

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No. 1**

Excise Appeal No. 59 of 2009

(Arising out of Order-in-Original No. 15/CEX/08 dated 30.09.2008 passed by Commissioner of Central Excise, Pune-I)

Commissioner of Central Excise, Pune-I

ICE House, 41-A, Sasson Road,
Opp. Wadia College, Pune 411 001.

Appellant

Vs.

M/s. Cadbury India Ltd.

Induri, Talegaon, Pune.

Respondent

Appearance:

Shri K.M. Mondal, Special Counsel, for the Appellant

Shri V. Sridharan, Sr. Advocate, with Shri Rajesh Ostwal, Advocate, for
the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. **A/85220/2020**

Date of Hearing: 15.10.2019

Date of Decision: 14.02.2020

PER: SANJIV SRIVASTAVA

This appeal filed by the Revenue is directed against order-in-original No. 15/CEX/08 dated 30.09.2008 passed by Commissioner of Central Excise, Pune-I. In the impugned order, the Commissioner has held as follows:-

“ORDER

I hereby drop the proceedings for demand of duty amounting to Rs.11,60,39,147/- (Rs. eleven crores sixty lakhs thirty nine thousand one hundred forty seven only) initiated under 2 Show Cause Notices detailed below against M/s. Cadbury India Ltd., Talegaon, Dist. Pune.

<i>Sr. No.</i>	<i>SCN no. and date</i>	<i>Period</i>	<i>Duty demanded</i>
1	49/P-I/R-TGN/COMMR/AE/07 dt. 6-7-2007	Oct. 2006 to Mar. 2007	5,42,60,959/-
2	32/PI/R-TGN/Commr/08 dt. 2-5-2008	April 2007 to Sept. 2007	6,17,78,188/-
		<i>Total</i>	<i>11,60,39,147/-</i>

2.1 The respondent herein is manufacturer of excisable goods viz. cocoa preparations, sugar confectionary falling under Chapter heading 17 & 18 of the First Schedule to the Central Excise Tariff Act, 1985.

2.3 During the visit by the Anti Evasion staff of Pune-I Commissionerate, it was observed that the respondent was manufacturing excisable goods viz. Milk Crumb classifiable under heading 18062000 and chargeable to Central Excise duty @ 16% *ad valorem*. They have been clearing these goods since October 2006 without payment of duty in contravention of the provisions of Rules 4, 6 & 8 of the Central Excise Rules, 2002.

2.4 After completion of investigation wherein statements of various functionaries of the respondent were recorded, a show cause notice dated 06.07.2007 was issued for demanding duty amounting to Rs.5,42,60,959/- for the period October 2006 to March 2007. Subsequently, another show cause notice dated 2.05.2008 demanding duty amounting to Rs.6,17,78,188/- for the period April 2007 to September 2007 was issued. Both the notices have been issued within the normal period of demand.

2.4 Both the show cause notices have been adjudicated by the Commissioner vide impugned order referred to in para 1 above. While dropping the demand, the Commissioner has in para 31 observed as follows:-

“31. In the present case, the show cause notice relies on the fact of transfer of milk crumbs to the job worker as additional evidence to prove the marketability of the product. I find that marketability is not dependent on whether goods move to a job worker, but whether they are sold for a consideration and whether the Sale of Goods Act becomes applicable to such goods. There is no evidence in the show cause notice to prove that the transfer of goods to the job worker was a sale and that Sales Tax has been paid on such goods. Further, the show cause notice also relies on the web site of M/s. International Customs Product which offers milk crumb products for sale. As is evident, the product offered for sale is milk crumb “products” and not milk crumbs per se. The evidence, therefore, cited in the show cause notice does not help the department and is of no value to prove the marketability of the product manufactured by the assessee.”

2.5 In the review, the Committee of Chief Commissioner directed filing of this appeal on various grounds as stated below:-

“(i) The short point in the whole case is whether 'Milk Crumbs', manufactured as intermediate product for use in chocolate, is excisable product on the test of its marketability. The Commissioner has held it as non-excisable in view of CESTAT decision in case of M/s Hindustan Cocoa Products vis-a-vis for lack of evidence. The Commissioner has further applied the test of 'sale' as defined under section 2(h) holding that there is no sale when goods are removed to the job workers.

(ii) It is mentioned that the definition of 'excisable goods' under Sec.2 (d) and hence that of term 'marketability' have undergone major change in the Finance Act, 2008, by virtue of explanation added to it. As per definition goods are excisable when those are specified in the first Schedule to CETA, 1985, which in present case are so specified under CHS 1806.

(iii) As per added explanation, 'goods include material, article, substance capable of being bought out and sold for a

consideration and such goods shall be deemed to be marketable. The explanation being clarificatory in nature would be retrospective and even if it is not assumed so yet, the dimension of entire case gets changed and now needs to have fresh look after 10.05.2008, which is the enacted date of the said insertion.

