CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal No. 875 of 2012

(Arising out of Order-in-Original No. 30/COMMR/2012 dated 19.01.2012 passed by the Commissioner of Central Excise & Service Tax, New Delhi)

DATE OF HEARING : 30.03.2017
DATE OF DECISION : 30.03.2017

M/s Nestle India Ltd. .... **Appellants**
(Rep by Sh. Anurag Kapoor, Adv.)

VERSUS

CC, Delhi .... **Respondent**
(Rep. by Sh. H.C. Saini, DR)

CORAM : **HON'BLE MR. JUSTICE (DR.) SATISH CHANDRA, PRESIDENT**
HON'BLE MR. V. PADMANABHAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 52711/2017

PER JUSTICE (Dr.) SATISH CHANDRA :

The present appeal is filed against the Order-in-Original No. 30/COMMR/2012 dated 19.01.2012 passed by the Commissioner of Central Excise, New Delhi. The period in dispute is May 2010 to December 2010.

2. The brief facts of the case are that, during the period under consideration, the assessee-Appellants were engaged in the manufacture of various excisable goods including NIDO Nutritious Milk for growing kids. They cleared the goods without payment of duty classifying the same under the

Tariff Item 0404 90 00 of the Central Excise Tariff Act, 1985 under intimation to the Department. However, the Department contended that the product merits classification under the Tariff Item 1901 90 90 of the Central Excise Tariff Act, 1985 on the ground that addition of flavour is not permitted in the products of Tariff Heading 0404. Accordingly, the Department sought to demand duty on the NIDO Nutritious Milk for growing kids treating the same to be classifiable under the Tariff Heading 1901 by issuance of the Show Cause Notice dated 15.03.2001. The assessee-Appellants submitted reply to the Show Cause Notice rebutting each and every allegation raised therein. However, without appreciating their submissions, the Learned Commissioner passed the impugned order. Being aggrieved, the assessee-Appellants have filed the present appeal.

3. With this background, we have heard Shri Anurag Kapoor, learned counsel for the assessee-Appellants and Shri R.K. Manjhi, learned DR for the Department, and perused the written submissions.

4. After hearing both sides and on perusal of the record, it appears that an identical issue has come up before this Tribunal in the assessee-Appellants' own case [**Nestle India Ltd. vs CCE, Delhi]** in Appeal No. E/379/2011, Final Order No. 52513/2017-DB dated 24.03.2017, wherein it was observed that :

> "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 the 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.”

5. By following our earlier order (supra), we are of the view that the classification for the impugned products will be under the Tariff Heading 0404 90 00 of the Central Excise Tariff Act, 1985, as claimed by the assessee-Appellants. Hence, the impugned order is set aside.

6. In the result, the appeal filed by the assessee-Appellants is allowed.

(Dictated & pronounced in the open court)

(V. PADMANABHAN)
MEMBER (TECHNICAL)

(JUSTICE Dr. SATISH CHANDRA)
PRESIDENT

Golay