

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

Excise Appeal No. 88313 of 2014

(Arising out of Order-in-Original No. 30-38/CEX/2014/C dated 25.06.2014 passed by the Commissioner of Central Excise, Customs & Service Tax, Nagpur)

M/s. Dinshaws Dairy Foods Ltd.

Appellant

Plot No.K-41 & K-42, Five Star Indl. Area,
MIDC, Butibori, Dist. Nagpur.

Vs.

Commissioner of Central Excise, Nagpur

Respondent

Telangkhedi Road, Civil Lines,
Post Box No.81, Nagpur 440 001.

WITH

In Excise Appeal No. 85959 of 2016

(Arising out of Order-in-Original No. 01-02/CEX/2016/PC/NGP-1 dated 22.01.2016 passed by the Commissioner of Central Excise, Customs & Service Tax, Nagpur)

M/s. Dinshaws Dairy Foods Ltd.

Appellant

Plot No.K-41 & K-42, Five Star Indl. Area,
MIDC, Butibori, Dist. Nagpur.

Vs.

Commissioner of CE, Nagpur

Respondent

Telangkhedi Road, Civil Lines,
Post Box No.81, Nagpur 440 001.

AND

In Excise Appeal No. 85960 of 2016

(Arising out of Order-in-Original No. 01-02/CEX/2016/PC/NGP-1 dated 22.01.2016 passed by the Commissioner of Central Excise, Customs & Service Tax, Nagpur)

M/s. Dinshaws Dairy Foods Ltd.

Appellant

Plot No.K-41 & K-42, Five Star Indl. Area,
MIDC, Butibori, Dist. Nagpur.

Vs.

Commissioner of Central Excise, Nagpur-I

Respondent

Telangkhedi Road, Civil Lines,
Post Box No.81, Nagpur 440 001.

Appearance:

Shri Gajendra Jain with Shri Aditya Jain, Advocates, for the Appellant
Shri Deepak Kumar, Special Counsel, for the Respondent

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

Date of Hearing: 14.11.2022
Date of Decision: 14.11.2022

FINAL ORDER NO. A/86176-86178/2022

PER: SANJIV SRIVASTAVA

These appeals are directed against the orders as indicated in the table below:

Appeal No	Order in Original No	Date	Show Cause Notice No	Date
E/88313/2014	30-38/CEX/2014/C 25.06.2014	26.06.2014	V(21)15-64/2006/Adj/19817	08.11.2006
			V(21)15-88/2007/Adj/12070	11.07.2007
			V(21)15-15/2008/Adj/3235	19.02.2008
			V(21)15-05/2009/Adj/1190	20.01.2009
			V(73)15-117/2009/Adj/27963	08.12.2009
			V(21)15-88/2010/Adj	28.07.2010
			V(21)15-9/2011/Adj/C/11730	03.05.2011
			V(21)15-9/2011/Adj/C	04.04.2012
			V(21)15-5/Adj/2013/C/2127	29.01.2013
E/85959/2016	01-02/CEX/2016/P C/NGP-1	22.01.2016	V(21)15-78/Adj/2014/C/9441-9444	03.07.2014
E/85960/2016	01-02/CEX/2016/P C/NGP-1	22.01.2016	V(21)15-20/Adj/2015/N GP-I/C/4428-4431	23.06.2015

2.1 By the impugned orders, Commissioner has held as follows:-

Order-in-Original No. 30-38/CEX/2014/C dt 25.06.2014

"ORDER

1. Show Cause Notice No. V(21)15-64/2006/Adj/19817 dt. 08.11.2006

(I) I classify the Frozen Desserts manufactured and cleared by the Noticee under chapter 2108.99 of Central Excise Tariff Act, 1985.

(II) I confirm the Central Excise duty amounting to Rs. 2,33,99,338/- (Rs. Two Crore Thirty Three Lakhs Ninety Nine Thousand Three Hundred and Thirty Eight Only) [Basic- Rs. 2,30,13,097/- + Ed. Cess - Rs. 3,86,241/-] in respect of clandestine removal of frozen desserts during the period 2002-03 to 30.06.2006 and order for recovery of the said amount from the Noticee under erstwhile proviso to Section 11A(1) of the Central Excise Act, 1944;

(III) I order for recovery of interest from the Noticee at the appropriate rate under erstwhile Section 11AB of the Central Excise Act, 1944.

(IV) I impose a penalty of Rs. 2,33,99,338/- (Rs. Two Crore Thirty Three Lakhs Ninety Nine Thousand Three Hundred and Thirty Eight Only) against the Noticee under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002;

(V) I refrain myself from imposing penalty under Rule 25 of Central Excise Rules, 2002 on Noticee.

(VI) I impose a fine of Rs.1,00,00,000/- (Rs. One Crore Only) upon the Noticee under Rule 25 of Central Excise Rules, 2002 in lieu of confiscation.

2. Show Cause Notice No. V(21)15-88/2007/Adj/12070 dt. 11.07.2007

(I) I classify the Frozen Desserts manufactured and cleared by the Notices under chapter 2108.99 of Central Excise Tariff Act, 1985.

(II) I confirm the Central Excise duty amounting to Rs. 1,12,24,945/- (Rs. One Crore Twelve Lakhs Twenty Four Thousand Nine Hundred Forty Five only) | Basic- Rs. 1,10,04,848/- + Ed. Cess -Rs. 2,20,097/-] in respect of

clandestine removal of frozen desserts during the period July, 2006 to January, 2007 and order for recovery of the said amount from the Noticee under erstwhile Section 11A(1) of the Central Excise Act, 1944;

(III) I order for recovery of interest from the Noticee at the appropriate rate under erstwhile Section 11AB of the Central Excise Act, 1944.

(IV) I impose a penalty of Rs.10,00,000/- (Rs. Ten Lakhs Only) against the Noticee under Rule 25 of Central Excise Rules, 2002;

3. Show Cause Notice No. V(21)15-15/2008/Adj/3235 dt. 19.02.2008

(I) I classify the Frozen Desserts manufactured and cleared by the Noticee under chapter 2106.9099 of Central Excise Tariff Act, 1985.

(II) I confirm the Central Excise duty amounting to Rs. 2,97,48,782/- Rs. Two Crore Ninety Seven Lakhs Forty Eight Thousand Seven Hundred Eighty Two only) [Basic- Rs. 2,89,06,544/- + Ed. Cess -Rs. 5,78,131/ SHE Cess- Rs. 2,64,107/-] in respect of clandestine removal of frozen desserts during the period February, 2007 to December, 2007 and order for recovery of the said amount from the Notices under Section 11A of the Central Excise Act, 1944;

(III) I order for recovery of interest from the Noticee at the appropriate rate under erstwhile Section 11AB of the Central Excise Act, 1944.