(iv) So far period prior to 10.05.2008 is concerned; the goods are specified in the First schedule to CETA, 1985 inter alia satisfying the test of Sec.2 (d) without the said explanation. However, as per settled law mere entry in tariff is not enough and the test is that the goods should be marketable, and therefore, to prove the marketability, the SCN has led the evidence in the form of web information in respect of M/s International Customs Product, as per - which Milk Crumbs products are offered for sale. The assessee has not disputed the marketability of Milk Crumb, as per the said evidence but has contended that firstly the goods should be similar to their products and secondly, the goods should be marketable in India, in as much as, CE laws apply in India, hence marketability abroad won't apply.

(v) The Commissioner has erred in admitting the said plea. The assessee manufactures Milk Crumbs and that literature relied also refer to Milk Crumbs only; there is no room to hold that both could be different products. The Central Excise Tariff Act, 1985 has been fully aligned with the International Tariff with classification codes unevenly adopted therein, and also seeks HSN support, which is also globally accepted version of classification. Therefore, no restrictive meaning is permitted that abroad marketability does not apply within India. Such an interpretation is baseless and would mean that if somebody imports Milk crumb, it is taxable and if manufactures in India is non-taxable. This cannot co-exist. Marketability is qualitative term and should be construed accordingly without confining to any regional aspects.

(vi) It is mentioned that in Polyester Industry, the basic monomer 'DEGT' is manufactured as intermediate product from chemicals DMT + MEG. The said monomer is polymerized to get

Polyester chips, for use in polyester yarn and other articles such as PET bottles etc. DEGT, the said monomer was obtained and consumed in pipeline and not brought and sold in India, though in US, the said product was otherwise sold as deterging agent. In acknowledgement of the same the Govt. of India inserted it in Chapter 29 vide Notification No.89/89 and exempted if used in polyester yarn. For past period Govt. however issued Notification No. 45/90 CE(NT) dated 08.11.1990 under Section 11 C. The relevant point is that global marketability was accepted to place the product in excisable category.

(vii) Therefore, Milk crumb, even if not sold in India, has to be held as marketable product, when the same is offered for sale abroad. The assessee too has not adduced any evidence that the product sold aboard is not milk crumb and thereby countered the department's reliance on it. The Commissioner ought to have admitted the said evidence, when there was no negation on facts.

(viii) With respect to cited CESTAT decision, though it held that Milk Crumb is not marketable, yet as per distinguishing facts brought on records in the SCN, its applicability gets totally nullified. Firstly the said decision relates to residual goods, not elsewhere specified and classified under erstwhile Tariff Item No. 68, prior to 1985. However, having brought in new Tariff Act, [CET A, 1985] which contains specific heading No. 1806 for the goods, the facts get distinguished to prove that Milk crumb are excisable goods as per Sec.2 (d) as now those are specified in the First Schedule, This point is also not disputed.

(ix) Secondly, in the said case department had not adduced any evidence about marketability of the goods, which present SCN has adduced. This is not negated, except on the point that goods are not sold in India, which has no relevance.

(x) The Commissioner's further finding that definition of 'sale' under Section 2 (h) does not apply to 'job work', is not only out of relevance but also out of misconstrued facts for following reasons:

(a) For payment of duty, essential test is removal of goods, whether or not removal constitutes 'sale' and latter part has relevance for valuation only.

(b) As per facts of the case assessee does not remove milk crumb under any procedure say Cenvat procedure or that under Notification No. 214/86 or that under Notification No. 83194 read with 84/94.

(c) The assessee has authorized the job workers to manufacture Chocolate on its behalf by supplying raw materials, including Milk Crumbs, may be free of cost, for conversion. The job worker is manufacturer within the meaning of Section 2(f) read with Notification No. 36/2001 CE(NT). Thus, it is transaction of removal of goods by one manufacturer to another for use as input by latter and even though removal does not constitute sale, yet taxable point does not escape.

(xi) On the point of 'consideration' the job worker has considered the value of Milk Crumb, as informed by M/s. Cadbury, in the value of chocolate for payment of duty. Therefore, Consideration does include but not charged being manufacture of goods on behalf of assessee. In the circumstances even if there is no sale to job worker, but job worker being manufacturer consideration flows and gets adjusted in the transaction with each other. Therefore, test under section 2(d) and its explanation get satisfied."

3.1 We have heard Shri K.M. Mondal, Special Counsel for the Revenue and Shri V. Sridharan, Senior Advocate with Shri Rajesh Ostwal, Advocate, for the respondent.

3.2 Arguing for the Revenue, learned Special Counsel submitted that:-

- The respondent have themselves been clearing these goods to their sister concerns on payment of duty upto 01.10.2006 and thereafter they started clearing the same without payment of duty.

