

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I**

APPEAL No. E/242/2010

(Arising out of Order-in-Appeal No. SB(92)82/MV/2009 dated 16.11.2009 passed by Commissioner of Central Excise (Appeals), Mumbai-I)

Hardcastle Restaurants Pvt. Ltd.

Appellant

Vs.

Commissioner of Central Excise, Mumbai-V

Respondent

Appearance:

Shri Dinesh Agarwal, C.A., for appellant

Shri A.B. Kulgod, Assistant Commissioner (AR), for respondent

CORAM:

Hon'ble Mrs. Archana Wadhwa, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 10.10.2018

Date of Decision: 10.10.2018

ORDER No. **A/87619/2018**

Per: Sanjiv Srivastava

The appeal is directed against the order of Commissioner (Appeal) Central Excise Mumbai Zone -1 dated 16th November 2009. By the said order Commissioner (Appeal) has held as follows:

"I uphold the classification of the product under sub heading 16010000, the demand of Central Excise duty of rs 2,44,927/- under section 11A(1), interest under

Section 11AB, penalty of Rs 2,40,124/= imposed under Section 11AC of the Central Excise Act, 1944, confirmed vide order in original No 86 to 88/19 to 21/AC/GDN dated 30.04.2008 passed by the Assistant Commissioner, Central Excise, Goregaon Div, Mumbai V, and reject the appeal.”

2.1 The fact of the case is that the appellants are operating Restaurants under the name and style of McDonald manufacturing and selling edible goods in retail namely Preparation of Meat, Preparation of Vegetable and Preparation of Chocolates, which were proposed to be classified under Chapter Sub-heading 1601.10, 2001.10 and 1803.00 respectively of the Central Excise Tariff Act 1985. Three show cause notices were issued, wherein it was alleged that the goods manufactured and sold by the various restaurants of the appellants are manufactured goods and classifiable under the chapter sub-heading as proposed above; that the goods are sold in the unit containers, which are bearing the brand name, logo and trade name of McDonald's.

2.2 The adjudicating Authority decided the classification of preparation of meat under CSH 1601.10 and confirmed the demand of duty along with interest and penalty in respect of the clearance and sale of these

products. He dropped the demand in respect of products under chapter 18.

2.3 Aggreived the appellants filed the appeal before the Commissioner (Appeal), who as indicated in para 1, upheld the order of adjudicating authority.

2.4 Aggrieved by the order of Commissioner (Appeal), Appellants have preferred this appeal.

3.0 Appellants have assailed the order of lower authorities stating that-

- i. They do not undertake any activity in relation to preparation of these products, but are only engaged in heating the preparations and serving the same in wrappers/ trays to the consumers for consumption in the restaurant.
- ii. Ratio of the decision in case of Venky's Fast Foods [2000 (124) ELT 939 (T)] would not be applicable in the present case because that case concerned the various processes resulting into emergence of new product.
- iii. They do not have any machinery or equipments to manufacture chicken/ meat patty. The only equipments they have are deep freezers to store and food warmer to warm the products for service to consumers.

- iv. In any case the goods were not put up in unit containers for service and did not bear any brand.
- v. The products received by them were in marketable form they had only served them to the consumers in their restaurant after warming them. Except for stray case these goods were consumed by their customers in their premises only.
- vi. Since the goods served by them were not put up in unit containers the same were not leviable to Central Excise duty.
- vii. All the activities were being carried out by them in open and not clandestinely or surreptitiously and hence they were undertaking all the activities in bonafide manner within the knowledge of department. Hence Commissioner (Appeal) was wrong in upholding 100% penalty against them.

4.1 We have heard Shri Dinesh Agarwal C A for the appellant and Shri A B Kulgod Assistant Commissioner, Authorized Representative for the revenue.

4.2 Arguing for the appellant learned C A submitted that-

- i. Appellant are operating twenty three Restaurants in Maharashtra and Gujarat but the dispute of dutiability pertains to only three outlets. No

dispute has been raised in respect of the other outlets even though activity is identical.

