CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SCO 147-148, SECTOR 17-C, CHANDIGARH – 160 017

COURT NO. I

Appeal NOs. E/578/2010 & E/57651/2013

[Arising out of Order-in-Original No. 38-39/COMMR/CEX/IND/09 dated 30.11.2009 passed by the Commissioner of Central Excise Indore and Order-in-Appeal No. IND/CEX/000/APP/15/13 dt. 22.01.2013 passed by the Commissioner of Central Excise (Appeals), Indore.]

Date of hearing/decision: 23.02.2017

For approval and signature:

Hon'ble Mr. Ashok Jindal, Member (Judicial)

Hon'ble Mr. V. Padmanabhan, Member (Technical)

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Cadbury India Limited **Appellant(s)**

VS

CCE, Indore. **: Respondent(s)**

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Appearance:

Sh. B.L. Narasimhan, Advocate for the Appellant(s)

Sh. R.K. Majhi and Govind Dixit ARs for the Respondent(s)

CORAM:

Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr. V. Padmanabhan, Member (Technical)

FINAL ORDER NO. 53191-53192 /2017

Per : Ashok Jindal

These appeals have been directed against the impugned order classifying the product namely Milk Treat under Tariff Heading 19053211.

2. The facts of the case are that the appellants are engaged in manufacturing of cocoa and cocoa products and wafers products falling under Chapter 18 and 19 of the Central Excise Tariff Act, 1985. The appellant manufactured during the period in question Milk Treat having ingredients sugar, liquid glucose, milk solids, golden syrup, partially hydrogenated vegetable fats/cocoa butter, emulsifiers (soya lecithin), wheat protein, synthetic food colour and added artificial flavouring substances. The appellants were classifying under Chapter Tariff Heading 19053219 and discharging their duty liability accordingly. The appellants have also filed their ER-1 return regularly. The classification of Milk Treat was disputed by the Revenue and issue 3 show cause notices for the period April 2005 to March, 2009 and December, 2010 to August, 2011 by invoking extended period of limitation to classify the said product under Tariff Heading 19053211 instead of Tariff Heading 19053219. The impugned orders have been passed classifying the product under Tariff Heading 19053211 and consequently the differential duty was demanded. Aggrieved from the said orders, the appellants are before us.

3. Sh. B.L. Narasimhan, Ld. Counsel for the appellant appeared and submits that the appellant has correctly classified Milk Treat under Tariff Heading 19053119 of the Excise Tariff during the impugned period as the appellants were availing benefit of Notification No. 3/2006 dt. 01.03.2006 at serial No. 19 for the period April, 2005 to 06 December, 2008 and thereafter,

paying duty as per Notification No. 15/2008 Central Excise dt. 07.12.2008. It is his contention that Milk Treat is not coated with chocolate or containing Chocolate, therefore, the same is correctly classified under Tariff Heading 19053219 of Excise Tariff. He submits that the Tariff Heading 19053211 applies wafers and wafers coated chocolate or containing chocolate falling under Chapter 18 and does not cover products coated or containing White Chocolate falling under Chapter Heading 1704 of Excise Tariff. He submits that Chapter 18 covers Cocoa and Cocoa preparations and the White Chocolate is not containing Cocoa therefore, the same is classifiable under Chapter Heading 1704 of the Excise Tariff. He also relied on the HSN notes to say that explaining note to chapter 18 clearing White Chocolate (composed Cocoa Butter) sugar and powder milk falling under Chapter Heading 1704 from its purview and Chapter Heading 1704 covers only sugar confectionary including White Chocolate but not containing Cocoa therefore, collective reading of the Tariff entries along with HSN explained noted notes. It can be seen that White Chocolate not containing Cocoa will merit classification under Chapter Heading 1704 and not under Chapter 1806 which applied to the goods containing Cocoa. Therefore, White Chocolate cannot be treated as Chocolate. Hence, it will not come in the purview under Chapter Heading 19053211. He relies on the decision of this Tribunal in the case of *Ravalgaon Sugar Farms Ltd. Vs. CCE, Ahmedabad – 2000 (121) ELT 488*

