

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Excise Miscellaneous Application (EH) No. 85853 of 2022

(On behalf of Appellant)

Excise Appeal No. 85275 of 2018

(Arising out of Order-in-Appeal No. PK/86/Appeal Thane/BW/2017-18 dated 30.10.2017 passed by the Commissioner of GST & Central Excise (Appeals Thane), Mumbai)

M/s. Hindustan Coca-Cola Beverages P Ltd **Appellant**
Survey No. 284, At Post Kudus,
Taluka-Wada, Dist. Thane 421 312.

Vs.

Commissioner of CGST, Bhiwandi **Respondent**

WITH

Excise Miscellaneous Application (EH) No. 85854 of 2022

(On behalf of Appellant)

Excise Appeal No. 85877 of 2019

(Arising out of Order-in-Appeal No. PVNS/304/Appeal Thane/BW/2018-19/5740 dated 05.12.2018 passed by the Commissioner of GST & Central Excise (Appeals Thane), Mumbai)

M/s. Hindustan Coca-Cola Beverages P Ltd **Appellant**
Survey No. 284, At Post Kudus,
Taluka-Wada, Dist. Thane 421 312.

Vs.

Commissioner of CGST, Bhiwandi **Respondent**

AND

Excise Miscellaneous Application (EH) No. 85855 of 2022

(On behalf of Appellant)

Excise Appeal No. 85254 of 2020

(Arising out of Order-in-Appeal No. PVNS/138/Appeal Thane/BW/2019-20 dated 23.10.2019 passed by the Commissioner of GST & Central Excise (Appeals Thane), Mumbai)

M/s. Hindustan Coca-Cola Beverages P Ltd **Appellant**
Survey No. 284, At Post Kudus,
Taluka-Wada, Dist. Thane 421 312.

Vs.

Commissioner of CGST, Bhiwandi **Respondent**

Appearance:

Shri Chirag Shetty, Advocate (Proxy), for the Appellant
Shri Amrendra Kumar Jha, Deputy Commissioner, Authorised
Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 12.10.2022
Date of Decision: 12.10.2022

FINAL ORDER NO. A/85981-85983/2022

PER: SANJIV SRIVASTAVA

These applications for early hearing have been filed by the applicant/appellant stating the following:-

"8. It is submitted that this is a fit case for grant an out of turn hearing, in respect of the present Appeal on the ground that the issue involved in the present Appeal is squarely covered in the case of M/s Brindavan Beverages Pvt Ltd Commissioner, Central Excise, Customs & Service Tax, Delhi Road, Meerut, Hapur in Central Excise Appeal No. 50661 of 2015 [2019 (29) GST.L. 418 (T-LBJ) and has been decided in favour of the assessee. It is submitted that the issue as present in the captioned appeal has been settled in favour of the Applicant by the decision of the Larger Bench of the CESTAT, Allahabad in Brindavan Beverages (

9. It is further submitted that the said decision of Brinkman Beverages (supra) has attained finality as the same has not been challenged by the Department and hence. accepted by them. Hereto annexed and marked as Exhibit A is a copy of the order passed in the matter of Brindavan Beverages (supra)."

2.1 We have heard Shri Chirag Shetty, Advocate (Proxy) for the applicant/appellant and Shri Amrendra Kumar Jha, Deputy Commissioner, Authorised Representative for the Revenue.

3.1 Undisputedly the issue involved in the appeals as per the impugned order in appeal No. E/85275/2018 is as follows:-

"The adjudicating authority vide impugned order dated 28.1.2016 has observed that-

(i) the appellant were clearing their product viz. "Minute Maid Nimbu Fresh" (MMNF) by wrongly classifying their product under Chapter sub-heading 220290.20 of Central Excise Tariff Act,

1985 and wrongly clearing the goods without payment of Central Excise Duty by claiming exemption under Notification No 3/2006-C.E. dated 01.03.2006 instead of classifying the said product under chapter sub-heading No 220210.20 of the Central Excise Tariff Act, 1985.

