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

COURT-IV

Appeal Nos. E/874/2012

[Arising out of the Order in Original No. 29/Commissioner/2012 dated 16.01.2012 passed by Commissioner, Central Excise, Delhi]

Nestle India Limited … Appellant

Vs.

Commissioner of Central Excise, LTU Delhi … Respondent

Appearance:

Rep. by - Shri Rahul Tangri, Advocate for the appellants.
Rep. by - Shri H.C. Saini DR, for the respondent

Coram: Hon'ble Mr. M.V. Ravindran, Member (Judicial)
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Date of Hearing : **01.03.2017**

Date of Decision : **24.03.2017**

Final Order No. 52514 /2017-DB

Per V. Padmanabhan

The appeal is directed against Order-in-Original No. 29/Commissioner/ 2012 dated 16.01.2012 passed by Commissioner of Central Excise, LTU, Delhi.

2. The period involved in this present classification dispute is November 2010 to March 2011. The appellant manufactured various excisable goods, including 'NESCLAC Nutritious Milk Drink'. The appellant classified the above product under Tariff Heading 0404. The Revenue sought to reclassify the above

product under Tariff Item 1901 90 90. A show cause notices was issued by the Revenue covering the period of dispute and the adjudicating authority vide impugned order confirmed the differential Central Excise duty demand of Rs. 1,29,77,684/- Further a penalty of Rs. 5,000/- was also imposed on the appellant under Rule 25 of the Central Excise Rules, 2002. Aggrieved by the impugned order, the present appeal has been filed.

3. With the above background, we heard Shri Rahul Tangri, ld. Advocate for the appellant and Shri H.C. Saini, ld. DR appearing for the Revenue.

4. The product under dispute is described as 'NESCLAC Nutritious Milk Drink' contains the ingredients - Milk Solids, Glucose Syrup, Sugar, Antioxidants, Vitamins, Minerals and Methyl Flavour. The appellant classified the product under Tariff heading 0404 90 90 attracting 'nil' rate of duty as "product consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter". Revenue issued show cause notice proposing to shift the classification to Tariff Item 1901 90 90, attracting 16% rate of duty. The main grounds taken by Revenue were that the appellants were adding artificial flavouring substance i.e. Methyl Vanillin Flavour. With the addition of the above ingredients, Revenue was of the view that the item manufactured would go out of the purview of Tariff Item 0404 since only sugar or other sweetening matter is

allowed to be added to natural milk constituent under heading 0404. The reasoning adopted was that with the addition of this item, the item becomes food preparation of goods of Heading 0401 to 0404 and is to be classified under Tariff Item 1901. In the impugned order, the adjudicating authority held that flavouring substance i.e. Methyl Vanillin Flavour is an item which is not permitted to be added to natural milk constituent in 0404. Accordingly, he proceeded to shift the classification to Chapter 19 under item 1901 90 90. He drew the inference from the explanatory notes to hold that if flavouring agents are specifically added to the products of Chapter heading 0404, the resultant product does not fall under Chapter 04, but falls under Chapter 19 of Central Excise Tariff.

5. The appellant's contention is that the addition of negligible quantity of artificial flavouring substance to the milk powder will not take the product out of the purview of Chapter 0404. They have argued that Chapter 4 will cover all the dairy products and includes the products consisting of natural milk constituents to which vitamins, minerals and small quantity of stabilizing agents are added. The product will get moved out of Chapter 4 to Chapter 19 only in those cases where it is in the form of food preparation of goods of heading 0401 to 0404. The milk products would fall in heading 1901 only if the same is excluded from Chapter 4 by virtue of not being specified there or by virtue of it

containing certain ingredients which are not natural milk constituents and are also not permitted in the products of tariff heading 0404; for example, milk preparation obtained by replacing one or more constituents will go under Chapter 19. Accordingly, they have submitted that addition of artificial flavouring substance which merely constitutes 0.3% of the total composition, will not take their product out from Chapter 4 to Chapter 19. They have also relied upon the following case laws:-

(a) Amrit Foods vs. CCE, Meerut – 2006 (202) ELT 545 (Tri. Del.)

(b) Nestle India Limited vs. CCE, New Delhi – 2001 (132) ELT 134 (Tri. Del.)