(IV) I impose a penalty of Rs. 2,97,48,782/- (Rs. Two Crore Ninety Lakhs Forty Eight Thousand Seven Hundred Eighty Two only) against the Noticee under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002; (M) I refrain myself from imposing penalty under Rule 25 of Central Excise Rules, 2002 on Noticee.

4. Show Cause Notice No. V(21)15-05/2009/Adj/1190 dt. 20.01.2009

(I) I classify the Frozen Desserts manufactured and cleared by the Noticee under chapter 2106.9099 of Central Excise Tariff Act, 1985.

(II) I confirm the Central Excise duty amounting to Rs. 2,90,83,099/- (Rs. Two Crore Ninety Lakhs Eighty Three

Thousand Ninety Nine only) [Basic- Rs. 2,82,36,019/- + Ed. Cess -Rs.5,64,720/- + SHE Cess- Rs. 2,82,360/-] in respect of clandestine removal of frozen desserts during the period January, 2008 to October, 2008 and order for recovery of the said amount from the Noticee under Section 11A of the Central Excise Act, 1944;

(III) I order for recovery of interest from the Noticee at the appropriate rate under erstwhile Section 11AB of the Central Excise Act, 1944.

(IV) I impose a penalty of Rs. 2,90,83,099/- (Rs. Two Crore Ninety Lakhs Eighty Three Thousand Ninety Nine only) against the Noticee under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002;

(V) I refrain myself from imposing penalty under Rule 25 of Central Excise Rules, 2002 on Noticee.

5. Show Cause Notice No. V/21115-117/2009/Adj/27963 dt. 08.12.2009

(I) I classify the Frozen Desserts manufactured and cleared by the Noticee under chapter 2106.9099 of Central Excise Tariff Act, 1985.

(II) I confirm the Central Excise duty amounting to Rs. 2,56,97,204/- (Rs. Two Crore Fifty Six Lakhs Ninety Seven Thousand Two Hundred Four only) [Basic- Rs. 2,49,48,742/- + Ed. Cess -Rs.4,98,975/- + SHE Cess- Rs.2,49,487/-] in respect of clandestine removal of frozen desserts during the period November, 2008 to June, 2009 and order for recovery of the said amount from the Noticee under Section 11A of the Central Excise Act, 1944;

(III) I order for recovery of interest from the Noticee at the appropriate rate under erstwhile Section 11AB of the Central Excise Act, 1944.

(IV) I impose a penalty of Rs. 2,56,97,204/- (Rs. Two Crore Fifty Six Lakhs Ninety Seven Thousand Two Hundred Four only) against the Noticee under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002;

(V) I refrain myself from imposing penalty under Rule 25 of Central Excise Rules, 2002 on Noticee.

6. Show Cause Notice No. V(21)15-88/2010/Adi/27963 dt. 08.12.2009

(I) I classify the Frozen Desserts manufactured and cleared by the Noticee under chapter 2106.9099 of Central Excise Tariff Act, 1985,

(II) I confirm the Central Excise duty amounting to Rs. 1,30,37,183/- (R.One Crore Thirty Lakhs Thirty Seven Thousand One Hundred Eighty Three only) [Basic-Rs. 1,26,57,459/+Ed. Cess Rs.2,53,149/- + SHE Cess- Rs. 1,26,575/-) in respect of clandestine removal of frozen desserts during the period July, 2009 to March, 2010 and order for recovery of the said amount from the Noticee under Section 11A of the Central Excise Act, 1944;

(III) I order for recovery of interest from the Noticee at the appropriate rate under erstwhile Section 11AB of the Central Excise Act, 1944.

(IV) I impose a penalty of Rs. 1,30,37,183/- (Rs. One Crore Thirty Lakhs Thirty Seven Thousand One Hundred Eighty Three only) against the Noticee under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002;

(V) I refrain myself from imposing penalty under Rule 25 of Central Excise Rules, 2002 on Noticee.

7. Show Cause Notice No. V(21)15-9/2011/Adj/11730 dt. 03.05.2011

(I) I classify the Frozen Desserts manufactured and cleared by the Noticee under chapter 2106.9099 of Central Excise Tariff Act, 1985.

(II) I confirm the Central Excise duty amounting to Rs. 3,73,17,838/- Rs. Three Crore Seventy Three Lakhs Seventeen Thousand Eight Hundred Thirty Eight only) [Basic-Rs. 3,62,30,911/- + Ed. Cess -Rs. 7,24,618/+SHE Cess- Rs. 3,62,309/-1 in respect of clandestine removal of frozen desserts during the period April, 2010 to February, 2011 and order for recovery of the said amount from the Notices under Section 11A of the Central Excise Act, 1944;

(III) I order for recovery of interest from the Noticee at the appropriate rate under erstwhile Section 11AB of the Central Excise Act, 1944.

(IV) I impose a penalty of Rs. 3,73,17,838/- (Rs. Three Crore Seventy Three Lakhs Seventeen Thousand Eight Hundred Thirty

Eight only) against the Noticee under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002;

(V) I refrain myself from imposing penalty under Rule 25 of Central Excise Rules, 2002 on Noticee.

8. Show Cause Notice No. V(21)15-9/2011/Adi/ dt. 04.04.2012

(I) I classify the Frozen Desserts manufactured and cleared by the Noticee under chapter 2106.9099 of Central Excise Tariff Act, 1985.

(II) I confirm the Central Excise duty amounting to Rs. 3,43,83,728/- (Rs. Three Crore Forty Three Lakhs Eighty Three Thousand Seven Hundred Twenty Eight only) [Basic-Rs. 3,33,82,260/- + Ed. Cess-Rs. 6,67,644/- + SHE Cess-Rs.3,33,824/-1 in respect of clandestine removal of frozen desserts during the period March, 2011 to December, 2011 and order for recovery of the said amount from the Noticee under Section 11A of the Central Excise Act, 1944;

(III) I order for recovery of interest from the Noticee at the appropriate rate under erstwhile Section 11AB of the Central Excise Act, 1944.

(IV) I impose a penalty of Rs. 3,43,83,728/- (Rs. Three Crore Forty Three Lakhs Eighty Three Thousand Seven Hundred Twenty Eight only) against the Noticee under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002;

(V) I refrain myself from imposing penalty under Rule 25 of Central Excise Rules, 2002 on Noticee.