(ii) on the same issue one show cause notice answerable to Commissioner of Central Excise Thane-1, was adjudicated wherein it was held that the product namely "Minute Maid Nimbu Fresh" (MMNF) was properly classifiable under chapter sub-heading 220210.20 attracting Central Excise duty @ 10% adv. and confirmed the demand vide 0-1-0 No 30/BR 30/Th-1/2011 dated 29.06.2011. Being aggrieved with Commissioner's above order the appellant filed an appeal before Hon'ble CESTAT vide Appeal No E/1465/2011-Mum. The Hon'ble CESTAT in the order dated 27.08.2014 after considering the detailed submission given by the appellant in support of their classification of product held that:

i) The product described in the Prevention of Food Adulteration Rules, 1955 is lime and not lemon. The two words are described different in Chamber's 21 Century Dictionary. However, even ignoring this point we note the requirement of Prevention of Food Adulteration Rules, 1955 is that the total soluble solid should not be less than 10%. Whereas the appellant's technical note describes above states that the solid content of the juice is measure in terms of brix and the lemon juice brix is at 6 degree i.e. 6%. We also have seen the labels on the bottles of the MMNF which also indicate the brix content as 5.7%. Under these Rules too, the appellant's product does not meet the criteria of fruit juice base drink since it does not have the brie content. The lemon juice concentrated in the MMNF is only 1% which falls below the limit of 5% specified PFA Rules. The MMNF thus squarely falls under CTH 2202 10 20.

(ii) the argument of the appellant that the classification should be uniform in all jurisdictions, CESTAT appreciated and agreed on this. However, as may be seen above, CESTAT have analyzed the issue from all angles namely common parlance, manufacturing process, the juice concentrate percentage,

prevention of Food Alteration Rules, 1955, HSN Notes and have come to the conclusion that CSH 22021020 is a more specific heading describing the essential character of the product and in accordance with Rules 3(a) and 3(b) of the Interpretative Rules

iii) On the issue of penalty, CESTAT find that the appellants had informed the Assistant Commissioner in the beginning itself vide their letter dated 5-2-2010 of their plan to manufacture MMNF and classify the same under CTH 22029020. In these circumstances, there is no scope for imposition of penalty.

According Hon'ble Tribunal rejected the claim of classification of appellant and hold that the correct classification of MMNF is 22021020 and duty is payable accordingly with interest. The Hon'ble Tribunal order has been accepted by Chief Commissioner Central Excise Zone-I

The appellant aggrieved with the Hon'ble CESTAT order filed appeal before Hon'ble Supreme Court. The Hon'ble Supreme Court vide order dated 27-07-2015 admitted the appeal but did not grant stay on operation of final order of CESTAT dated 27-08-2014.

3.2 From the above, it is evident that the issue involved in the matter is in regard to classification of "Minute Maid Nimbu Fresh".

3.3 As submitted by the counsel, the matter has been agitated before a Larger Bench of the Tribunal and the Tribunal has given favourable decision. Hence these applications for early hearing.

4.1 We find merit in the submissions of the counsel and allow the early hearing applications.

5.1 With the consent of both sides, as the issue is now settled by the decision of the Larger Bench, the appeals too have been taken up for consideration.

5.2 We find that the issue involved in the present case is covered by the decision of the Larger Bench in the case of Brindavan Beverages Pvt. Ltd. [2019 (29) GSTL 418 (Tri.-LB)].

Taking note of the difference in the opinions, following issue was taken up for consideration by the Larger Bench:-

"21. *The Division Bench of the Tribunal at Mumbai in Hindustan Coca Cola Beverages held that the product MMNF is classifiable under Tariff Item No. 2202 10 20 and did not agree with the contention of the appellant that MMNF is not a flavoured drink. It observed that the decision of the Tribunal in the case of Commissioner of Central Excise, Bhopal v. Parle Agro Pvt. Ltd. - [2008 \(226\) E.L.T. 194](#) (Tri. - Del.) classifying "Appy Fizz" as a fruit juice based drink under Tariff Item No. 2202 90 20 would not help the appellant because Appy Fizz contains a far more higher and significant percentage of apple which is 23%, whereas in the case of MMNF, the juice concentrate is admittedly only 1%. Reliance placed by the appellant on the provisions of Food Adulteration Rules to contend that since the Total Soluble Solid was not less than 10% and the lemon juice content was also not less than 5%, it should be treated as a "fruit based drink" was not accepted for the reason that the labels indicated that the brix content was 5.7% and the Lemon juice concentrate was only 1%.*