- ii. Issue in the case is that the food preparation of Chapter 16 falling under Section IV of the Central Excise Tariff Act 1985, are subjected to excise duty only when the said goods are put up in unit container and bear a brand name. Appellants use butter paper, paperboard, tray, pouches, paperboard cones or any other paperboard boxes for serving the food to the customer, which do not qualify to be a unit container because it does not bear any indication of the quantity or weight of the goods and it cannot be treated as being designed to hold a pre-determined quantity as per the definition of Unit Container provided under Section Note 1 to Section IV of the Central Excise Tariff Act, 1985.
- iii. The unit container should be designed to hold as pre-determined quantity or number of any goods, as has been held in following decisions:
 - a. G. Claridge and Company Ltd. Vs Collector of Central Excise [1991(52) ELT 341 (SC)]
 - b. Commissioner of Sales Tax VS Voltas Limited [1997(39) STC 409 (Bom)]

- c. Commissioner of Central Excise Vs. Shalimar Super Foods [2007 (210) ELT 695 (Tri-Mumbai)].
 - d. Dodsai Corporation Pvt. Ltd. VS Commissioner of Central Excise [2011 (263) ELT 719 (Tri-Bang.)]
 - e. Prerna Fast Foods & Others vs Commissioner of Central Excise Mumbai [2011 (4) TMI 1101-CESTAT MUM]
 - f. Agro Food Punjab Ltd. Vs Commissioner of Central Excise [1990 (49) ELT 404 (Tribunal)].
- iv. Butter paper, paperboard, tray, pouches, paperboard cones or any other paperboard boxes used by the appellant for serving the edible preparation are neither enclosed receptacle nor sealed nor meant to pack a pre-determined quantity or number and cannot be used for transportation or storage.
- v. In the case of Commissioner of Central Excise VS Costa and Co. Pvt. Ltd. 2004 (173) ELT 394 Tribunal, tribunal held that packing used were unit containers as on the packing pouches the pre-determined weight/quantity were mentioned.
- vi. Since the butter paper, paperboard, tray, pouches, paperboard cones or any other paperboard boxes

used by the appellant do not qualify to be unit container, the demand raised against them is not sustainable.

4.3 Arguing for revenue learned Authorized Representative reiterated the findings of the impugned order. He also pointed out that tribunal has in case of appellants, for past period remanded the matter back to adjudicating authority to determine the issue of unit container. Accordingly he requested that this matter may also be remanded.

5.1 We have considered the matter and the submissions made during the argument of case. The prime issue for consideration is “whether the goods, “Non Vegetarian Burgers, McCurry pans, Non Vegetarian wraps etc, which are preparation of meat and served in the restaurant of appellants in butter paper, paperboard, tray, pouches, paperboard cones or any other paperboard boxes would merit classification under tariff heading 1601.10 and be subject to duty of excise or otherwise”

5.2 The relevant section note, chapter notes and chapter headings along with applicable rates are indicated below:

“SECTION IV

PREPARED FOODSTUFFS; BEVERAGES, SPIRITS AND VINEGAR; TOBACCO AND MANUFACTURED TOBACCO SUBSTITUTES NOTES

- 1.
- 2. In this Section the expression, “unit container” means a container, whether large or small (for example, tin, can, box, jar, bottle, bag or carton, drum, barrel or canister) designed to hold a predetermined quantity or number.

CHAPTER 16 Preparations of Meat, of Fish or of Crustaceans, Molluscs or Other Aquatic Invertebrates

- 1.
- 2.
- 3. In relation to products of this Chapter, labeling or relabeling of containers or repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to ‘manufacture’.
- 4. In this Chapter, “brand name” means a brand name, whether registered or not, that is to say, a name or a mark, such as a symbol, monogram, label, signature or invented words or any writing which is used in relation to a product, for the purpose of indicating, or so as to indicate, a connection in the course of trade between the product and some person using such name or mark with or without any indication of the identity of that person.

Heading No/ Subheading No	Description of Goods	Rate of Duty
16.01	Preparation of meat, of fish or of crustaceans, molluscs or other aquatic invertebrates including sausages and similar products, extracts and juice, prepared or preserved fish and	

	<i>caviar and caviar substitutes</i>	
<i>1601.10</i>	<i>Put up in unit containers and bearing a brand name</i>	<i>16%</i>
<i>1601.90</i>	<i>Others</i>	<i>Nil</i>

5.2 There is no dispute in respect of the classification of the goods under the chapter 16 or elsewhere. The dispute is whether the goods in question are put up in a unit container and bearing a brand name so as to classify them under heading 1601.10 or under heading 1601.90. If the goods are held to be classifiable under heading 1601.10 then they will subject to Central Excise duty.