6. Ld. Counsel appearing for the appellant explained the various grounds of appeal. He took us through the competing tariff headings as well as relevant HSN Notes of Chapter 4 as well as Chapter 19. He explained that what is envisaged under Chapter 19 is substantial change in the product falling under Chapter 4, wherein it no longer remains milk powder. He submitted that in addition to flavouring substance i.e. Methyl Vanillin Flavour, which is in the nature of sweetening matter, the appellant is merely adding a very miniscule percentage of total composition of flavouring substance. Hence, it cannot be said that the milk powder ceased to be milk powder for any substantial change in the product to justify to shift the classification from Chapter 4 to Chapter 19. In the *Amrit Foods* case (supra), the Tribunal decided the classification of milk shake mixes under item 0404. In the appellant's own case (supra), the dispute

was pertaining to classification of Nestle Milkmaid Kesar Kulfi Mix, Nestle Milkmaid Shahi Rabri Mix, Nestle Milkmaid Kalakand Mix and the Tribunal held the products to be classifiable under tariff heading 0404. The decision is affirmed by the Hon'ble Supreme Court as reported at -*2015 (324) ELT 418 (SC).* Accordingly, he submitted that the product in the case in hand will be classifiable under Chapter 0404 90 00 as claimed by the appellant and not under Chapter 1901 90 90, as decided in the impugned order.

7. Ld. DR justifies the impugned order. He submitted that the impugned products will not be classifiable under CETH 0404 since the legislature through an amendment in the heading has deleted the word “flavouring”. Therefore, he argued that if the product manufactured contains flavouring substance, if not fall under tariff heading 0404. He submitted that the term ”food preparation” is not a technical or legal word but a term of ordinary usage and means that food which is edible and it should be a preparation which does not occur naturally but prepared by manufacturing process. The product in question is food preparation inasmuch as milk powder with addition of other constituents becomes the food preparation of heading 0404. With addition of flavouring substance, such food preparation will be classifiable under Chapter 1901.

8. We reproduce below the two competing tariff entries:-

Chapter 4 – Dairy Produce, etc.

Tariff Item	Description of goods	Unit	Rate of

				duty
0404		Whey, whether or not concentrated or containing added sugar or other sweetening matter; products consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter, not elsewhere specified or included		
0404 10	-	**Whey and modified whey, whether or not concentrated or containing added sugar or other sweetening matter:**		
0404 10 10	-	**---**	Kg.	Nil
0404 10 20	---	**---**	Kg.	Nil
0404 10 90	---	**---**	Kg.	Nil
0404 90 00	-	**Other**	Kg.	Nil

Chapter 19 – Preparations of Cereals, Flour, Starch etc.

Tariff Item		Description of goods	Unit	Rate of duty
1901		Malt extract; food preparations of flour, groats, meal, starch or malt extract, not containing cocoa or containing less than 40% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included; ***food preparations of goods of heading 0401 to 0404***, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included		
1901 10	-	Preparations for infant use, put up for retain sale		
1901 10 10	---	---		
1901 10 90	---	---		
1901 20 00	---	---		
1901 90	---	---		
1901 90 10	---	---		
1901 90 90	---	Other		

The disputed product, 'NESLAC NUTRITIOUS Milk Drink' is made up of milk predominantly but is added with a few additional ingredients. The show cause notice cited the ingredients of flavouring substance i.e. Methyl Vanillin Flavour. With the addition of these items, the view taken by Revenue is that the item will no longer remain classifiable under CETH 0404 but classified under Chapter 19.

In the impugned order, ld. Commissioner has taken the view that addition of Methyl Vanillin Flavour is permissible since it is in the nature of sweetening agent. But he held that addition of artificial flavouring agent will modify the item into a food preparation of goods of heading 0401 to 0404 and hence, it will be classifiable under 1901 90 90. Since CETH is fully align with the HSN Notes, it would be useful to refer to the explanatory notes for guidance for classification of the impugned product.

> "*This Chapter covers:*
>
> *(I) Dairy Products:*
>
> *(A) Milk, i.e. full cream milk and partially or completely skimmed milk.*
> *(B) Cream.*
> *(C) Buttermilk, curdled milk and cream, yogurt, kephir and other fermented or acidified milk and cream.*
> *(D) Whey*
> ***(E) Products consisting of natural milk constituents, not elsewhere specified or included.***
> *(F) Butter and other fats and oils derived from milk; dairy spreads.*
> *(G) Cheese and curd.*
>
> *The products mentioned at Items (A) to (E) above may contain, in addition to natural milk constituents (e.g. milk enriched in vitamins or mineral salts), small quantities of stabilizing agents which serve to maintain the natural consistency of the product during transport in liquid state (disodium phosphate, trisodium citrate and calcium chloride, for instance) as well as very small quantities of anti-oxidants or of vitamins not normally found in the product. Certain of these products may also contain small quantities of chemicals (e.g. sodium bicarbonate) necessary for their processing; products in the form of powder or granules may contain anticaking agents (for example, phospholipids, amorphous silicon dioxide).*