- Undisputedly, the respondent manufactured milk crumb which was further used by them at their units at Thane and Baddi and also sent for job work to M/s. Dr. Writer's Food Products Ltd. These goods have been cleared in bulk quantity (in 50 kg. bags) under proper Central Excise invoice on payment of duty. The shelf life of the goods is also not in dispute. All the factors clearly show that the item was itself an excisable product satisfying all the requisites of manufacture, marketability as enshrined in various decisions of the courts.
- While adjudicating, the learned Commissioner has not appreciated that the decision relied upon by the Noticee in the case of *Hindustan Cocoa Products Ltd. [1996 (87) ELT 299 (T)]* was in respect of the erstwhile tariff and the dispute was whether the goods were covered under tariff entry 1A or 68. The said decision in any case was not applicable to the present facts of the case. Hence the finding of the Commissioner based on this decision is not correct interpretation of law as the definition of 'excisable goods' at that time when *Hindustan Cocoa Products Ltd.* was under consideration, has undergone the change. Section 2(d) of the Central Excise Act, 1944 defines excisable goods as follows—

“(d) “excisable goods” means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt;

Explanation: For the purposes of this clause, “goods” includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable.”
- The impugned goods are in powder form and are being taken to market for being marketed. This fact is evident from the respondent themselves transferring the goods to their sister units at Thane and Baddi and the job worker at Phaltan for manufacture of chocolates.

- Further evidence is in the form of web material in respect of M/s. International Customs Products as per which milk crumb products are offered for sale.
- Hon'ble Supreme Court has in the case of *A.P. State Electricity Board [1994 (70) ELT 3 (SC)]* held that marketability is a question of fact and needs to be decided on the facts of each case. So long as the goods are marketable, they attract levy of excise duty.
- Similar view has been taken in the case of *Indian Cable Co. Ltd. [1994 (74) ELT 22 (SC)]*. As per this decision, marketability only means saleable or suitable for sale. In the case of *T.N. State Transport Corpn. Ltd. [2004 (166) ELT 433 (SC)]*, similar view has been taken.
- In the case of *Moti Laminates Pvt. Ltd. [1995 (76) ELT 241 (SC)]*, Hon'ble Supreme Court has held that goods are excisable and dutiable if produced and manufactured by the assessee are having shelf life so that they are capable of being marketed.
- He also relied upon the decision of the Hon'ble Supreme Court in the case of *Dharampal Satyapal [2005 (183) ELT 241 (SC)]* and in the case of *Nicholas Piramal India Ltd. [2010 (260) ELT 338 (SC)]*.
- He submits that in the case of *Hindustan Zinc Ltd. [2004 (166) ELT 145 (SC)]*, Hon'ble Supreme Court while explaining the concept of marketability has in para 6 observed as under:-

“6. We have already noted the manufacturing process. The lead and aluminium sheets by themselves cannot and do not act as electrodes. They become electrodes only after the process mentioned above is undertaken. Thus the lead and aluminium sheets are converted into electrodes which is a new product known in the market with a distinct name, character and use. The Respondents pay duty on that product at the Debari unit as they accept that there has been manufacture. The Commissioner in his Order dated 31st March, 1997 has also noted that the product is bought in the market by one M/s. Cominico Binani Zinc

*Limited. This shows that the product is marketable. The Tribunal has failed to notice this. **Even otherwise, it is settled law that for a product to be marketable there need not be actual purchase or sale. So long as a new and distinct commodity known in the market has come into existence there is manufacture.** We are unable to accept the submission that the headers are attached merely to keep the lead and aluminium sheets emerged in the cell. From the process set out above it is clear that the headers are attached in order to see that the lead and aluminium sheets become positive and negative electrodes so that the current can pass through them. Without the headers it would not be possible to pass the current through the sheets."*

3.3 Arguing for the respondent, learned Senior Counsel sought to support the order of the Commissioner and submitted that:-

- The decision of *Hindustan Cocoa Products Ltd.* held that these goods, milk crumb, is non-excisable and cannot be classified under tariff item 68 and for holding so they relied upon the decision of Bombay High Court.
- Hon'ble Supreme Court in their own case [2006 (200) ELT 353 (SC)] has held as follows:-

*"15.It may be noted that in the present case the intermediate products (milk crumbs, refined milk chocolate and four other intermediate products) are captively consumed in the Respondent's own factory. **These intermediate products are not sold nor are marketable.** Hence there can be no question of including the expenses of the factory which produces the final product namely the chocolate e.g. advertising, insurance and another expenses in their valuation as was sought to be added by the Commissioner (Appeals) and the Assistant Commissioner."*