5.3 Commissioner (Appeal) has in para 13 of his order while deciding the classification under 1601.10, recorded as follows:

“13. Further as per the section note the “Unit Container”, means a container, whether large or small (for example, tin, can, box, jar, bottle, bag or carton, drum, barrel or canister) designed to hold a predetermined quantity. The goods are available in predetermined sizes. The customer does not have the option to order Non vegetarian Burgers, McCurry pans, Non Vegetarian Wrap of his desired size and weight and in fact selects the one only from the varieties offered by the appellant. All the products have standard weight viz Chicken McCurry Pan (190 gms), Chicken Maharaja Mac Burger (255 gms), McChicken Burgers 9172 gms), Chicken McGrill Burgers (140 gms), Filet-0-Fish Burgers 9145 gms). The customer does not have option to order these goods say 100 gms or 200

gms etc., the same will be refused. Further in their own case {Hard Castle Restaurants P Ltd vs CCE Mum-V 2007 (211) ELT 607 (T)} the Hon CESTAT while deciding in respect of same edible preparations viz Non Veg Burgers, Non Veg Curry, Curry Pan, Non Veg wraps, Pizza Puffs etc., has held that emergence of a distinctly known commodity from its ingredients are prima facie result of process of manufacture. As regards brand name the products are put up in unit cartons bearing the trade name, brand name and logo of M/s McDonalds Corporation USA and it is also not disputed. As informed by the applicant that they are joint venture Company owned by M/s McDonalds India Pvt Ltd. Which is again a 100% subsidiary of M/s McDonald Corporation of USA and as such the brand name logo is owned by M/s McDonald Corporation and not owned by the appellant.

14 Thus considering all above points it is absolutely clear the appellants' product is rightly classifiable under Chapter sub heading 1601.10 of Central Excise Tariff Act, 1985 as claimed by the department and is put up in unit container as described above and as such liable for Central Excise duty."

5.4 The reasoning and decision do not appear to be sound in as much as Commissioner (Appeal) has failed to take the note of the submission that the goods are being supplied to consumer for consumption in restaurant. In stray case the same may have been carried by the customer as per his option for consumption later on. Only the mode of supply for consumption in restaurant is by wrapping them in butter paper, paperboard, tray, pouches, paperboard

cones or any other paperboard boxes. How the mode of such service is different from serving the same on crockery or plates has not been answered by the Commissioner (Appeal). If the reasoning and logic of Commissioner (Appeal) is accepted then service of food in restaurant/ hotel for consumption therein will have to be treated as service in unit container. Do really we say “a plate of Chicken Tikka” or a half plate of “Chicken Tikka” served in restaurant is service of the same in unit container. To make the things worse if some brand name is embossed on the said tableware/ crockery then as per commissioner appeal all the non vegetarian preparations served in the restaurants merit classification under Central Excise Tariff Heading 1601.10 and shall be levied to duty. Such a view neither will be logical or sustainable as it against the basic principle of levy of Central Excise duty, which is never levied on the retail consumption of goods. The basic purpose of the phrase “put up in unit containers” is that for whole sale clearance from the manufactory the goods have been packed in unit container. We are unable to agree with the reasoning of Commissioner (Appeal) as mode and manner of service in a restaurant cannot determine the leviability to duty.

5.5 The view take by us is in line with earlier decisions of this tribunal as follows:

Commissioner of Central Excise Mumbai Vs Shalimar Super Foods {2007 (210) ELT 695 (T-Mum)}

“3. We find that the goods are supplied in plastic bags showing brand name of the respondents. The quantity is not pre-printed on the bags which are also not sealed, as seen from the averment in the show cause notice and the finding of the authorities below. The adjudicating authority had classified the goods under C.E.T. sub-heading 1601.10 solely on the ground that the plastic bags were nothing but unit containers for the reason that a pre-determined quantity was packed in the plastic bags. However, unit container, as per the definitions contained in several dictionaries, is a container containing pre-determined uniform quantities of contents whereas the items cleared by the respondents were not of uniform quantities. For this reason, the goods in question which were cleared in plastic bags not sealed and not containing pre-printed quantities thereon, cannot be treated as unit containers for the purpose of classification of meat articles packed therein under C.E.T. sub-heading 1601.10.”

