IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Customs Appeal No.75228 of 2021

(Arising out of Order-in-Original No.08/CUS/CC(P)/WB/2020-21 dated 07.12.2020 passed by Principal Commissioner of Customs(Preventive), West Bengal.)

M/s. Anutham Exim Private Limited
(PS Aviator, 5th Floor, Room No.501, New Town Road, Mouza Atghora, Chinar Park, Rajarhat, Kolkata-700136.)

...Appellant

VERSUS

Commissioner of Customs (Preventive), Kolkata
.....Respondent
(15/1, Strand Road, Customs House, Kolkata-700001.)

APPEARANCE

Shri Rahul Tangri, Advocate for the Appellant (s)

Shri M.P.Toppo, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI RAJU, MEMBER(TECHNICAL)

FINAL ORDER NO. 75732/2021

DATE OF HEARING : 26 August 2021
DATE OF DECISION : 26 August 2021

P.K. CHOUDHARY :

The facts of the case in brief are that the Appellant Company is engaged in the business of import and selling of carbonated food drinks such as Big Cola, Big Orange Cola, Big Lemon etc. classifiable under

Tariff Item 2202 99 20 of the Customs Tariff Act, 1975 and specified at Sl. No.48 under Schedule-II as "*fruit pulp or fruit juice based drinks*" of Notification No.1/2017-Integrated Tax (Rate) dated 28.06.2017 ("IGST Rate Notification"), taxable @ 12%. It is claimed by the Appellant that the imported product is in conformity with clause 3-A to Regulation 2.3.30 of Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 as amended (hereinafter referred to as "FSSAI") which provides that if the quantity of fruit juice in the beverage is below 10% (5% in case of lime or lemon), but not less than 5% (2.5% in case of lime or lemon), such product shall be denoted as Carbonated Beverage with Fruit Juice. During the month of April 2020, the Appellant filed two Bills of Entry No.7482868 and 7482872 both dated 20.04.2020 (BOEs), applying IGST @ 12%. The learned Assistant Commissioner vide Order-in-Original No.01/AC/DH-DIVN/20-21 dated 06.05.2020 re-assessed the said BOEs and classified imported goods under tariff sub-heading 2202.10 treating the same as carbonated flavoured waters. The learned Commissioner(Appeals) vide Order-in-Appeal being Kol/Cus(CCP)/AKR/299/2020 dated 08.06.2020, set aside the Order-in-Original dated 06.05.l2020 and held that subject goods would be treated as 'fruit juice based drinks' only and classifiable under tariff item 2202 99 20. Being aggrieved with the decision of the learned Commissioner(Appeals), the Department filed Appeal before this Tribunal, being Appeal No.C/77195/2020. The Tribunal vide Final Order No.75031/2021 dated 25.01.2021 held that the impugned goods are rightly classifiable under Tariff item 2202 99 20. In the meantime the Department had issued a Show Cause Notice dated 22.06.2020 for prior consignments imported during the period prior to 20.04.2020 viz. April 2018 to 20.04.2020. The Show Cause Notice proposed to impose differential duty of IGST amounting to Rs.7,04,65,625/- under Section 28(8) of the Customs Act. Subsequently, the learned Principal Commissioner confirmed the demand vide the impugned order without conducting personal hearing. Hence the present Appeal before the Tribunal.

2. Heard both sides through video conferencing and perused the Appeal records.

3. We find that the issue is no more *res integra* and the facts of the present case are squarely covered by the decision of the Tribunal in Appellant's own case being Final Order No.75031/2021 (supra). The Tribunal vide the Final Order No.75031/2021 rejected the Appeal filed by the Department and held that the subject goods are appropriately classifiable under tariff item 2202 99 20. It is abundantly clear that the issue has since been decided by the Tribunal in Appellant's own case for the consignments of the identical goods, imported previously, the impugned order is liable to be set aside. The relevant paragraphs of the Tribunal's Order are being reproduced below for ready reference:-