- Similar view in respect of intermediate products has been expressed by the Hon'ble Supreme Court in the case of *Union Carbide [1986 (24) ELT 169 (SC)]*.
- Since the milk crumb as cleared by them is in crude form and required further processing, it cannot be said to be marketable in the form in which it is cleared, as held by the Hon'ble Supreme Court in *Cadila Laboratories [2003 (152) ELT 262 (SC)]*.
- Since the product is a proprietary product and cannot be used by any other manufacturer. The milk crumb is specifically made for manufacture of their own chocolates and cannot be used by any other chocolate manufacturer, the goods are not marketable. It has been held by the Hon'ble Supreme Court in the case of *Sonic Electrotherm [2002 (145) ELT 274 (SC)]*. In the case of *Board of Trustees [2007 (216) ELT 513 (SC)]*, Hon'ble Supreme Court has stated the law that the goods made to order which are harbor specific cannot be termed to be marketable.
- Merely because the goods have been transferred by them to other factories or to their job worker, cannot be the ground for holding that these goods are marketable as has been held by the Hon'ble Supreme Court in *Cipla Ltd. [2008 (225) ELT 403 (SC)]* and *Bata India Ltd. [2010 (252) ELT 492 (SC)]*.
- Also, duty cannot be demanded as the respondent were themselves paying duty prior to October 2006, contrary to the decision of the Tribunal in the case of *Hindustan Cocoa Products Ltd. [1996 (87) ELT 299 (T)]*. In the case of *Union Carbide* referred to above, duty liability cannot be fastened on them merely for the reason that they were earlier paying duty under mistaken belief that duty was payable.
- Reliance placed by the Revenue on various evidences such as web material etc, do not prove the marketability of the said goods. Even the patent documents of United States Patent do not advance the case made by revenue as the

patent is a process patent. Hon'ble Gujarat High Court has in case of *Lupin Ltd [2013 (293) ELT 354 (Guj)]* has held that the process patent is irrelevant to prove marketability.

- Various judgments relied upon by the revenue are not applicable to the present case.
- Since Revenue has failed to produce evidence of marketability as held by the Hon'ble Supreme Court in the case of *Hindustan Ferodo [1997 (89) ELT 16 (SC)]*, the appeal filed by Revenue should fail.

4.1 We have considered the impugned order along with the submissions made in the appeal filed by Revenue, during the course of arguments and the written submissions filed by both the sides.

4.2 There seems to be no dispute about various propositions of the law for determining excisability/dutiability of the goods. One of the tests that has to be conclusively established, is that the product is marketable. It has also been held in various decisions that marketability essentially does not mean "being marketed". In the case of *Hindustan Zinc [2004 (166) ELT 145 (SC)]*, the Hon'ble Supreme Court has specifically laid down that actual purchase or sale is not necessary for determining the marketability of any goods. What needs to be shown is that the product is capable of being taken to the market to be sold and the market recognizes the said product as such.

4.3 In the case of *A.P. State Electricity Board* referred to by the Special Counsel, Hon'ble Supreme Court has specifically stated that marketability is a question of fact and needs to be determined in the facts of each case independently.

4.4 We also find that the Hon'ble Supreme Court has in respondent's own case (*Cadbury India Ltd [2006 (200) ELT 353 (SC)]*) in the decision referred to by the learned Senior Counsel, stated in para 15 that the intermediate goods are not sold nor are marketable. However, in the said decision, Hon'ble Supreme Court has upheld the order of tribunal holding milk crumbs to be excisable. The dispute before the Hon'ble Supreme Court in the said case was inclusion of certain expenses incurred in the factory producing final products in the value milk crumbs cleared

by the respondent on payment of duty by determining the value as per Rule 6(b)(ii) of Central Excise Valuation Rules, 1988, as they existed then. This fact is very clearly evident from the decision of the Tribunal reported at [2001 (135) ELT 510 (T)]. Respondents herein had themselves not disputed the levy of excise duty on the ground of the product being not marketable. The Hon'ble Supreme Court has in para 3 and 4, while framing the question, has observed as follows: -

“3. The question involved in these appeals is about the valuation of milk crumbs, refined milk chocolate and four other products manufactured by the respondent - M/s. Cadbury India Limited, in its factory at Induri, Pune and captively consumed in that factory and other factories of the respondent in the manufacture of chocolate. No part of these products are sold by the respondent.

4. The respondent had sought valuation of these goods under Rule 6(b)(ii) of the Central Excise (Valuation) Rules, which provides for basing the valuation on such goods on the “cost of production on manufacture including profits, if any, the assessee would have earned in the sale of such goods.”

The issue under consideration before the Hon'ble Supreme Court was with regard to inclusion of certain expenses in the value of the intermediate product and not the marketability or excisability of the market crumbs. The observation sought to be relied upon by the respondent's counsel cannot be anything more than an *obiter dicta*. More so over, the Hon'ble Supreme Court has not quashed the demand of duty treating these products to be non-excisable for the reason that they are not marketable, as that issue was not in dispute before them.

4.5 The decision of the Tribunal in the case of *Hindustan Cocoa Products Ltd. [1996 (87) ELT 299 (T)]* are specifically not in reference to the law as it existed during the period of dispute. The Tribunal has in para 14 observed as follows: -

“14. Even in the judgment of the High Court at Bombay, the marketability of the impugned milk crumb had been examined. The Hon'ble Court in this connection observed :

“It is now well settled that a tariff item has to be understood in the manner in which it is understood by people in the trade. It is, therefore, necessary to see whether milk crumb is understood in the trade as ‘chocolate’. The petitioners have relied upon the affidavit filed by P.K. Irani of Great Western Stores to show that milk crumb is not marketable in India at all, much less as chocolate. In the order of 30th October, 1975, however, the respondents have said that crumb is sold as a commercial article in coarse powder form in western countries. In the first place, there is nothing on record in support of this conclusion arrived at by the respondents. There is no material on record to show that crumb is sold in the market in western countries. Similarly there is nothing which would indicate that crumb is sold as chocolate in western countries.