9. Show Cause Notice No. V(21)15-9/2011/Adj/ dt. 04.04.2012

(I) I classify the Frozen Desserts manufactured and cleared by the Noticee under chapter 2106.9099 of Central Excise Tariff Act, 1985.

(II) I confirm the Central Excise duty amounting to Rs. 3,23,17,883/- (Rs. Three Crore Twenty Three Lakhs Seventeen Thousand Eight Hundred Eighty Three only) (Basic-Rs. 3,13,76,585/- + Ed. Cess -Rs. 6,27,532/- + SHE Cess- Rs. 3,13,766/- in respect of clandestine removal of frozen desserts during the period January, 2012 to June, 2012 and order for recovery of the said amount from the Noticee under Section 11A of the Central Excise Act, 1944;

(III) I order for recovery of interest from the Noticee at the appropriate rate under Section 11AA of the Central Excise Act, 1944.

(IV) I impose a penalty of Rs. 3,23,17,883/- (Rs. Three Crore Twenty Three Lakhs Seventeen Thousand Eight Hundred Eighty Three only) against the Noticee under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002;

(V) I refrain myself from imposing penalty under Rule 25 of Central Excise Rules, 2002 on Noticee."

Order-in-Original No. 01-02/CEX/2016/PC/NGP-I dt 22.01.2016

"ORDER

(A) In respect of Show Cause Notice C. No. V(21)15-78/Adj/2014/C/9441- 9444 dated 03/04-07-2014

(i) I order classification of Frozen Dessert' manufactured and cleared by the Noticee, under Chapter Heading No.2106 90 99 of Central Excise Tariff Act, 1985.

(ii) I allow abatement of 35% of MRP on Frozen Dessert in terms of Notification No. 49/2008-CE(NT) dated 24-12-2008 & confirm the demand of duty of Rs.4,11,12,837/-(Rs. Four Crore Eleven Lakh Twelve Thousand Eight Hundred and Thirty Seven Only) (BED of Rs.3,99,15,366/-, Ed. Cess of Rs.7,98,313/- S.H. Ed. Cess of Rs. 3,99,158/-) pertaining to the F.Y. 2013-14, under Section 11A(10) of the Central Excise Act, 1944;

(iii) Interest at appropriate rate on the demand so confirmed is ordered to be recovered from the Noticee under Section 11AA of Central Excise Act, 1944;

(iv) I impose penalty of Rs.40,00,000/- (Rs. Forty Lacs only) on the Noticee under Rule 25 of the Central Excise Rules, 2002.

(B) In respect of Statement Cum Notice C. No. V(21)15-20/Adj/2015/NGP-I/ C/4428-4431 dated 23-06-2015

(i) I order classification of Frozen Dessert' manufactured and cleared by the Noticee, under Chapter Heading No.2106 90 99 of Central Excise Tariff Act, 1985.

(ii) I allow abatement of 35% on MRP of Frozen Dessert in terms of Notification No 49/2008-CE(NT) dated 24-12-2008 & confirm the demand of duty of Rs.7,33,20,002/- Rs. Seven Crore

Thirty Three Lakh Twenty Thousand and Two Only) (BED of Rs.7,14,30,855/-, Ed. Cess of Rs. 12,59,431/-, S.H. Ed. Cess of Rs.6,29,716/-) pertaining to the F.Y. 2014-15 under Section 11A(10) of the Central Excise Act, 1944;

(iii) Interest at appropriate rate on the demand so confirmed is ordered to be recovered from the Noticee under Section 11AA of Central Excise Act, 1944:

(iv) I impose penalty of Rs.73,00,000/- (Rs. Seventy Three Lacs only) on the Noticee under Rule 25 of the Central Excise Rules, 2002."

2.2 Appellant is engaged in the manufacture of ice cream.

2.3 During the course of audit it was noticed that the appellant had issued invoices for clearing the ice cream prefixing the letters 'FD' to the flavor name of the ice cream manufactured by them. On enquiry it was informed that FD stands for Frozen Dessert.

2.4 By referring to the definition under Prevention of Food Adulteration Act, 1954, Revenue was of the view that these preserves would not qualify as ice cream to be classified under Heading 21054 00 00.

2.5 Accordingly show cause notices for recovery of duty evaded by misclassifying these goods, were issued under Section 11A of the Central Excise Act, 1944. These show cause notices have been adjudicated as per the impugned orders. Aggrieved appellants have filed these appeals.

3.1 We have heard Shri Gajendra Jain with Shri Aditya Jain, Advocates for the appellant and Shri Deepak Kumar, Special Counsel, for the Revenue.

3.2 Arguing for the appellant, learned counsel submits that:-

- Appellant has classified the frozen dessert, a non-dairy ice cream under tariff heading 2105 00 00. Department has by referring to Prevention of Food Adulteration Act sought to reclassify them under the residuary heading.
- As per HSN Explanatory Note to Chapter Heading 21.05, ice cream is usually prepared with the basis of milk or cream and other edible ice whether or not containing cocoa in any proportion. HSN Explanatory Notes do not lay down any minimum percentage of milk or cream for classifying the item as ice cream under this heading. Even the Central

Excise Tariff does not provide for any such distinction. Therefore reliance placed on Prevention of Food Adulteration Act to hold contrary is not correct.

- Reliance is placed on following decisions:
 - Medley Pharmaceuticals Ltd. [2011 (263) ELT 641 (SC)]
 - Shree Baidyanath Ayurved Bhavan [2009 (237) ELT 225 (SC)]
- In common parlance also, frozen dessert cleared by the appellant is known as ice cream. The only difference between the frozen dessert and the items covered under items of other ice creams under PFA is milk fat has been replaced by vegetable oil. Hon'ble Supreme Court in the case of Oswal Agro Mills Ltd. [1993 (66) ELT 37 (SC)] has held that such common parlance test would prevail.
- The issue involved in the present case is no longer res integra and has been decided by Hon'ble Supreme Court in the case of Connaught Plaza Restaurant [2012 (286) ELT 321 (SC)]. In the said decision Hon'ble Supreme Court has relied upon the common parlance test to hold that soft serves served at restaurants of McDonalds are ice cream and other edible ice rejecting the test of technical meaning given to them under Prevention of Food Adulteration Act.
- If the present demand is to be upheld, appellant would be entitled for the benefit of Cenvat credit.
- Extended period of limitation cannot be invoked as everything was in the knowledge of the department. Hence extended period cannot be invoked and no interest or penalty can be imposed on the appellant.