> *"12. We have heard both sides through video conferencing& have gone through the records of the case and considered the submissions made by both sides. We have also examined the labels produced before us by the learned Counsel of the respondent and the test reports. There is no dispute regarding the facts of the case. The goods are sold as 'carbonated beverage with fruit juice'. In the case of lime, the fruit juice content is 2.5% whereas in the case of other fruit, such as, apple the content is 5%. There are also products named Big Orange which has orange flavour but contains 5% apple juice and no orange juice but has only pictures of cut orange. Similarly, Big Kids Jeera does not appear to have any Jeera but only apple juice. To that extent, the representation on the labels appears to be inaccurate but this does not affect the classification of the products since there is no dispute that all these are 'carbonated beverages with fruit juice'. The products in question are not fruit or vegetable juices themselves which would be classifiable under Heading 2009. It is also not in dispute that the Customs Tariff is relevant for determining the rate of IGST payable on the imported goods. The relevant entry in Chapter 22 of the Customs Tariff Heading Act is as follows :-*

Tariff Item	***Description of goods***	***Unit***	***Rate of*** *Standard*	***Duty*** *Preferential Areas*
2202	***Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured and other non-alcoholic beverages, not including fruit or vegetable juices of heading 2009***			
2202 10	*- Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured :*			
2202 10 10	*--- Aerated waters ....*	*1*	*30%*	
2202 10 20	*--- Lemonade ....*	*1*	*30%*	

2202 10 90	*--- Other ....*	*1*	*30%*	
	- Other			
2202 91 00	*-- Non-alcoholic beer ....*	*1*	*30%*	
2202 99	*-- Other :*	*1*	*30%*	
2202 99 10	*--- Soya milk drinks, whether or not sweetened or flavoured*	*1*	*30%*	
2202 99 20	*--- Fruit pulp or fruit juice based drinks*	*1*	*30%*	
2202 99 30	*--- Beverages containing milk ....*	*1*	*30%*	
2202 99 90	*--- Other ....*	*1*	*30%*	

13. The Schedule to the Customs Tariff Act, 1975 (commonly referred to as Customs Tariff) is based on, although it is not identical to, the Harmonised System of Nomenclature (HSN)-an internationally recognised scientific method of classifying all goods. Sometimes there are differences between the HSN and the Customs Tariff in which case, the latter is relevant for determining the duty liability under the Customs Act. In view of the explanation to this effect in the IGST Notification specifying the rates of IGST chargeable on different goods, IGST is also to be charged as per the classification under the Customs Tariff. Customs Tariff,groups goods into Sections, each of which is further divided into Chapters with a two digit Chapter number. Within each Chapter, there are four digit headings which are further divided into six digit and still further divided into eight digit tariff headings.

14. Further, in the Customs Tariff, groups of articles are prefixed by a Single dash (-) or Double Dash (--) or triple dash (---). Wherever there is a single dash, it is to be read as a sub-classification of the article or group of articles covered by the heading preceding it. Similarly, a double dash is to be taken as a sub-classification of the goods covered by a single dash preceding it. A triple dash is a further sub-classification of the goods covered by a double dash preceding it.

15. In this appeal, it is not in dispute that the goods in dispute fall under Tariff item 2202. Under this heading there are two groups of products with a single dash (-) ***the first one is numbered 220210 which covers "Waters including mineral waters and aerated waters containing added sugar or other sweetening matters or flavoured" and the second one is for "other" which is not numbered but the further divisions under this single dash are numbered.According to the Revenue, the goods fall under the first Single Dash and according to the Respondent Assessee, under the second Single dash****.*

16. Within the first Single dash, there are three categories of products "Aerated waters" (22021010), Lemonade (22021020) and other (22021090). ***Revenue wants to classify the Carbonated beverage with fruit juice***

containing lime imported by the respondent under 'Lemonade' (22021020) and classify the Carbonated beverage containing other fruit juices under others (22021090).

