

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

Appeal No. E/1498/2005 - EX[DB]

Date 26/06/2012

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

To :
C.C.E.JAIPUR-I
N.C.R.B.STATUE CIRCLE C-SCHEME JAIPUR
302005
C.C.E.JAIPUR-I

Appellant
Vs
Respondent

M/S NAGAD NARAYAN FOOD PRODUCTS.

2012 EX[DB] dated 25-6-12

I am directed to transmit herewith a certified copy of **Final order No. A/719**
passed by the Tribunal under **Section 35-C(1) of Central Excises Act, 1944**


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

M/S NAGAD NARAYAN FOOD PRODUCTS.
PLOT NO.F-152,BICHWAL
INDUSTRIAL AREA BIKANER
RAJASTHAN

2. Adv. / Consult *SH. MAYANK GARG, ADV.,*
C/O RESPONDENT.

3. C.D.R

4. Bar association. CESTAT. New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi-3

7. Company Law Institute of India Pvt Ltd., No.2 (Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17

8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005

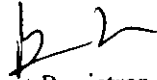
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road,
Ahmedabad-15

10. LAWCRUX Advisors Pvt Ltd, LAW House, 1-8, Sector - 10, Faridabad 121003 (Haryana)

11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070

12. Office Copy

13. Guard file


Assistant Registrar
(Excise Appeal Branch)

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi**

**COURT NO. I
DATE OF HEARING : 02/05/2012.
DATE OF DECISION : 25.06.2012.**

Excise Appeal No. 1498 of 2005

[Arising out of the Order-in-Appeal No. 60 (MPM) CE/JPR-I/2005 dated 18/03/2005 passed by The Commissioner (Appeals-II), Central Excise, Jaipur.]

**Hon'ble Shri Justice Ajit Bharihoke, President
Hon'ble Shri Rakesh Kumar, Member (Technical)**

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? :
2. Whether it would 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 Department Authorities? :

CCE, Jaipur – I

Appellant

Versus

M/s Nagad Narayan Food Products

Respondent

Appearance

Shri Sunil Kumar, Authorized Representative (DR) – for the appellant.

Shri Mayank Garg, Advocate - for the Respondent.

**CORAM : Hon'ble Shri Justice Ajit Bharihoke, President
Hon'ble Shri Rakesh Kumar, Member (Technical)**

FINAL Order No. A/719/2012 Dated : _____

Per. Rakesh Kumar :-

The facts leading to this appeal by the Revenue are, in brief, as under.

1.1 The respondent, a proprietary firm of Shri Narain Das, manufacture Biscuits, Breads, Prasad and Mishri – the last two products are sugar products. For making 'Prasad', boiled sugar is rotated in a vessel till it dries up and for 'Mishri', boiled sugar is put into moulds alongwith thread for six days till it solidifies and becomes Mishri. The period of dispute is 2000-2001 when the respondent was availing SSI exemption. According to Department, Prasad and Mishri are sugar confectionery classifiable under sub-heading 1704.90, while according to the respondent, Prasad and Mishri being classifiable under sub-heading 2108.30 are chargeable to nil rate of duty and, hence, their clearances are not to be included in the value of clearances of value upto rupees one crore for the purpose of SSI exemption. According to Department, the Mishri and Prasad being sugar confectionery covered by 1704.90 are chargeable to duty and, therefore, value of their clearance is also to be counted while calculating the value of the goods cleared during the financial year. Since, the value of Biscuits, Prasad and Mishri cleared during 2000-2001 was Rs. 1,20,04,585/- on this basis, the Assistant Commissioner vide order-in-original dated 30/11/04 confirmed the duty demand of Rs. 3,20,734/- against the

appellant alongwith interest under Section 11AB, and imposed a penalty of Rs. 3,20,734/- on the appellant firm under Section 11AC and penalty of Rs. 10,000/- on Shri Narain Das under Rule 26 of the Central Excise Rules, 2002.