3.3 Arguing for the Revenue, learned Special Counsel submits that:

- It is not so that the words ice cream have been defined under HSN and HSN states as follows:-
"21.05 – Ice cream and other edible ice, whether or not containing cocoa.
This heading covers ice cream, which is usually prepared with a basis of milk or cream, and other edible ice (e.g., sherbet, iced lollipops), whether or not containing cocoa in any proportion. However, the heading excludes mixes and

bases for ice cream which are classified according to their essential constituents (e.g., heading 18.06, 19.01 of 21.06)."

- Admittedly in the present case the goods manufactured and cleared by the appellant do not satisfy the requirements as stated in HSN and hence cannot be classified under this heading.
- Under prevention of Food and Adulteration Act, it is specifically required that the said goods should be having prescribed contents of 10% milk fat, 3.5% protein and 36.0% total solids.
- As the product does not need requirement as specified under Prevention of Food Adulteration Act and the rules made thereunder, Commissioner had held that this product does not merit classification under heading 2105 00 00 but more appropriately classifiable under heading 2108.99 for the period upto January 2007 and under heading 2106.9099 thereafter.

4.1 We have considered the submissions made in appeal and during the course of argument.

4.2 We are referring to the order passed by the Commissioner in appeal E/88313/2014.

4.3 For confirming the demand, Commissioner has held as follows:-

"5.3 No definition or clarification in respect of ice cream has been given in the respective Section Note and Chapter Notes. Thus as per the Interpretative Rules of Central Excise Tariff Act, 1985 the classification of goods i.e. Frozen Dessert (non dairy ice cream) are to be determined according to the terms of the headings. Chapter heading 2105 reads as Ice cream and other edible ice, whether or not containing cocoa.

A plain reading of 2105 reveals that chapter heading 2105 covered all kind of Ice cream and other edible ice whether they contained Cocoa or not. Similarly Chapter 2108/2106 covered all those food preparations not elsewhere specified or included i.e. those food preparations not elsewhere classified in the Central Excise Tariff.

5.4 Classification of goods under the Central Excise Tariff is undisputedly based on Harmonized Commodity description and

coding system known as HSN. There are plethora of decisions wherein it was held that explanatory notes to HSN are meant to guide the determination of the scope of heading of Central Excise Tariff. The relevant notes contained in the HSN are reproduced below:-

21.05- ICE CREAM AND OTHER EDIBLE ICE, WHETHER OR NOT CONTAINING COCOA.

This heading covers ice cream, which is usually prepared with a basis of milk or cream, and other edible ice (e.g. sherbat, iced lollipops), whether or not containing cocoa in any proportion. However the heading excludes mixes and bases for ice cream which are classified according to their essential constituents (e.g. heading 18.06, 19.01 or 21.06)

A plain reading of the said clarification reflect that ice cream which is prepared with a basis of milk or cream covered under the said chapter heading. No details of constituents of ice cream are discussed in the said explanatory notes. The term ice cream is not described either in the Central Excise Tariff or in the Explanatory of HSN. So before proceeding further it is necessary to understand which kind of food preparation would be called as ice cream.

5.5 Noted author C. Clarke described the ice cream in "The Science of Ice- Cream" as "The legal definition of ice-cream varies from country to country. In the UK ice-cream' is defined as a frozen food product containing a minimum of 5% fat and 7.5% milk solids other than fat (i.e. protein, sugars and minerals) which is obtained by heat-treating and subsequently freezing an emulsion of fat, milk solids and sugar (or sweetener), with or without other substances. 'Dairy ice-cream' must in addition contain no fat other than milk fat, with the exception of fat that is present in another ingredient, for example egg, flavouring, or emulsifier.' In the USA, ice-cream must contain at least 10% milk fat and 20% total milk solids, and must weigh a minimum of 0.54 kg 1- Until 1997, it was not permitted to call a product ice-cream' in the USA if it contained vegetable fat. Ice-cream is often categorized as premium, standard or economy. Premium ice. cream is generally made from best quality ingredients and has a relatively high amount of dairy fat and a low amount of air (hence it is relatively

expensive), whereas economy ice-cream is made from cheaper ingredients (e.g. vegetable fat) and contains more air. However, these terms have no legal standing within the UK market, and one manufacturer's economy ice-cream may be similar to a standard ice-cream from another."

Therefore, while some authorities are strict in their classification of products as ice-cream" and base it on milk fat content, others are more liberal and identify it by other characteristics. There is, thus, no clear or unanimous view regarding the true technical meaning of "ice-cream". In fact, there are different forms of "ice cream" in different parts of the world that have varying characteristics. From the above definition it is ample clear that the ice cream should conform with the constituents and standard prescribed by the authorities constituted under the statute.

5.6 Food is one of the basic necessities for sustenance of life. Pure, fresh and healthy diet is most essential for the health of the people. It is no wonder to say that community health is national wealth. In India Food Safety and Standards Authority of India working under Ministry of Health and Family Welfare is the constituent body to prescribe science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import, to ensure availability of safe and wholesome food for human consumption and for matters connected therewith or incidental thereto. Prevention of Food Adulteration Act, 1954 was enacted in order to curb the food adulteration activities. Food Safety and Standards Act, 2006 and rules made therein under and the Bureau of Indian Standard specifies the standard of commodity.

5.7 The of Food Adulteration Act, 1954 defined Ice cream and other edible ice as under:-

A.07.04--- "ICE LOLLIES OR EDIBLE ICES" means the frozen ice produce which may contain sugar, syrup, fruit, fruit juices, cocoa, citric acid, permitted flavours and colours. It may also contain permitted stabilizers and/ or emulsifiers not exceeding 0.5 per cent by weight. It shall not contain any artificial sweetener.

A.07.04.01---ICE CANDY means the frozen ice produce which may contain fruit, fruit juices, cocoa, nuts, citric acids, permitted flavours and colours. It may also contain permitted stabilizers

and / or emulsifiers not exceeding 0.5 per cent by weight. The Total sugar expressed as sucrose shall not be less than 10 per cent. by weight. It shall not contain any artificial sweetener.

A.11.02.08--- ICE CREAM, KULFI AND CHOCOLATE ICE CREAM means the frozen product obtained from cow or buffalo milk or a combination thereof or from cream, and/or other milk products, with or without the addition of cane sugar, dextrose, liquid glucose and dried liquid glucose, Malto dextrin, eggs, fruits, fruit juices, preserved fruits, nuts chocolate, edible flavours and permitted food colours. It may contain permitted stabilizers and emulsifiers not exceeding 0.5 per cent by weight. The mixture shall be suitably heated before freezing. The product shall contain not less than 10.0 per cent milk fat, 3.5 per cent protein and 36.0 per cent total solids Starch may be added to a maximum extent of 5.0 per cent under a declaration on a label as specified in sub-rule (2) of Rule 43. The standards for ice-cream shall also apply to softy ice-cream.