(Tribunal). He further submitted that the Ld. Commissioner has held that Cocoa butter is same as Cocoa. As per HSN explained note under Chapter 17, it has been clearly stated that Cocoa butter is not regarded as Cocoa, therefore, the Ld. Commissioner has fell in error. He further submitted that the White Chocolate is classified under Chapter Heading 1704 as Sugar Confectionary at the suppliers end and the same has not been disputed therefore, the demand is not sustainable. He further submitted that for the period May, 2002 to December, 2001, the issue has been settled in the favour of the appellant and the same has been accepted by the Department. Therefore, the Department cannot take a contradict of stand against the appellant. He further submits that the appellant has always classified the product 'Milk Treat' as per the order of the ld. Commissioner (Appeals) dt. 31.01.2004 and no dispute has been raised. To support this contention, he relied upon the decision of *Jayaswal Neco Ltd. Vs. CCE, Nagpur, 2006 (195) ELT 142 (SC).* He also relied on the test report evidencing that product Milk Treat does not contain any Cocoa powder but contains only Cocoa butter and the Ld. Commissioner has considered Cocoa butter is equivalent to Cocoa, therefore, the said finding is incorrect. Consequently, the classification sought by the Revenue is not sustainable. He also submits that as the appellants are regularly filing their ER-1 returns and the issue has attained finality vide order dt. 31.01.2004 passed by the Ld. Commissioner (Appeals) on the issue. Therefore, extended period

is not invokable. To support, he relied the decision of *Nizam Sugar Factory Vs. CCE, A.P. 2006 (197) ELT 465 (S.C.).* Finally, he submitted that the penalty on the appellant is not imposable.

4. On the other hand, Ld. AR opposed the contention of the Ld. Counsel, he relied upon the decision of *Nestle India Limited Vs. CCE, Goa – 2008 (227) E.L.T. 631 (Tri. Mumbai)* to say that White Chocolate is one of the variety of the Chocolate, therefore, appellant have no case. He also submits that the said order has attained finality vide decision of the Hon'ble Apex Court reported in *2009 (237) ELT A102 (SC)*

5. In rebuttal to the arguments advanced by the Ld. AR, Sh. B.L. Narasimhan, Advocate submits that the order of this Tribunal in the case of *Nestle India Limited (supra)* has been set aside by the Hon'ble Apex court on merits and remanded matter back to this Tribunal for reconsideration of the issue. He further submitted that in remand, the matter has been heard by the Tribunal and the order is awaited.

6. On merits, Sh. R.K. Maghi, Ld. AR supported the impugned orders and submits that it is admitted fact that the appellants are manufacturing Milk Treat having Cocoa butter and Cocoa butter is extracted from Cocoa. Therefore, there is no difference between Cocoa and Cocoa butter. In that circumstances, the impugned orders are to be upheld.

7. Heard both the sides and considered the submissions.

8. On considerations of submissions heard by both the sides, the following issue emerges for consideration whether the product namely Milk Treat is classifiable under Tariff Heading 19053211 or 19053219.

9. For better appreciation, the Chapter Heading 1905 is extracted below:-

1905	***Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa; communion wafers, empty cachets of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products.***	
1905 10 00	*- Crispbread*	*Kg. NIl*
1905 20 00	*- Gingerbread and the like*	*Kg. NIL*
	- Sweet biscuits; waffles and wafers:	
1905 31 00	*– Sweet biscuits*	*Kg. 16%*
1905 32	*- Waffles and wafers:*	
	- Communion wafers:	
1905 32 11	*– Coated with chocolate or containing chocolate*	*Kg. 16%*
1905 32 19	*– Other*	*Kg. 16%*
1905 32 90	*– Other*	*Kg. 16%*

On plain reading of the said Tariff, we find that the wafers coated with Chocolate or containing Chocolate are classifiable under Tariff Heading 19053211, therefore, we have to find out whether the product in question has been coated with Chocolate or containing Chocolate.

10. The Chocolate has been classified under Chapter Heading 1806. The Chapter Heading 1806 is also reproduced here as under:-

1806	***Chocolate and other food preparations containing Cocoa***	
1806 10 00	*- Cocoa powder, containing added sugar or other sweetening matter.*	*Kg. 16%*
1806 20 00	*- Other preparations in blocks, slabs or bars weighing more than 2 Kg. or in liquid, paste, powder, granular or other bulk form in containers or immediate packing's, of a content exceeding 2 Kg.*	*Kg. 16%*
	- Other, in blocks, slabs or bars:	
1806 31 00	*-- Filled*	*Kg. 16%*
1806 32 00	*-- Not filled*	*Kg. 16%*
1806 90	*- Other:*	
1806 90 10	*- Chocolate and chocolate products*	*Kg. 16%*
1806 90 20	*- Sugar confectionery containing cocoa*	*Kg. 16%*
1806 90 30	*- Spreads confectionery containing cocoa*	*Kg. 16%*
1806 90 40	*- Preparations containing cocoa for making beverages*	*Kg. 16%*
1806 90 90	*- Other*	*Kg. 16%*

We further find that the HSN explained notes to Chapter 18 are reproduced here as under for the consideration of the issue:-

Cocoa and Cocoa preparations

Notes.

