioner (Appeals) has erred in law in relying upon the Tribunal's judgement in **Nestle India Ltd. Vs. CCE, Delhi-III, Gurgaon reported in 2004 (173) ELT 495 (Tribunal-Delhi),** as that judgement was in respect of sweetened and partially skimmed milk powder, that for determining the classification of the products, in question, only the commercial parlance test has to be applied and that when tested on the basis of understanding in common parlance, the goods, in question, cannot be called skimmed milk power/partially skimmed milk powder and, therefore, the same would be correctly classifiable under heading no.0401.19 of the tariff.

4. Shri Nitin Anand, ld. Departmental Representative, defended the impugned order reiterating the Commissioner (Appeals)'s findings and emphasised that the issue involved in this case is clearly covered by the ratio of the Tribunal's judgement in the case of **Nestle India Ltd. Vs. CCE** (supra) wherein the Tribunal has held that Nestle Every-day Whitener, T mate Dairy Whitener and Dairy Powder 5 P are classifiable under heading no.0401.13 of the tariff. He also pleaded that Tribunal's judgement in the case of **Nestle India Ltd. Vs. CCE** (supra) is based on the judgement of the Hon'ble Supreme Court in the case of **Food Specialities Vs. Union of India reported in 1998 (97) ELT 402 (SC).** He emphasised that sub-heading no.0401.13 refers only to the milk powder without qualifying it with any adjective and, therefore, this term would cover within its compass all types of milk powder whole, skimmed and partially skimmed and that the goods, in question, are nothing but skimmed milk powder.

5. We have carefully considered the submissions from both the sides and perused the records.

6. The dispute in this case is about the classification of the two products viz. "Milkana Dairy Whitener" and "Milkana Dairy Powder Light & Sweet". Both the products are used as whitener in tea and coffee. While the appellant claim the classification of these products under sub-heading no.0401.19 of the Tariff where the tariff rate of duty is nil, according to the Department, these products are classifiable under

heading no.0401.13 pertaining to "milk powder, other than powder specially prepared for feeding infants, put up in unit containers and ordinarily intended for sale" and chargeable to duty @ 8% adv. There is no dispute that the products, in question, consist of partially skimmed milk powder and some sugar. The contention of the appellant is that these products used as dairy whiteners have name, character and uses distinct from the "milk powder, other than powder specially prepared for feeding infant", covered by heading No.0401.13. In support of this contention, the appellant rely upon the affidavits of several consumers, retailers and a scientist of National Dairy Institute.

7. Heading 04.01 of the Tariff and its various sub-headings are reproduced below:-

Heading No.	Sub-heading No.	Description of goods	Rate of duty
(1)	(2)	(3)	(4)
04.01		Milk and Cream, concentrated or containing added sugar or other sweetening matter. -In or in relation to the manufacture of which any process is ordinarily carried on with the aid of power:	
	0401.11	Flavoured milk, whether sweetened or not, put up in unit containers and ordinarily intended for sale.	
	0401.12	Skimmed milk powder, specially prepared for feeding infants.	

0401.13	Milk powder, other than powder specially prepared for feeding infants, put up in unit containers and ordinarily intended for sale.
0401.14	Concentrated(condensed) milk, whether sweetened or not, put up in unit containers and ordinarily intended for sale.
0401.19	Other
0401.90	Other

7.1 From a plain reading of the above heading of the Central Excise Tariff, it is clear that this heading covers milk and cream whether concentrated or containing added sugar or other sweetening matter. Sub-Heading No.0401.11 covers "flavoured milk, whether sweetened or not, put up in unit containers and ordinarily intended for sale". Sub-heading no.0401.12 covers "Skimmed milk powder, specially prepared for feeding infants". Sub-heading no.0401.13 covers "milk powder, other than powder specially prepared for feeding infants, put up in unit containers and ordinarily intended for sale". Heading No.0401.14 covers "concentrated (condensed) milk, whether sweetened or not, put up in unit containers and ordinarily intended for sale". Sub-heading No.0401.19 covers "other milk products. The goods covered by sub-headings 0401.11, 0401.12, 0401.13, 0401.14 and 0401.19 are those in or in relation to manufacture of which any process is ordinarily carried out with the aid of power. Sub-heading No.0404.90 covers those products of this heading in or in relation to which no process is ordinarily carried on with the aid of powder. Thus from the perusal of this heading, it is clear that so far as milk powder is concerned, there are only two sub-heading nos.0401.12 and 0401.13. Sub-heading 0401.12 covers only those skimmed milk powders which are specially prepared for feeding infants and other Heading No.0401.13 covers all other types of milk powders and hence this sub-heading would cover whole milk powder, skimmed milk powder or partially skimmed milk powder, other than those which are intended for feeding infants. Since Heading No.0401.13 covers all milk powders other than those skimmed milk powder specially prepared for feeding infants and since the products, in question, are nothing but the skimmed milk powder, the same would be correctly classifiable under sub-heading no.0401.13. We find that the same view had been taken by the Tribunal in the case of **Nestle India Ltd.** (supra) and this decision of the Tribunal is based on the judgement of the Hon'ble Supreme Court in the case of **Food Specialities Ltd.** (supra).

8. It has been pleaded that for deciding the classification of the goods in question, the commercial parlance test must be applied and since in common parlance, the goods, in question, are considered as different from the milk powder, the same would not be covered by Heading no.0401.13 of the Tariff. This plea of the appellant is un-acceptable, as when the words of the sub-headings are clear and un-ambiguous and admit only one interpretation, there is no need to take recourse to commercial parlance test. In the expression "milk powder other than powder ~~power~~ specially prepared for feeding infants, put up in unit containers and

ordinarily intended for sale" in sub-heading no.0401.13, the expression "milk powder" is not qualified by any adjective and, therefore, this sub-heading would cover all milk powders other than "milk powder specially prepared for feeding infants" irrespective whether the same are whole milk powder or partially skimmed milk powder or skimmed milk powder and irrespective of whether the same are sweetened or not or whether the same are used as whitener in tea or coffee or put to some other uses.

9. In view of the above discussion, we do not find any infirmity in the impugned order. The appeal is dismissed.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

Ckp.