In case of ice-cream, where the chocolate or like covering portion forms a separate layer, only the ice-cream portion shall conform to the standards of ice-cream.

A.11.02.09--- MILK ICES OR MILK LOLLIES means the frozen product obtained from milk, skimmed milk, or milk product with or without the addition of cane sugar dextrose, liquid, glucose and dried liquid glucose, eggs, fruits, juices, nuts, chocolate, edible flavours and permitted food colours. It may contain permitted stabilizers not exceeding 0.5 per cent of the product. The mixture shall be suitably heat-treated before freezing. The product shall contain not more than 2.0 per cent milk fat, not less than 3.5 per cent proteins and not less than 20. per cent total solids.

5.8 The Food Safety and Standards (Food Products Standard and Food Additives) Rules as amended time to time defined the Ice Cream and Frozen Dessert as under:

2.1.7: DAIRY BASED DESSERTS/ CONFECTIONS

1. Ice Cream, Kulfi, Chocolate Ice Cream or Softy Ice Cream(hereafter referred to as the said product) means the product obtained by freezing a pasteurized mix prepared from milk and/or other products derived from milk with or without the addition of nutritive sweetening agents, fruit and fruit products,

eggs and egg products, coffee, cocoa, chocolate, condiments, spices, ginger and nuts and it may also contain bakery products such as cake or cookies as a separate layer and/or coating. The said product may be frozen hard or frozen to a soft consistency; the said product shall have pleasant taste and smell free from off flavour and rancidity; the said product may contain food additives permitted in these regulation including Appendix A; the said product conform to the microbiological requirements specified in Appendix B; the said product shall conform to the following requirements, namely:-

Requirement (1)	Ice Cream (2)	Medium Fat Ice Cream (3)	Low fat Ice Cream (4)
Total Solid	Not less than 36.0%	Not less than 30.0%	Not less than 26.0%
Wt/Vol (gms/1)	Not less than 525	Not less than 475	Not less than 475
Milk Fat	Not less than 10.0%	More than 2.5% but less than 10.0%	Not more than 2.5%
Milk Protein (Nx6.38)	Not less than 3.5%	Not less than 3.5%	Not less than 3.0%

Note: In case where Chocolate, Cake or similar food coating, base or layer forms a separate part of the product only the Ice Cream portion shall conform to the requirements given above. The type of ice-cream shall be clearly indicated on the label otherwise standard for ice-cream shall apply.

2. Dried Ice Cream Mix/ Dried Frozen Dessert/ Confection(hereafter referred to as the said product) means the product in a powder form which on addition of prescribed amount of water shall give a product conforming to the requirements of the respective products, namely - ice cream, medium fat ice- cream, low fat ice-cream as prescribed under regulation 2.1.7 (1) and frozen confection, medium fat frozen confection and low fat frozen confection as prescribed under regulation 2.1.7 (3) of these regulations except the requirement of weight /volume for both the products. The moisture content of the product shall not be more than 4.0 percent. It may contain food additives permitted in these regulation including Appendix A. It shall conform to the microbiological requirements prescribed in Appendix B.

3. Frozen Dessert / Frozen Confection (hereafter referred to as the said product) means the product obtained by freezing a pasteurized mix prepared with milk fat and / or edible vegetable

oils and fat having a melting point of not more than 37.0 degree C in combination and milk protein alone or in combination / or vegetable protein products singly or in combination with the addition of nutritive sweetening agents e.g. sugar, dextrose, fructose, liquid glucose, dried liquid glucose, maltodextrin, high maltose corn syrup, honey, fruit and fruit products, eggs and egg products coffee, cocoa, chocolate, condiments, spices, ginger, and nuts. The said product may also contain bakery products as cookies as a separate layer/or coating, it may be frozen hard or frozen to a soft consistency. It shall have pleasant taste and flavour free from off flavour and rancidity and may contain food additives permitted in Appendix A. It shall conform to the microbiological requirements prescribed in Appendix B. It shall conform to the following requirements:-

Requirement (1)	Frozen Dessert (2)	Medium Fat Frozen Dessert (3)	Low fat Frozen (4)
Total Solid	Not less than 36.0%	Not less than 30.0%	Not less than 26.0%
Wt/Vol (gms/1)	Not less than 525	Not less than 475	Not less than 475
Milk Fat	Not less than 10.0%	More than 2.5% but less than 10.0%	Not more than 2.5%
Milk Protein (Nx6.25)	Not less than 3.5%	Not less than 3.5%	Not less than 3.0%

Note: In case where Chocolate, Cake or similar food coating, base or layer forms a separate part of the product only the frozen dessert/ confection portion shall conform to the requirements given above. The type of frozen confection shall be clearly indicated on the label otherwise, standards of frozen dessert / frozen confection shall apply and every package of Frozen Dessert / Frozen Confection shall bear proper label declaration under regulation 2.4.5 (41) of Food Safety and Standards (Packaging and Labeling) Regulations, 2011.

The standard prescribed by the Bureau of Indian Standard in respect of Ice cream prescribed under IS:2802:1964 reaffirmed 2009 is same to that standard prescribed under Food Adulteration Act, 1954 and Food Safety and Standards (Food Products Standard and Food Additives) Rules as discussed above. Further Bureau of Indian Standard prescribed that ice cream shall comply with the requirement given in the Table-1 and that the no fat other than milk fat shall be present in the product with exception of that derived from eggs, cocoa, nuts and emulsifiers.

From the above it is clear that Ice cream shall comply with the requirement given in the said regulation and no fat other than milk fat shall be present in the ice cream. When vegetable fat is used instead of the milk fat the resultant product will be fall under the purview of frozen dessert as all other standards are same except the milk fat.

5.9 Prevention of Food Adulteration Act, 1954 was replaced by Food Safety and Standards Act, 2006 which prescribed not only the composition of the food but also prescribed other details such as manufacturing, packing, labeling, selling etc. and every food articles manufacturers are required to follow the said norms fixed by the Food Safety and Standards Authority of India and labeled the same as per the standard prescribed by the said authority. As per the Food Safety and Standards Authority of India Frozen Dessert is a separate commodity from the Ice cream as discussed in detail above, accordingly the Noticee declared their Non-dairy products purported ice cream as Frozen Dessert as evident from the statement of Shri Ajay Keshao Deshpande, Vice President (Operations) of the Noticee was recorded under Section 14 of Central Excise Act, 1944 on 1st August, 2006 wherein on being enquired he deposed that products containing less than 10% milk fat would not be termed as Ice cream and they were not supposed to sell these products as Ice cream in terms of Food and Drug Administration directives. The products containing less than 10% milk fat and/or having vegetable oil (fat) as a substitute was sold by them as Frozen Desserts. This product having milk fat less than 10% and/or having vegetable oil (fat) as a substitute was not recognized by FDA as ice cream. He further deposed that they were selling the same as "Frozen Desserts" which is known as Ice Cream in Trade Parlance but the same is not true as discussed above. Frozen Dessert is not same as ice cream as claimed by the Noticee as evident from the fact that Food Safety and Standards (Food Products Standard and Food Additives) Rules has prescribed the constituent of Frozen Dessert and thus it is proved beyond doubt that Frozen Dessert is marketable food article and known as such in the trade parlance otherwise the competent authority are not required to prescribed the standard for such an article.