In the present case there is absolutely no material on record which would suggest that milk crumb is marketed in western countries as chocolates or that it is understood in common parlance in western countries as chocolates. Even assuming that to be so, such common parlance in western countries is not relevant for the purpose of construing a tariff item in our country. There is no material on record which would show that milk crumb is either understood in common trade parlance in our country as chocolates or that it is marketed as chocolates.

That milk crumb falls within the tariff item 1A. Thus, in the case of Colgate Palmolive (India) Ltd. v. Union of India and others reported in 1980 Excise Law Times p. 268 Lentin J. observed that if the department wants to classify a product under a particular tariff item, then it is for the department to establish that the said product is liable to duty under that particular tariff item and it is not for the manufacturer to establish a negative. I may also refer in this connection to my decision in Garware Nylons v. Union of India and others reported in 1980 (6) E.L.T. 249 when I was sitting in a

Division Bench, to the same effect. The respondents have failed to discharge this burden."

From the above para it is quite evident what Hon'ble Bombay High Court was interpreting in the case before it was the classification of "milk crumbs" as chocolate as per the tariff entry No 1A of the erstwhile Central Excise Tariff as it existed then. Hon'ble Bombay High Court has after examining the facts available found that no evidence has been adduced to show that "milk crumb" is chocolate to be classified as such. Accordingly the case was decided even at that time for the reason that no evidence has been adduced. In para 3 and 4 while referring to the decision of Bombay High Court, Tribunal has observed as follows:

"3. For better appreciation of the merit of the case, it is necessary to define the product Milk Crumb. The product has been described in the Bombay High Court judgment dated 16-8-1984 as follows :-

"The petitioners have annexed an extract from an Article by J. Koch "Milk Crumb : The Modern Chocolate Engredient". It sets out the "Crumb" style of manufacture of milk chocolates. Milk Crumb is a special sort of cocoa-milk-sugar preparation which is used as the basic ingredient of many milk chocolates. Under this style of manufacture milk and cocoa are mixed while the milk contains an appreciable quantity of moisture. Traditionally it is a three stage process. At the first stage milk is condensed to 25-30 per cent residual moisture. Thereafter sugar is added and the product is recondensed to 14-18 per cent moisture. Cocoa mass is added to this moisture and it is followed by vacuum stove drying until the moisture has been eliminated. The product at this stage comes out of the final vacuum stove in the form of a hard brown slab or cake; sometimes also in the form of a crumbled rope of hard material. As far as the petitioners' factory is concerned, this product comes out in the form of hard lumps. This is known as milk crumb or chocolate crumb. Thereafter it has to be crushed, mixed with cocoa butter, refined and couched

in order to produce milk chocolates which are marketed as such to the consumers."

4. About this product the respondents have had a running battle with the Excise Department. In January, 1972 the Department sought to classify the product under Tariff Item No. 1A - confectionery. In July, 1973 the Collector held that crumbs were not excisable. In their order in review dated 30-10-1975 the Government of India held that crumb was "basically chocolate" and ordered its classification under Tariff Item No. 1A. The Bombay High Court in their order referred to above held that crumbs were not excisable under Tariff Item No. 1A. On 22-4-1985 the Assistant Collector classified it under the Residuary Item T.I. 68 but extended the benefit of Notification No. 118 of 1975 which exempted any dutiable goods when captively consumed in the manufacture of further dutiable goods. Against this order the Collector (Appeals) passed the impugned order. Significantly after the change over to the new Tariff, the respondents continued to file classification showing crumbs as falling under sub-heading 1804 and claiming benefit of the Notification No. 88 of 1986, dated 10-2-1986."

4.6 The term marketability has been interpreted by the Hon'ble Supreme Court in decisions subsequent to the case of *Hindustan Cocoa Products* of Tribunal specifically in the case of *Hindustan Zinc* [2004 (166) ELT 145 (SC)], *Dharampal Satyapal* [2005 (183) ELT 241 (SC)]. In case of *Dharam Pal Satyapal*, Hon'ble Apex Court has in para 18 and 19 observed as follows:

"17. The main contention advanced on behalf of the assessee herein was that the compound (kimam) was neither a chewing tobacco nor a preparation for chewing tobacco under chapter sub-heading 2404.49 prior to 23-7-1996 and under 2404.40 w.e.f. 23-7-1996; it was neither edible nor consumable; it was made by the assessee from a secret formula and that the entire production was captively consumed by their three

factories at Okhla Industrial Estate, Phase-II, New Delhi, Noida (UP) and Barotiwala (HP).