1. This Chapter does not cover the preparations of heading 04.03, 19.01, 19.04, 19.05, 21.05, 22.02, 22.08, 30.03 or 30.04.

2. Heading 18.06 includes sugar confectionery containing cocoa and subject to Note 1 to this Chapter, other food preparations containing Cocoa.

GENERAL

This Chapter covers Cocoa (including Cocoa beans) in all forms, Cocoa butter, fat and oil and preparations containing Cocoa (in any proportion), except

(a) Yogurt and other products of ***Heading 04.03.***

(b) White Chocolate ***(Heading 17.04).***

On going through the explainery notes of the Chapter 18, we find that White Chocolate has been excluded from Chapter 18. The Chapter 1806 deals with Chocolate and other food preparations containing Cocoa.

11. We also take note of fact that the issue, the explainery notes to Chapter 17.04 are also relevant which are reproduced here as under:-

17.04 – Sugar confectionery (including white chocolate), not containing Cocoa.

1704.10 – Chewing gum, whether or not sugar-coated.

1704.90 – Other

This heading covers most of the sugar preparations which are marketed in a solid or semi-solid form, generally suitable for immediate consumption and collectively referred to as ***sweetmeats, confectionery*** *or* ***candies.***

It includes, inter alia :

(1) Gums containing sugar (including sweetened chewing gum and the like)

(2) *Boiled sweets (Including those containing malt extract).*

(3) *Caramels, cachous, candies, nougat, fondants, sugared almonds, Turkish delight.*

(4) *Marzipan.*

(5) *Preparations put up as throat pastilles or cough drops, consisting essentially of sugars (whether or not with other foodstuffs such as gelatin, starch or flour) and flavouring agents (including substances having medicinal properties, such as benzyl alcohol, menthol, eucalyptol and tolu balsam). However, throat pastilles or cough drops which contain substances having medicinal properties, other than flavouring agents, fall in* ***Chapter 30 provided*** *that the proportion of those substances in each pastille or drop is such that they are thereby given therapeutic or prophylactic uses.*

(6) *White chocolate composed of sugar, Cocoa butter, milk powder and flavouring agents, but not containing more than mere traces of Cocoa (Cocoa butter is not regarded as Cocoa).*

(7) *Liquorice extract (cakes, blocks, sticks, pastilles, etc.) containing more than 10% by weight of sucrose. When put up (i.e., prepared) as confectionery, however, (flavoured or not), liquorice extract falls in the heading irrespective of the proportion of sugar.*

The explainery notes clearly states that Sugar confectionary including White Chocolate and not containing Cocoa is classifiable under Chapter Heading 1704 and it includes White Chocolate compressed of Sugar, Cocoa butter, Milk Powder, flavoring agents but not containing more than mere traces of Cocoa (Cocoa butter is not regarded as Cocoa).

12. As Cocoa butter cannot be said as Cocoa and the supplier of the goods have classified the White Chocolate under Chapter Heading 1704. In that circumstances, from the collective reading of the all the Chapter Heading and their classification list, we find that the Chapter Tariff Heading 19053211 covers the product manufactured under Chapter 1806 having Chocolate or Cocoa but

does not include the goods classified under Chapter Heading 1704.

13. Particularly, the Cocoa butter cannot be treated as Cocoa. In the impugned orders, the lower authorities have fell in error by holding that Cocoa butter is Cocoa.

14. As per the notes 6 to Chapter Heading 17.04 Cocoa butter cannot be regarded as Cocoa, therefore, the classification adopted by the lower authorities is on their misunderstanding that Cocoa butter as Cocoa.

15. Admittedly, the ingredients used in manufacturing of Milk Treat does not contained any Cocoa or Chocolate but only contained Cocoa butter and Cocoa butter is specifically excluded and does not cover under Chapter 18 of the Central Excise Tariff Act, therefore, the White Chocolate cannot be said as Chocolate. In that circumstances, the product "Milk Treat" is not covered under Tariff Heading 19053211.

16. With these observations, we classify the product in question under Tariff Heading 19053219 which has been correctly classified by the appellants. In that circumstances, the impugned order deserve no merits, hence, set aside.

Consequently, the appeals are allowed.

(Dictated and pronounced in the open court)

V. Padmanabhan
Member (Technical)

Ashok Jindal
Member (Judicial)

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