Usage of vegetable fat in the preparation of Ice cream was started worldwide during the year 1996-97 in order to culminate the cost of production of ice cream as the cost of milk fat is four-five times higher than the cost of vegetable fat. By replacing the milk fat with vegetable fat the resultant product will not remain as Ice cream rather it is known in the market as Frozen dessert as discussed above. The Frozen dessert is recognized/understood as such by the people dealing with it and also treated and consumed as such.

It is not a coincidence that standard prescribed by the Food Safety and Standards Authority of India under Food Safety and Standards (Food Products Standard and Food Additives) Rules tallied with the constituents of Frozen Dessert manufactured and marketed by the Noticee declaring their product as Frozen Dessert in terms of Food Safety and Standards (Food Products Standard and Food Additives) Rules and cleared the same as such but discharging the Central Excise duty by treating them as Ice cream. This is nothing but modus operandi adopted by the Noticee to evade the payment of appropriate Central Excise duty.

5.11 Since the Ice cream and Frozen Dessert has not been defined in the Central Excise tariff Act, hence it has to be taken in a scientific and technical sense. Considering the scientific definition of Ice cream given under Bureau of Indian Standard, Prevention of Food Adulteration Act, 1954 and Food Safety and Standards (Food Products Standard and Food Additives) Rules all these specifies that Ice cream should not contain fat other than Milk fat. Whereas the constituent of Frozen Dessert contained the aforesaid Act specifies about uses of fat other than milk fat.

5.13 The Notices contended that Frozen Dessert is known as Ice cream in trade and in common parlance and relied upon various decisions but they have not submitted any documentary evidence in support of their claim that their final product is known as Ice cream in the trade and common parlance. It is an admitted fact that they have declared their disputed product as Frozen Dessert on each and every pack of such product. Besides above, they raised the invoices in respect of disputed items as Frozen Dessert as admitted and explained by Shri Ajay Keshao Deshpande, Vice President (Operations) in his statement dt.

01.08.2006 wherein he admitted that they are selling frozen dessert and they mention the same in the each packet by suffixing FD before flavour name. The Frozen Dessert is marketable goods and known as such in the trade parlance as evident from the fact that same was classified by the Food Safety and Standards (Food Products Standard and Food Additives) Rules. It cannot be presumed that Food Safety and Standards Authority of India has classified a goods which is not known as such in the trade or common parlance and it will defeat the basic purpose of quality and standard food prescribed under the said Act as discussed in details.

The Hon'ble Supreme Court in the matter of CCE Vs Connaught Plaza Restaurant (p) Ltd reported in 2002(286)ELT-321(SC) held that in the absence of any statutory definition of the goods, the same has to be construed in common parlance understanding. A statutory definition in precise terms; words, entries and items in taxing statutes must be construed in terms of their commercial or trade understanding, or according to their popular meaning. In other words they have to be constructed in the sense that the people conversant with the subject-matter of the statute, would attribute to it. In common parlance and in trade Frozen Dessert is not known as Ice cream as discussed in detail, hence the resultant product which was declared by the Noticee themselves as Frozen Dessert in term of directive of Food and Drug Authority and hence the same cannot be classified under 2105 as Ice cream rather the same will be classifiable under 2106/2108 as food preparation not elsewhere specified or included as Frozen dessert has not been specified anywhere in the Central Excise Tariff Act, 1985. I do not find any merit in the defense submission put forth by the Noticee in support of classification of their product. The decisions relied by the Noticee are distinct and different as discussed in detail and hence not applicable in the instant case. Thus Frozen desert manufactured by the Noticee by using Vegetable fat in place of Milk fat, will fall under the chapter heading No. 2106/2108 of Central Excise Tariff Act, 1985 during the material times as discussed in detail and I hold accordingly.

6. Since I found that Frozen Dessert manufactured with use of vegetable fat in place of Milk fat is classifiable under chapter

2106/2105 as discussed in detail above, hence the duty so evaded by the Noticee during the period 2006 to 2013 is recoverable from them under Section 11A of the Central Excise Act, 1944 and I hold accordingly."

4.4 The issue in the present case is no longer res integra and has been decided by Hon'ble Supreme Court in the case of Connaught Plaza Restaurant (P) Ltd. [2012 (286) ELT 321 (SC)] wherein the Hon'ble Supreme Court has held as follows:-

"11. In short, the case of the assessee is that "soft serve" is a product distinct and separate from "ice-cream" since the world over "ice-cream" is commonly understood to have milk fat content above 8% whereas 'soft serve' does not contain more than 5% of milk fat; it cannot be considered as "ice-cream" by common parlance understanding since it is marketed by the assessee the world over as 'soft serve'; "ice-cream" should be understood in its scientific and technical sense; and hence, for these reasons, 'soft serve' is to be classified under Heading 04.04 as "other dairy produce" and not under Heading 21.05. On the other hand, Revenue claims that "ice-cream" has not been defined under Heading 21.05 or in any of the chapter notes of Chapter 21; upon conducting enquiries it was found that 'soft serve' is known as "ice-cream" in common parlance; and hence, it must be classified in the category of "ice-cream" under Heading 21.05 of the Tariff Act.

12. Before we proceed to evaluate the rival stands, it would be necessary to notice the length and breadth of the relevant tariff entries that have been referred to by both the learned counsel.