1.2 On appeal to CCE (Appeals), the Assistant Commissioner's order was set aside vide order-in-appeal dated 28/2/05.

1.3 Against the above order of CCE (Appeals), this appeal has been filed by the Revenue.

2. Heard both the sides.

3. Shri Sunil Kumar, the learned Departmental Representative assailed the impugned order by reiterating the grounds of appeal in the Revenue's appeal and emphasising that according to HSN Explanatory notes to heading 1704, this heading covers all boiled/sugar confectionery, cited the judgment of the Tribunal in the case of **CCE vs. S.M. Confectionery Works** reported in **1993 (66) E.L.T. 469 (Tribunal)**, wherein it was held that – "Mishri", Rewadi", "Batasha" and "Chironjidana" are more appropriately classifiable as sugar confectionery under tariff heading 1704.90.

4. Shri Mayank Garg, Advocate, the learned Counsel for the respondent, defending the impugned order pleaded that –

(a) Hon'ble Supreme Court, in case of **State of Gujarat vs. Sakarwala Brothers** reported in **1996 INDLAW SC 43** has, taking into account the definition of sugar, as "any

form of sugar containing more than 90% of sucrose" in item No. 8 of the 1st Schedule to Central Excise Act, 1944, has held that Patasha, Bura Sugar, Harda and Alchidana are 'sugar' covered by entry No. 47 of schedule A to the Bombay Sales Tax Act and hence not chargeable to Sales Tax ;

(b) Hon'ble Rajasthan High Court in its judgment dated 2/7/92 in case of **Commercial Tax Officer, Bikaner vs. M/s Heera Lal Murlidhar** has held that "sugar candy" with more than 90% sucrose is a variety of sugar and hence exempted from levy of sales tax ;

(c) in Central Excise Tariff, during the period of dispute, Chapter Note 2 of Chapter 17 provided that for the purpose of subheading 1701.10 (sugar manufactured without the aid of power), 1701.20 (Khandsai sugar), sub-heading 1701.31 (levy sugar) and sub-heading 1701.39 "sugar" means any form of sugar in which sucrose content, if expressed as a percentage of the material dried to constant weight at 105°C, is more than 90% and in view of this Chapter Note, the judgment of the Apex Court in the case of **Sakarwala Brothers** (supra) and of Hon'ble Rajasthan High Court in the case of **M/s Heera Lal Murlidhar** (supra) would be squarely applicable to this case ;

(d) Tribunal in case of **DCM Shriram Industries vs. CCE, Meerut** reported in **1996 (84) E.L.T. 221 (T)** and **Atul Products vs. CCE, Pune** reported in **2007 (210) E.L.T. 681 (T)** has held that Patasa, Mishri, Alchidana are classifiable under heading 1701 as sugar; and

(e) as the goods, in question, are sugar and in their manufacture no power is used, the same are classifiable under sub-heading 170110 where the rate of duty is 'nil'.

He further pleaded that while the show cause notice dated 23/2/04 issued to the respondent and the grounds of appeal of the Revenue seek classification of 'Prasad' and 'Mishri', which according to test report of M/s Shri Ram Institute of Industrial Research, New Delhi, referred to in the CCE (Appeals)'s order, are pure sugar, under sub-heading 1704.90 as sugar confectionery, classification under this sub-heading is ruled out even in terms of the Board's Circular No. 879/17/08-CX. I dated 5/12/08. He also pleaded that the process of making 'Mishri' and 'Prasad' from sugar is not specified in any chapter notes as amounting to manufacture and hence in view of Apex Court's judgment in case of **Shyam Oil Cake Ltd. vs. CCE, Jaipur** reported in **2004 (174) E.L.T. 145 (S.C.)**, the process would not amount to manufacture. He, therefore, pleaded that there is no merit in the Revenue's appeal.

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

6. The undisputed fact is that 'Prasad' and 'Mishri' are made from sugar. In the Revenue's appeal, the test report of Shri Ram Institute for Industrial Research, New Delhi according to which while 'Prasad' - contains 97.1% sucrose, and 'Mishri' contains 94.9% sucrose, is not disputed. The show cause notice has been issued on the basis that these products are 'sugar confectionery' classifiable under heading 1704.90, as against appellant's claim for classification under sub-heading 2108.90. The Assistant Commissioner upheld the classification under 1704.90. The CCE

(Appeals), while rejecting the classification under 1704.90 and 2108.90, has held that goods, in question, are classifiable under 1701.10 as "sugar manufactured without the aid of power" for which the tariff rate itself is 'nil'. It is this finding of CCE (Appeals), which has been challenged in the Revenue's appeal, wherein the classification of 'Prasad' and 'Mishri' has been claimed under 1704.90.