17. Under the second Single dash (-) "other", under which the respondent assessee classifies the product, there are two sub-categories, viz., non-alcoholic beer (22029100) and other (220299). Undisputedly, the goods in question are not non-alcoholic beer. Within the"other" (220299), there are four further sub-categories -those containing soya, those containing milk, fruit pulp or fruit juice based drinks and others. The ***Respondent assessee classified their product under 22029920 --- fruit pulp or fruit juice based drinks.***

18. The contention of the Revenue is that the main ingredient of all the products is carbonated water and therefore theycannotbe called fruit pulp or fruit juice based drinks. Revenue's second contention is that even if the goods have fruit juice in them, they also have sugar and sweetening matter and carbon dioxide and they are sold as carbonated beverage with fruit juice and therefore they should be considered as carbonated beverage, which is the pre-dominant content by weight of the product and only 5% or 2.5% of the total content is fruit juice. It is also the contention of the Revenue that the essential character of the goods in question is Carbonated water and hence they should be classified accordingly.

19. Often, there could be doubt as to how a particular good should be classified when it matches the description of more than one Tariff heading or sub-heading in the Customs Tariff. The General Rules of Interpretation of the Customs Tariff help resolve such differences. The relevant extract of these Rules is below:

> *THE GENERAL RULES FOR THE INTERPRETATION OF IMPORT TARIFF*
>
> *Classification of goods in this Schedule shall be governed by the following principles:*
>
> *1. The titles of Sections, Chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:*

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished articles has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. ***The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3****.*

3. When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description*. However,* ***when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods****.*

(b) ***Mixtures, composite goods*** *consisting of different materials or made up of different components, and goods put up in sets for retail sale,* ***which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable.***

(c) ***When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration****.*

4. ....

5. ....

20. As can be seen from the above Rules, if a product is mixed with other products, the classification of the product still applies. Further, when classifying, the specific description should prevail over a more generic description (eg: automobiles are largely articles of iron and steel but are classified under the chapter which gives them a more specific description and not under Chapter 72 as Articles of Iron and Steel). The third factor which determines the classification is as to what gives the goods their essential character. If none of these resolve the issue, the last of the conflicting entries in the tariff prevails.

21. Mixtures of articles can sometimes be confounding. A simplistic way of deciding is to go by the predominant weight or volume which can sometimes give absurd conclusions. A cup of coffee, for instance, is predominantly hot water. It also has milk, sugar and (instant) coffee powder. A couple of teaspoons of sugar makes the coffee sweet to taste but a couple of teaspoons of coffee powder makes it too strong and undrinkable. The smallest component of the drink is usually the coffee powder which imparts the drink its essential character and the predominant hot water is irrelevant. Nimbupani has lime juice, water and sugar of which the lime juice, the smallest component defines the drink.

*22. Ice-cream is neither predominantly ice nor cream nor sugar. It is predominantly (at least 50%)air.Water-melon is 99% water. Human body is also predominantly comprised of water. All matter in the universe, with the exception of that in black holes, is mainly space because the nucleus (with its protons and neutrons) is but a very small part of the atom and a few electrons are revolving around it and rest of the atom between the outer edge of atom and the nucleus is just space. Any tablet marked 5mg actually weighs several times more as 5 mg is only the active ingredient and the rest is filler material like talc, glue, etc. Yet, the tablet cannot be classified as product of talc.**Thus, predominance of a component may not matter at all in many cases**.*

*23. **In other cases, the predominant ingredient characterises the product and the smaller ingredient only impartsto it some special characteristics or features.** Some manufacturers offer pickles with garlic and without garlic. In such a case, the pickle does not become a product of garlic and the garlic only adds an additional flavour. Similarly, a chocolate with nuts is essentially a chocolate and not a preparation of nuts.*

*24. **There are still other cases, where more than one component or ingredient of a mixture- regardless of the quantities- characterise the product.** Milk shake, for instance, is made from fruit and milk and can neither be called only milk nor fruit juice. It is the combination of the two which gives its unique character.*