Dodsal Corporation Pvt Ltd. Vs Commissioner Central Excise Bangalore [2011 (263) ELT 719 (T-Bang)]

“16. For the period prior to 1-3-2005 duty was attracted only when such preparations of meat were ‘put up’ in unit containers bearing a brand name. For the subsequent period, such goods not put up in unit containers are exempted from payment of duty under Notification No. 3/05-C.E., dated 24-2-2005. We find that

in the instant case, the paper carton bearing the logo of Pizza Hut is used mainly for packing and transportation of the pizzas from the outlet to the place where the pizza is consumed. Pizzas are packed in these cartons when pizzas are ordered by the customer for delivery at his residence or when the customer wishes to take away the pizza instead of consuming it at the eatery. The carton itself does not display the quantity in terms of weight or number of the contents. The carton can be used for packing different types of pizzas (not necessarily one in a pack). We find that the 'unit container' appearing in the tariff entry 160110 connotes packages of a predetermined quantity which is indicated on the container. The expression does not cover packages of relatively short life used to pack goods of any particular description and measure at the choice of the server or the customer for its transport from the restaurant to the residence of the customer. Therefore we find that the pizzas involved were not covered under the entry 160110 during the period prior to 1-3-2005 and were covered by Notification No. 3/05-C.E., dated 24-2-2005 post 1-3-05. In reaching the above finding, we are fortified by the decision of the Tribunal in the case of Shalimar Super Foods cited above. For the period from 1-3-2005, the Chapter Note 2 to Chapter 16 of the tariff provided that food preparations covered by Chapter 16 had to necessarily contain more than 20% by weight of sausages, meat, meat offal, blood, fish or crustaceans or other aquatic invertebrates or in combination. In all the cases, the weight to be considered is the weight of meat, fish etc. in the preparation at the time it is presented and not the weight of the products before cooking/preparation. We find that the impugned pizzas

in respect of which demand has been confirmed are not found in the order to fulfil this condition in the order.”

Prerna Fast Foods & Others Vs Commissioner Central Excise Mumbai-1 [2011 (4) TMI 1101 – CESTAT Mumbai]

“7. On careful examination of the issue before us, we find that the said issue has been settled by this Tribunal in the case of Dodsai Corporation Pvt. Ltd. Vs. Commissioner of Central Excise, Bangalore 2011 (263) ELT 719 (Tri-Bang), wherein this Tribunal has held that Pizza cannot be brought under sub-heading 1601.10 for the reason that pizza has a topping of chicken along with other ingredients. It was held that paper carton bearing the logo of Pizza Hut is used mainly for packing and transportation of the pizzas from the outlet to the place where the pizza is consumed. Therefore, it was held that the pizza cannot be classified under Chapter 16 of the Central Excise Tariff Act, 1985. Same view was taken by this Tribunal in the case of CCE, Mumbai-V Vs. Dodsai Corporation Pvt. Ltd. vide Order No. A/124/2011/EB/C-II dated 1.2.2011. Therefore, we find that the issue is no more res integra. Hence, after waiving the requirement of pre-deposit, we took the appeal also for final disposal with the consent of the learned JDR.”

5.6 During course of arguments learned AR had referred to an earlier order of the this bench Order No A/88555-88558/17/DB pronounced on 20/07/2017 remanding the matter to original adjudicating authority for consideration of the issue of unit container. He had requested that this matter be also remanded back to be

decided simultaneously. We are not remanding the matter back, for two reasons that-

- i. The issue involved is pure question of law which has been settled by the earlier orders of this tribunal and do not require any fresh verification or consideration of facts;
- ii. The earlier order remanding the matter back was pronounced on 20/07/2017, and even after lapse of more than a year, revenue has not been able to adjudicate the matter in remand proceedings. Thus by remanding the matter the issue which could be decided will be delayed to what extent is not known. Even otherwise matter is more than decade old.

6.0 In view of discussions as above the order of Commissioner (Appeal) is set aside and appeal allowed in favour of appellants.

(Pronounced in court)

(Archana Wadhwa)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)