"Chapter 4 Dairy Produce, etc. 312

04.04 Other dairy produce; Edible products of animal origin, not elsewhere specified or included

- Ghee :

0404.11 -- Put up in unit containers and bearing a brand name Nil

0404.19 -- Other Nil

0404.90 -- Other Nil

Heading No.	Sub-heading No.	Description of goods	Rate of duty
(1)	(2)	(3)	(4)
21.052105.00		Ice-cream and other edible ice, whether or not containing cocoa	16%
21.08		Edible preparations, not elsewhere specified or included	
2108.91		- Not bearing a brand name	Nil

13. Chapter 4 of the Tariff Act reads "dairy produce; edible products of animal origin, not elsewhere specified or included." Heading 04.04 is applicable to "other dairy produce; or edible products of animal origin which are not specified or included elsewhere." As is evident from Chapter Note 4, the terms of Heading 04.04 have been couched in general terms with wide amplitude. Chapter Note 4 reads :

"4. Heading No. 04.04 applies, inter alia, to butter-milk, curdled milk, cream, yogurt, whey, curd, and products consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter or flavoured or containing added fruit or cocoa and includes fats and oils derived from milk (e.g. milkfat, butterfat and butteroil), dehydrated butter and ghee."

14. On the other hand, Chapter 21 of the Act is applicable to "Miscellaneous Edible Preparations". Heading 21.05 refers to "ice-cream and other edible ice". It is significant to note that none of the terms have been defined in the chapter. Further Heading 2108.91 is a residuary entry of wide amplitude applicable to "edible preparations, not elsewhere specified or included" and "not bearing a brand name".

15. According to the rules of interpretation for the First Schedule to the Tariff Act, mentioned in Section 2 of the Tariff Act, classification of an excisable goods shall be determined according to the terms of the headings and any corresponding chapter or section notes. Where these are not clearly determinative of classification, the same shall be effected according to Rules 3, 4 and 5 of the general rules of interpretation. However, it is also a well known principle that in the absence of any statutory definitions, excisable goods mentioned in tariff entries are construed according to the common parlance understanding of such goods.

16. The general rules of interpretation of taxing statutes were succinctly summarized by this Court in *Oswal Agro Mills Ltd. & Ors. v. Collector of Central Excise & Ors.* - 1993 Supp (3) SCC 716 at page 720 = 1993 (66) E.L.T. 37 (S.C.); as follows :

"4. The provisions of the tariff do not determine the relevant entity of the goods. They deal whether and under what entry, the identified entity attracts duty. The goods are to be identified and then to find the appropriate heading, sub-heading under which the identified goods/products would be classified. To find the appropriate classification description employed in the tariff nomenclature should be appreciated having regard to the terms of the headings read with the relevant provisions or statutory rules or interpretation put up thereon. For exigibility to excise duty the entity must be specified in positive terms under a particular tariff entry. In its absence it must be deduced from a proper construction of the tariff entry. There is neither intendment nor equity in a taxing statute. Nothing is implied. Neither can we insert nor can we delete anything but it should be interpreted and construed as per the words the legislature has chosen to employ in the Act or rules. There is no room for assumption or presumptions. The object of the Parliament has to be gathered from the language used in the statute

... Therefore, one has to gather its meaning in the legal setting to discover the object which the Act seeks to serve and the purpose of the amendment brought about. The task of interpretation of

the statute is not a mechanical one. It is more than mere reading of mathematical formula. It is an attempt to discover the intention of the legislature from the language used by it, keeping always in mind, that the language is at best an imperfect instrument for the expression of actual human thoughts. It is also idle to expect that the draftsman drafted it with divine prescience and perfect and unequivocal clarity. Therefore, court would endeavour to eschew literal construction if it produces manifest absurdity or unjust result. In Manmohan Das v. Bishun Das : (1967) 1 SCR 836, a Constitution Bench held as follows :

"...The ordinary rule of construction is that a provision of a statute must be construed in accordance with the language used therein unless there are compelling reasons, such as, where a literal construction would reduce the provision to absurdity or prevent manifest intention of the legislature from being carried out."

17. Therefore, in order to find an appropriate entry for the classification of 'soft serve', it would be necessary to first construe the true scope of the relevant headings. As noted above, none of the terms in Heading 04.04 and Heading 21.05 have been defined and no technical or scientific meanings have been given in the chapter notes. Evidently, 'soft serve' is not defined in any of the chapters aforesaid. Under these circumstances, it becomes imperative to examine if the subject goods could come under the purview of any of the classification descriptions employed in the Tariff Act. Having regard to the nature of the pleadings, the issue is whether the term "ice-cream" in Heading 21.05 includes within its ambit the product 'soft serve'. That leads us to the pivotal question, whether, in the absence of a statutory definition, the term "ice-cream" under Heading 21.05 is to be construed in light of its scientific and technical meaning, or, whether we are to consider this term in its common parlance understanding to determine whether its amplitude is wide enough to include 'soft serve' within its purview.

Common Parlance Test :

18. *Time and again, the principle of common parlance as the standard for interpreting terms in the taxing statutes, albeit subject to certain exceptions, where the statutory context runs to the contrary, has been reiterated. The application of the common parlance test is an extension of the general principle of interpretation of statutes for deciphering the mind of the law maker; "it is an attempt to discover the intention of the Legislature from the language used by it, keeping always in mind, that the language is at best an imperfect instrument for the expression of actual human thoughts." [(See Oswal Agro Mills Ltd (supra)].*

19. *A classic example on the concept of common parlance is the decision of the Exchequer Court of Canada in The King v. Planter Nut and Chocolate Company Ltd. - (1951) C.L.R. (Ex. Court) 122. The question involved in the said decision was whether salted peanuts and cashew nuts could be considered to be "fruit" or "vegetable" within the meaning of the Excise Tax Act. Cameron J., delivering the judgment, posed the question as follows :*

"...would a householder when asked to bring home fruit or vegetables for the evening meal bring home salted peanuts, cashew or nuts of any sort? The answer is obviously 'no'."

Applying the test, the Court held that the words "fruit" and "vegetable" are not defined in the Act or any of the Acts in pari materia. They are ordinary words in every-day use and are therefore, to be construed according to their popular sense.

20. *In Ramavatar Budhaiprasad Etc. v. Assistant Sales Tax Officer, Akola - (1962) 1 SCR 279, the issue before this Court was whether betel leaves could be considered as "vegetables" in the Schedule of the C.P. & Berar Sales Tax Act, 1947 for availing the benefit of exemption. While construing the import of the word "vegetables" and holding that betel leaves could not be held to be "vegetables", the Court observed thus :*

"...But this word must be construed not in any technical sense nor from the botanical point of view but as understood in common parlance. It has not been defined in the Act and being a

word of every day use it must be construed in its popular sense meaning "that sense which people conversant with the subject matter with which the statute is dealing would attribute to it."