Therefore, addition of stabilizer while making the aforesaid preparation would not take it out from Heading 04.01. Thus, it needs to be determined as to whether the addition of artificial flavour would make it a food preparation and therefore, it would no more remain diary produce and would be covered under heading 19.01. The Commissioner, has taken the view that sweetening agent can be added without affecting the Chapter heading 0404 but addition of flavouring substance are not permitted as additives.

9. The relevant HSN Notes of tariff heading 1901 is reproduced below:-

> *"The preparations of this heading may be distinguished from the products of headings 04.01 to 04.04 in that they contain, in addition to natural milk constituents, other ingredients not permitted in the products of those earlier headings Thus, heading 19.01 includes, for example:*
>
> *(1) Preparations in powder or liquid form used as infant food or for dietetic purposes and consisting of milk to which secondary ingredients (e.g. cereal groats, yeast) have been added.*
>
> *(2) Milk preparations obtained by replacing one or more constituents of milk (e.g. butyric fats) by another substance (e.g. oleic fats)."*

By referring to the HSN Notes to tariff heading 0404 and 1901, it is evident that milk powder would fall under heading 1901 only if the same is excluded from Chapter 4. That brings us to the question whether adding artificial flavouring substance will jettison the product from Chapter 4 to Chapter 19. The reference to HSN Notes to Chapter 4 and 19 clearly indicates that there is no reference to flavouring substance being one of the prohibited ingredients for the product in Chapter 4. HSN Notes also make it clear that product would fall under Chapter 1901 only when natural milk constituents are added with other items such as cereal, groats, yeast etc. or the milk constituent is replaced by an other substance such as oleic fats. From what is stated before us, we are convinced that this is not a case. Addition of small quantity of artificial flavouring substance does not change the essential nature of the product from what is covered under 0404. It does not make it a food preparation of milk instead of a "product consisting of natural milk constituent". In this view of the matter, there is no justification to shift the classification of the main product from 0404 to 1901, on account of addition of a minuscule quantity of flavouring substance.

10. The appellant has relied upon the Tribunal decisions in the case of Amrit Foods as well as Nestle India Limited. However, the Commissioner has brushed aside the reliance placed on these judgments. In the case of Amrit Foods, the dispute before the CESTAT was *inter alia* regarding the classification of milk shake mixes. The product constituents were milk, milk powder, sugar, glucose and stabilizers. The assessee classified the product under tariff heading 0404. However, the adjudicating authority classified the product under tariff heading 1901 on the ground that the product contained stabilizers, whose main purpose was emulsification of oil in water throughout the self life, to improve the body and texture and to impart smoothness to the product, which as per the adjudicating authority, was not the case. The adjudicating authority relied upon the Chapter Note 4 of the Chapter 4 of Central Excise Tariff Act, 1985, wherein stabilizers were not specifically mentioned and thus, the authority contended that it is not a permitted ingredient in products classifiable under tariff heading 0404. However, the Tribunal ruled in the favour of the assessee relying on the decision of Nestle India Limited (supra). It is pertinent to note that the aforesaid decision has been affirmed by the Hon'ble Supreme Court, as reported 2015 (324) ELT 418 (SC). Thus, even when the stabilizers were not specifically mentioned in the Chapter Note 4 of the Central Excise Tariff Act, still the milk shake mixes containing the same were held classifiable under the tariff heading

0404 by CESTAT as well as the Hon'ble Supreme Court on the ground that stabilizers do not interfere with basic characteristics of the milk products and are added merely to impart stability to the product. The same analogy can be drawn in the present case where flavouring agent of 0.03% of the total composition is added, which does not change the basic characteristic of the product and the product remains a nutritious milk drink only.

11. In view of the above discussions, we are of the view that the appropriate classification for the impugned product will be under Chapter tariff item 0404 90 00 of the Central Excise Tariff Act, 1985, as contended by the appellant. Accordingly, the impugned order is set-aside and appeal is allowed.

[Order pronounced in open court on 24.03.2017]

(**M.V. Ravindran**)
Member (Judicial)

(**V. Padmanabhan**)
Member (Technical)

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