22. *Another Division Bench for the Tribunal at Allahabad, while hearing the Appeal filed by Brindavan Beverages found itself unable to agree with the reasoning given by the Mumbai Tribunal in Hindustan Coca Cola Beverages. The Bench noticed the Tariff Item No. 2202 10 with a single dash was divided into three categories, including lemonade with Tariff Item No. 2202 10 20, while Tariff Item No. 2202 90 with single dash had four categories including Fruit Pulp or Fruit Juice based drinks with Tariff Item No. 2202 90 20. Thus comparison of the two Tariff Items falling under two separate single dash groups cannot be made for classification. In the first instance, six digit classification has to be arrived at and then it has to be proceeded by arriving at eight digit classification. This process was not adopted by the Mumbai Tribunal in Hindustan Coca Cola Beverages and, therefore, it expressed its disagreement. According to the Bench, the product in question was lemon juice based drinks and, therefore, would fall under Tariff Item No. 2202 90 20."*

5.3 The decision referred by the Commissioner (Appeals) in the order has not been agreed by the Larger Bench and the Larger Bench has answered the reference made, as follows:-

"64. *The fruit juice content of lime or lemon juice in MMNF, Nimbu Masala Soda or Nimbooz has been indicated to be not less than 5% and the Total Soluble solids is also not less than 10%. All the three products namely MMNF, Nimbu Masala Soda and Nimbooz, satisfy the requirements of Regulation 2.3.10 or Regulation 2.3.30. These products, therefore, would classify under Tariff Item No. 2202 90 20 as fruit juice based drinks. The Mumbai Tribunal in Hindustan Coca Cola was, not justified in holding that the Regulations are not required to be examined.*

65. *The irresistible conclusion, therefore, that follows from both the common parlance test and the supporting legislation test is, therefore, that the three products MMNF, Nimbu Masala Soda and Nimbooz would classify under Tariff Item No. 2202 90 20 as fruit juice based drinks.*

66. *It can however be urged that even when lemon or lime juice is added to water as a flavoring agent, the product can still be called lemonade. Though it has to be seen whether the product is essentially waters with added flavour or whether lemon juice is the basis of the fruit drink, but the answer also lies in the definition of "non-carbonated ready to serve fruit beverages" under Regulation 2.3.10 and "carbonated fruit beverages and fruit drinks" under Regulation 2.3.30. It would follow from these Regulations that even when lime juice is added but the fruit content of lime or lemon juice is not less than 5%, the product would be classified as fruit juice based drinks but if the lime or lemon juice content is less than 5%, then it would classify as lemonade.*

67. *Accordingly, the reference is answered as follows :*

The product "Minute Maid Nimbu Fresh (hereinafter referred to as MMNF) manufactured by Brindavan Beverages Private Limited, and 7UP "Nimbooz Masala Soda" or 7UP "Nimbooz" manufactured by PepsiCo India Holdings Private Limited are classifiable under Tariff Item 2202 90 20 of the Central Excise

Tariff Schedule under the category of "fruit pulp or fruit juice based drinks"."

5.4 Further, by final order No. 71374-71377/2019 dated 15.07.2019, the Tribunal has followed the Larger Bench and observed as follows:-

"5. In view of the conclusions given by the Larger Bench, it has to be held that the demands raised in all the above stated appeals confirmed by Original Authority holding the said beverages to be falling under Tariff Item No.22021020 are not sustainable.

6. We, therefore, allow all the appeals by setting aside the impugned orders except for the part of the Order-in-Original dated 28 October, 2014 in respect of M/s Brindavan Beverages Pvt. Ltd. where by cenvat credit to the tune of Rs.1,16,099/- already paid by the appellant was appropriated."

6.1 Respectfully following the decision and the consensus arrived at by the Larger Bench, we allow these three appeals filed by the appellant.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)