25. The question which falls for consideration in the present case is how to view the products in question- (a) as carbonated beverages treating the fruit juice as a secondary character as the Revenue views them or (b) as fruit juice based drinks as the Respondent assessee views them. In our considered view, a decision on this could be made by examining how they are being sold. They are being sold as 'Carbonated beverages with fruit juice'- neither as fruit juice based drinks nor as carbonated beverages although the fruit juice content is only 5% (or 2.5% in case of lime). This gives the products their unique characteristic distinct from both carbonated beverages and fruit juices. The FSSAI regulation (2.3.30 clause 3A) also conceives of such a category of products in the market. Thus, they form a separate specie of products known to the market and are recognised as such by FSSAI. The Customs Tariff, however, does not have a separate entry for such products. We do not agree with the Revenue's contention that the essential character of the products is only carbonated drinks and not the fruit juices. In our view both components are important. As carbonated beverages, they can be classified under 2202 10 20/ 22021090 (as claimed by the Revenue). As fruit juice based drinks, they could as well be classified under 2202 99 20 (as claimed by the assessee). In our view neither carbonated beverage alone nor fruit juice alone gives the essential character of the products in question; both contribute to its essential character. The issue cannot be resolved as per Rule 3(a) and 3(b) of the Rules of Interpretation and therefore we need to resort to Rule 3(c) which reads as follows:

> *3 (c) **When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration**.*

Since Customs tariff heading 22029920 comes last in the order, it prevails and the goods are classifiable under this heading.

*26. We find that the Hon'ble Supreme Court in the case of **Parle Agro** (supra) examined the classification of appy fizz which was a drink containing apple juice as well as carbonated water and held that the product is correctly classifiable under 22029920. While deciding the matter, the Hon'ble Apex*

Court has referred to the Regulation 2.3.30 of FSSAI too, inter-alia, found that the product appy fizz met with the conditions in Clause 2 of this Regulation. Revenue's argument is that the appy fizz contained 10% of the apple juice whereas the present products contained only 5% fruit juice (2.5% in the case of lime). It is true that in view of this difference in the composition these goods do not fall under Clause 2 of FSSAI Regulation 2.3.30 but they do fall under Clause 3A. Identical view has been taken by the Larger Bench of the Tribunal in the case of ***Brindavan Beverages*** *(supra).*

27. Revenue has relied upon the ruling of the Advance Ruling Authority in the case of IGST and a support to such a decision by the GST Council which are not binding precedents for this Bench. At any rate, the ruling of the Advance Ruling Authority is not even applicable to any assessee other than the one who sought clarification. Therefore, the learned Commissioner (Appeals) is correct in not relying upon such a decision.

28. Revenue has also argued that the food category description in Appendix A of the FSSAI Regulations clarifies that the beverages based on fruit and vegetable juices are to be classified under food categories 14.1.4.2 whereas carbonated beverages fruit juice, such as, one being imported by the respondent are covered under 14.1.4.1. A perusal of Appendix A of the FSSAI Regulations shows that it is a Food Category System. It states that the food category system is a tool for assigning food additive uses in the Regulations. It applies to all food stuffs. The food category descriptors are not to be legal product designations nor are they intended for labelling purposes. Thus, essentially, it is a system of classification to show which preservatives can be used in what kinds of foods. In our view, this is not relevant for the classification of the products under the Customs Tariff.

29. It was also argued by the Revenue that the Commissioner (Appeals) has erred in relying on the judgment of the Hon'ble Apex Court in the case of ***Parle Agro*** *(supra) as it was in respect of Appy fizz in which the apple fruit content was more than 10% whereas in the present case the juice content is only 5% or 2.5% (in case of Lime). We find no force in this argument because products containing 5% fruit juice (2.5% in case of lime) are now squarely covered by the FSSAI regulations.*

30. In view of our above findings and respectfully following the decision of the Hon'ble Supreme Court in the case of ***Parle Agro*** *(supra) and the decision of the Larger Bench of the Tribunal in the case of* ***Brindavan Beverages*** *(supra), we hold that the products, in question, have been* *correctly classified under 22029920 by the learned Commissioner (Appeals) in the impugned order and the same calls for no interference."*

In view of the above discussion, the impugned order is set aside and the Appeal, filed by the Appellant, is allowed.

(Operative part of the order was pronounced in the open Court.)

Sd/
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/

(RAJU)
MEMBER (TECHNICAL)

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