18. We do not find merit in the above submissions. Marketability is an attribute of manufacture. It is an essential criteria for charging duty. Identity of the product and marketability are the twin aspects to decide chargeability. Dutiability of the product depends on whether the product is known to the market. The test of marketability is that the product which is made liable to duty must be marketable in the condition in which it emerges. Marketable means saleable. The test of classification is, how are the goods known in the market. These tests have been laid down by this Court in a number of judgments including Moti Laminates Pvt Ltd v. Collector of Central Excise, Ahmedabad [1995 (76) E.L.T. 241]; Union of India v. Delhi Cloth & General Mills Co. Ltd. [1997 (92) E.L.T. 315]; Cadila Laboratories Pvt Ltd. v. Commissioner of Central Excise, Vadodara [2003 (152) E.L.T. 262].

19. Applying the above tests to the facts of this case, we find that sada kimam was bought by the assessee as a raw material which was then blended with saffron, perfumes, menthol etc. to form a compound which was then packed in "balties" and cleared to the above three licensed units at Okhla Industrial Estate, Phase-II, New Delhi, Noida (UP) and Barotiwala (HP), where Tulsi Zafrani Zarda was manufactured. That, the assessee used to buy a similar compound (Lucknowi kimam) from the market from time to time and used in the manufacture of their final product. That, the compound (kimam) prepared by the assessee at 96, Okhla Industrial Estate, Phase-III, New Delhi and at E-1, Maharani Bagh, New Delhi, in the highly concentrated form, was cleared therefrom and taken to the above three licensed factories where it was diluted and used in the manufacture of Tulsi Zafrani Zarda. In their reply to the show cause notice, the assessee admitted that the said "compound" was not capable of being used for any purpose, other than for manufacture of branded chewing tobacco (underline supplied by us). This statement of the

assessee in reply to the show cause notice establishes that the said compound (kimam) was not edible, it was not capable of consumption as such, however, it was used as preparation in the manufacture of Tulsi Zafrani Zarda which was a branded chewing tobacco manufactured in the licensed factories of the assessee at Okhla Industrial Estate, Phase-II, New Delhi, Noida (UP) and Barotiwala (HP). Further, from time to time, the assessee herein bought from the market a similar compound (Lucknowi kimam) and used it in the manufacture of the final product which indicated that on blending of sada kimam with saffron, spices, menthol etc., the compound in question (kimam) which emerged was a distinct, identifiable product, known to the market as kimam. Hence, we do not find any infirmity in the impugned judgment of the tribunal which has held that the said compound (kimam) was marketable and classifiable as chewing tobacco or a preparation for chewing tobacco under chapter sub-heading 2404.49/2404.40.”

4.6 Now examining the various evidences led in the present case, the first and the foremost being that the respondents themselves have been treating this goods as excisable and were discharging the duty demand on that till October 2006. Hence they were themselves treating these goods as marketable contrary to the decision in the case of *Hindustan Cocoa Products Ltd.* Once they themselves have been doing so, they cannot turn around and say that the product which was marketable till that date has become unmarketable. Even in their own case in subsequent decision of tribunal reported at [2001 (135) ELT 510 (T)] and Hon'ble Supreme Court reported at [2006 (200) ELT 353 (SC)] they did not challenged the demand on the ground that goods being cleared by them were not marketable and hence not excisable. It can be that the product which was being marketed would now not be marketed, but it continues to be marketable because there cannot be any dispute with regard to the capability/recognition of these goods as such in the market. The decision to market a good or sell the goods is decision taken by the seller of the goods and just because somebody decides

not to sell the goods will not make the same good non marketable.

4.7 The evidences produced in the form of reference from web material etc. in respect of these goods further establish the fact that the milk crumb under dispute is marketable commodity and is known in trade and commerce as such. As per the information available on the website of "International Custom Products Inc", *"Milk Products ICP offer a complete line of milk powder replacers, skim milk preparations, dairy creams, yogurt powders, sour creams, ice cream blends and various milk crumb products which are mainly used as an ingredient by manufacturers of dairy, bakery and confectionery products."* When Shri P Manivannan working as legal Counsel for appellant was confronted with the said material he stated *"Presently I am not in a position to offer my comments. I will revert back to you within next five days."* Subsequently he has vide his letter dated 24.04.2007 stated *"We understand that the product mentioned in the ICP brochure is not the Milk Crumb, they deal in various Milk Crumb Products. It is submitted that it is clear that ICP does not sell Milk Crumb as such, but only makes products out of Milk Crumb that is why it is stated in their brochure as "Various Milk Crumb Products". Therefore it is clear that the product dealt by ICP is not an equivalent Milk crumb produced by us."* In our view from the statement of Shri Manivannan it is quite evident that there is no dispute in respect of the commercial understanding of the product as "milk crumb". The actual test of marketability as laid down is availability of the goods in market and their trade understanding as determinative factor for determining marketability of the goods. The actual fact of these goods being bought and sold by the respondent in the market is immaterial for determination of the marketability of this product.