7. So far as the Revenue's claim for classification under sub-heading 1704.90 is concerned, the same is incorrect as both the items have more than 90% sucrose and, hence, in view of Chapter Note 2 to Chapter 17, have to be treated as sugar for the purpose of sub-heading 1701.10, 1701.20, 1701.31 and 1701.39. In this regard, even the Board, in its Circular No. 879/17/08-CX.I dated 5/12/08 issued under Section 37B, observing that the Tribunal's decision in case of **CCE vs. S.M. confectionery Works** reported in **1993 (66) E.L.T. - 469 (Tribunal)**, having failed to consider the implications of Chapter Note 2 of Chapter 17 and the decision of the Apex Court in case of **Sakarwala Brothers** (supra), is *per incuriam*, has ruled out the classification of Mishri, Batasha, Rewadi, Chironjidana/Alachidana, Harda under tariff heading 1704.90. According to this circular, however, making of Bura, Mishri, Hardas, Batasha from sugar would amount to manufacture under Section 2 (f) and these products are classifiable under sub-heading 17019100 pertaining to - "Refined sugar containing added flavouring or colouring matter".

7.1 However, during the period of dispute, there was neither any sub-heading covering - "refined sugar containing added flavouring or colouring matter", nor it is anybody's case that the products, in question, - "Prasad" and "Mishri" are sugar with added flavouring or colouring matter.

8. In terms of Apex Court's judgments in cases of **Empire Industries Ltd. vs. Union of India** reported in **1985 (20) E.L.T. 179 (S.C.)**, **South Bihar Sugar Mills Ltd. vs. Union of India** reported in **1978 (2) E.L.T. J336 (S.C.)**, **Metlex (I) Pvt. Ltd. vs. CCE, New Delhi** reported in **2004 (165) E.L.T. 129 (S.C.)**, **CCE vs. Technoweld Industries** reported in **2003 (155) E.L.T. 209 (S.C.)** and **Union of India vs. J.G. Glass Industries Ltd.** reported in **1998 (97) E.L.T. 5 (S.C.)** for a process to be called 'manufacture' it must result in emergence of a commercially new product with a distinct name, character or usages. The Apex Court in para 16 of its judgment in case of **Union of India vs. J.G. Glass Industries Ltd.** (supra) has held thus :-

"16. On an analysis of the aforesaid rulings, a two-fold test emerges for deciding whether the process is that of "manufacture". First, whether by the said process a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist; secondly, whether the commodity which was already in existence will serve no purpose but for the said process. In other words, whether the commodity already in existence will be

of no commercial use but for the said process. In the present case, the plain bottles are themselves commercial commodities and can be sold and used as such. By the process of printing names or logos on the bottles, the basic character of the commodity does not change. They continue to be bottles. It cannot be said that but for the process of printing, the bottles will serve no purposes or are of no commercial use."

Thus, the new commercial commodity emerging by a process of "manufacture" must also have character and hence usages different from the original material from which the new commodity has been made. In this case, the character and usage of the goods - 'Prasad' and 'Mishri' remain the same as sugar from which the same have been made, as both the products have more than 90% sucrose and both the products are used for sweetening the foods and beverages, which is the same as the use of sugar from which the same are made. It is not the Department's case that they are coloured or flavoured sugar which in addition to sweetening imports some particular colour or flavour to the food or beverage. In our view, they are just a form of sugar. Mishri is nothing but a form of sugar with bigger crystals and 'Prasad' in this case is an amorphous form of sugar. Just because by subjecting a material to some process, a product with a new name emerges, the process cannot be called manufacture - for manufacture to take place, the resulting product must have a new commercial identity and must have

character and usages different from the character and usages of the material from which it has been made.

9. We, therefore, hold that making of 'Prasad' and 'Mishri' from sugar does not amount to manufacture and hence 'Prasad' and 'Mishri' can neither be charged to duty by classifying them under 1704.90 nor under any sub-heading of 1701. The Revenue's appeal is, therefore, without any merit. The same is dismissed.

(Pronounced in the open court on 25/6/2012)

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

PK