4.8 Relying on the decision of Hon'ble Gujarat High Court in case of Lupin Limited respondents have argued that reliance placed by the revenue on the United State Patent during the course of argument is misplaced. In their submission these patents are process patent and not the product patent, hence do

not establish the marketability of the goods in question. In case of Lupin, Hon'ble High Court has stated as follows:

“34. With respect to patent issued by the U.S. Office, there are several reasons why such ground is not germane. Firstly, the petitioners have pointed out that such patent is not the product patent, but a process patent. Secondly, the patent is issued with respect to the final drug and not intermediate chemical. These two significant aspects which the petitioners have brought about in the rejoinder affidavit have not been seriously contested by the respondents though detailed sur-rejoinder affidavit has been filed. Additionally, the petitioners have also produced the disclosure statement made by the manufacturer for obtaining such a patent which suggests that the patent was for the process. Therefore, the conclusion of the respondents that the intermediate chemical involved in the present case resembles very closely in its properties to the chemical referred to in the patent, is of no consequence. Even if the two are identical, it may at best establish that the process is similar and the final product may also be identical. Insofar as our inquiry is concerned, these aspects have no bearing since the question involved is whether the intermediate chemical is marketable or not.”

We respectfully follow the decision of the Hon'ble Gujarat High Court, and hold that reliance placed by the revenue on the said document is not sufficient to establish the marketability of the product, but is sufficient to establish the understanding of the product and its manufacturing process. It is also noted that the patent is in respect of not the end product namely chocolate but is in respect of “milk crumbs” only. The abstract to the said document reads as follows:

“Milk crumb for use in milk chocolate manufacture is prepared by forming a mixture containing milk, sugar and optionally cocoa, drying the mixture under reduced pressure to form milk crumb product and compressing the crumb product under pressure of at least 100 kg/cm² to crystallize amorphous sugar present in the crumb”

4.9 We do not find any merits in the submissions of the respondent that this product is proprietary product and hence cannot be considered as marketable in view of the decision in the case of *Sonic Electrotherm* and *Board of Trustees* referred above. In the case of *Sonic Electrotherm*, the Hon'ble Supreme Court has specifically observed that "*The essence of marketability is neither in the form nor in the shape or condition in which the manufactured articles are to be found, it is the commercial identity of the articles known to the market for being bought and sold. The fact that the product in question is generally not being bought and sold or has no demand in the market would be irrelevant.*" The real test which the Apex Court has laid down here is not different from the test laid down in the decisions referred to by the learned Special Counsel. If the product is identifiable as a distinct product in the market, it is to be treated as a marketable product. In our view, the goods viz. milk crumb satisfies this requirement. The test of "product formulation" and associated secrecy has been specifically rejected by the Hon'ble Apex Court in case of *Dharampal Satyapal* referred above.

4.10 Certain other judgments relied upon by the respondent with regard to holding that the product is not marketable just because the same was transferred to the units of the same manufacturer or to the job worker. We do not find that these judgments support the case of the respondent. In the case of *Cadila Laboratories* referred by the learned Senior Counsel, the Hon'ble Supreme Court has observed that "*The product produced must be a distinct commodity known in common parlance to the commercial trade for the purpose of buying and selling.*" In the present case when we have recorded the finding that the product is having a distinct commercial identity, then the case of *Cadila Laboratories* is distinguishable and not applicable to the present set of case. Similarly, in the case of *Bata India Ltd.*, the Hon'ble Supreme Court has decided the matter that the goods viz. "unvulcanised sandwiched fabric" was since it was not commercially known or since no evidence had been led in that

case with regard to the commercial identity of the goods in dispute, the Hon'ble Supreme Court held against the marketability of the same. In the present case evidences have been led to that effect. Hence this judgment is also distinguishable.

4.11 Respondents have also argued that the "milk crumbs" cleared by them is in crude form and is intermediate product for the manufacture of their own final products and hence not marketable. However we find that similar argument has already been rejected by the Hon'ble Apex Court in case of *Nicholas Piramal India Ltd [2010 (26) ELT 338 (SC)]* stating as follows:

"10. The taxable event for the levy of excise duty is the manufacture of goods. The term "manufacture" is of wide import and may include various activities and processes which may not be termed as 'manufacture' in the common parlance. But manufacture of goods alone is not enough. In order to attract the levy of excise duty, the goods should not only be manufactured, i.e., come into existence, but also should be articles or products that are known to the market and must be capable of being brought and sold. Some emphasis has to be laid on the use of the word capable as actual sale of the product or article is not essential and required. This has been settled in a number of authorities of this Court and no longer res integra. There cannot be any doubt that intermediate products, even if captively consumed and not actually sold, may be liable to levy of excise duty if they satisfy the test of both manufacture and marketability. The aforesaid legal principle has been laid down by this Court in the judgments in Hindustan Zinc Ltd. v. Commissioner of Central Excise, Jaipur, reported in 2005 (181) E.L.T. 170 (S.C.), Union of India v. Delhi Cloth & General Mills Co. Ltd., reported in 1997 (92) E.L.T. 315 (S.C.), Cadila Laboratories Pvt. Ltd. v. Commissioner, reported in 2003 (152) E.L.T. 262 (S.C.). In the decision in Hindustan Zinc Ltd. (supra), decided by three Judge Bench of this Court, it was also held, by this Court that marketability of a product is essentially a question of fact.

11. *Therefore, the question of marketability, being a question of fact, has to be determined in the facts of each case and cannot be strait-jacketed into pigeon holes. The orders passed by the Commissioner as also the Tribunal clearly demonstrate that the product in question is commercially known and is capable of being marketed. The facts that the appellants have chosen not to sell the product in question does not mean that the same is not capable of being marketed. The matter can be looked from another angle. There is also no dispute that the said product in question is used in the manufacture of the animal feed supplement sold by the Appellant. Had the Appellant not used the product in question, they would have had to buy the same from the market to manufacture and sell the Animal Feed Supplement. This clearly shows that a marketable product emerges.”*

4.12 Section 2(d) of the Central Excise Act specifically defines the excisable goods and the Explanation appended to the said rule specifically reads *“For the purposes of this clause, “goods” includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable.”* This Explanation confirms what has been stated by the Hon’ble Supreme Court in various decisions referred earlier. Any product which is capable of being bought and sold for a consideration are deemed to be marketable.

4.13 There is no dispute with regard to the shelf life of the product. Shelf life of the product is one of the determinant of the product being marketable. If some product is having no shelf life or a very short shelf life, then the same could not be held to be marketable as has been held in the decision of the Apex Court in the case of *Moti Laminates*. That is not the case here. In case of *T N State Transport Corpn Ltd [2004 (166) ELT 433 (SC)]*, Hon’ble Supreme Court has held that shelf life of 8 to 10 hours is enough to market the goods. The respondent do not dispute that this product has sufficient shelf life. The respondent only state that shelf life cannot be an only criteria for holding a

product to be marketable. We do not find merit in this submission in the specific facts and circumstances of the case as it is not only shelf life but many factors which have been taken into consideration for determining the marketability of these goods.

4.14 We have also called for the samples of the product. The samples produced before us were in the form of brownish packet in small plastics bags. While looking at these samples, we are convinced that these are capable of being taken to market for the purpose of being bought and sold. The size of packing in which this goods can be taken is irrelevant for determining the marketability till the time it can be shown that they are capable of being taken to the market. In view of this also, we find that the test laid down by the Apex Court in various decisions referred to by the respondent is also satisfied.

4.15 The Commissioner has in his order, in para 32, observed as follows:-

“32. I find that CESTAT decision in the case of Hindustan Cocoa Products Ltd. covers the entire aspect of marketability very comprehensively and no fresh evidence has been adduced by the department to change this position. The fact that Hindustan Cocoa Products Ltd. manufactured milk crumbs in the shape of lumps and at present the product was being manufactured in powder form does not help, as the product remains the same even though the shape may differ. It can, therefore, be concluded that milk crumbs are not excisable products and no duty can be levied on such products in respect of the assessee. I also find that the entire exercise is also revenue neutral as even if duty was paid, the same would have been taken as credit by the other unit of the assessee. This would also mean that the assessee are not entitled to Cenvat Credit on the inputs used in the manufacture of milk crumbs during the period and the same would have to be reversed/paid in terms of the Cenvat Rules, 2002/4.”

The finding recorded by the Commissioner in respect of revenue neutrality which cannot be justified for the reason that credit of duty paid in respect of the milk crumbs would be available to

some other unit or its job worker, is contrary to the decision of the Larger Bench of the Tribunal in the case of *Jay Yushin Ltd. [2000 (119) ELT 718 (T-LB)]* and the Hon'ble Supreme Court in the case of *Star Industries [2015 (324) ELT 656 (SC)]*. The Hon'ble Supreme Court has in para 35 has observed as follows: -

“35. It was submitted by the learned counsel for the assessee that the entire exercise is Revenue neutral because of the reason that the assessee would, in any case, get Cenvat credit of the duty paid. If that is so, this argument in the instant case rather goes against the assessee. Since the assessee is in appeal and if the exercise is Revenue neutral, then there was no need even to file the appeal. Be that as it may, if that is so, it is always open to the assessee to claim such a credit.”

We find that if the issue was revenue neutral, the respondent would have paid the duty and taken the credit whatsoever, if the same was admissible. Secondly revenue neutrality can never be ground for not demanding the duty on the excisable goods in the form and manner they are being cleared by the assessee.

4.16 Accordingly we hold that the goods in question viz. milk crumb is marketable and hence excisable.

5.2 In view of above discussions, we allow the appeal filed by the Revenue and set aside the impugned order.

(Order pronounced in the open court on 14.02.2020)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)