21. *In Commissioner of Sales Tax, Madhya Pradesh v. Jaswant Singh Charan Singh - (1967) 2 SCR 720, the Court had to decide whether "charcoal" could be classified as "coal" under Entry I of Part III of Schedule II of the Madhya Pradesh General Sales Tax Act, 1958. Answering the question in the affirmative, it was observed as follows :*

"3. Now, there can be no dispute that while coal is technically understood as a mineral product, charcoal is manufactured by human agency from products like wood and other things. But it is now well-settled that while interpreting items in statutes like the Sales Tax Acts, resort should be had not to the scientific or the technical meaning of such terms but to their popular meaning or the meaning attached to them by those dealing in them, that is to say, to their commercial sense....."

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"5. The result emerging from these decisions is that while construing the word 'coal' in Entry I of Part III of Schedule II, the test that would be applied is what would be the meaning which persons dealing with coal and consumers purchasing it as fuel would give to that word. A sales tax statute is being one levying a tax on goods must in the absence of a technical term or a term of science or art, be presumed to have used an ordinary term as coal according to the meaning ascribed to it in common parlance. Viewed from that angle both a merchant dealing in coal and a consumer wanting to purchase it would regard coal not in its geological sense but in the sense as ordinarily understood and would include 'charcoal' in the term 'coal'. It is only when the question of the kind or variety of coal would arise that a distinction would be made between coal and charcoal; otherwise, both of them would in ordinary parlance as also in their commercial sense be spoken as coal."

22. *In Dunlop India Ltd. v. Union of India & Ors. - (1976) 2 SCC 241 = 1983 (13) E.L.T. 1566 (S.C.), at page 251, while*

holding that VP Latex was to be classified as "raw rubber" under Item 39 of the Indian Tariff Act, 1934, this Court observed :

"29. It is well established that in interpreting the meaning of words in a taxing statute, the acceptance of a particular word by the trade and its popular meaning should commend itself to the authority."

"34. We are, however, unable to accept the submission. It is clear that meanings given to articles in a fiscal statute must be as people in trade and commerce, conversant with the subject, generally treat and understand them in the usual course. But once an article is classified and put under a distinct entry, the basis of the classification is not open to question. Technical and scientific tests offer guidance only within limits. Once the articles are in circulation and come to be described and known in common parlance, we then see no difficulty for statutory classification under a particular entry."

23. In Shri Bharuch Coconut Trading Co. and Ors. v. Municipal Corporation of the City of Ahmedabad & Ors. - 1992 Suppl. (1) SCC 298, this Court applied the test as "would a householder when asked to bring some fresh fruits or some vegetable for the evening meal, bring coconut too as vegetable (sic)?" The Court held that when a person goes to a commercial market to ask for coconuts, "no one will consider brown coconut to be vegetable or fresh fruit much less a green fruit. No householder would purchase it as a fruit." Therefore, the meaning of the words 'brown coconut', and whether it was a green fruit, had to be "understood in its ordinary commercial parlance." Accordingly it was held that brown coconut would not be considered as green fruit.

24. In Indian Aluminium Cables Ltd. v. Union of India & Ors. - (1985) 3 SCC 284 = 1985 (21) E.L.T. 3 (S.C.), this Court observed the following :

"...This Court has consistently taken the view that, in determining the meaning or connotation of words and expressions describing an article in a tariff schedule, one principle which is fairly well-settled is that those words and

expressions should be construed in the sense in which they are understood in the trade, by the dealer and the consumer. The reason is that it is they who are concerned with it and, it is the sense in which they understand it which constitutes the definitive index of the legislative intention”.

25. *In Collector of Central Excise, Kanpur v. Krishna Carbon Paper Co. - (1989) 1 SCC 150 = 1988 (37) E.L.T. 480 (S.C.), this Court has opined thus :*

“12. It is a well settled principle of construction, as mentioned before, that where the word has a scientific or technical meaning and also an ordinary meaning according to common parlance, it is in the latter sense that in a taxing statute the word must be held to have been used, unless contrary intention is clearly expressed by the legislature....

...But there is a word of caution that has to be borne in mind in this connection, the words must be understood in popular sense, that is to say, these must be confined to the words used in a particular statute and then if in respect of that particular items, as artificial definition is given in the sense that a special meaning is attached to particular words in the statute then the ordinary sense or dictionary meaning would not be applicable but the meaning of that type of goods dealt with by that type of goods in that type of market, should be searched.”

26. *In Reliance Cellulose Products Ltd., Hyderabad v. Collector of Central Excise, Hyderabad-I Division, Hyderabad - (1997) 6 SCC 464 = 1997 (93) E.L.T. 646 (S.C.), it was observed :*

“20. In other words, if the word used in a fiscal statute is understood in common parlance or in the commercial world in a particular sense, it must be taken that the Excise Act has used that word in the commonly understood sense. That sense cannot be taken away by attributing a technical meaning to the word. But if the legislature itself has adopted a technical term, then that technical term has to be understood in the technical sense. In other words, if in the fiscal statute, the article in question falls within the ambit of a technical term used under a particular entry, then that article cannot be taken away from that entry

and placed under the residuary entry on the pretext that the article, even though it comes within the ambit of the technical term used in a particular entry, has acquired some other meaning in market parlance. For example, if a type of explosive (RDX) is known in the market as Kala Sabun by a section of the people who uses these explosives, the manufacturer or importer of these explosives cannot claim that the explosives must be classified as soap and not as explosive."

27. There is a catena of decisions that has dealt with the classification of Ayurvedic products between the categories of medicaments and cosmetics and in the process made significant pronouncements on the common parlance test.

28. In Shree Baidyanath Ayurved Bhavan Ltd. v. Collector of Central Excise, Nagpur - (1996) 9 SCC 402 = 1996 (83) E.L.T. 492 (S.C.), at page 404 this Court while applying the common parlance test held that the appellant's product "Dant Lal Manjan" could not qualify as a medicament and held as follows :

"The Tribunal rightly points out that in interpreting statutes like the Excise Act the primary object of which is to raise revenue and for which purpose various products are differently classified, resort should not be had to the scientific and technical meaning of the terms and expressions used but to their popular meaning, that is to say the meaning attached to them by those using the product. It is for this reason that the Tribunal came to the conclusion that scientific and technical meanings would not advance the case of the appellants if the same runs counter to how the product is understood in popular parlance."

29. In Naturalle Health Products (P) Ltd. v. Collector of Central Excise, Hyderabad - (2004) 9 SCC 136 = 2003 (158) E.L.T. 257 (S.C.), two appeals were under consideration. One was with respect to Vicks Vapo Rub and Vicks Cough Drops while the other was with respect to Sloan's Balm and Sloan's Rub. It was observed that when there is no definition of any kind in the relevant taxing statute, the articles enumerated in the tariff schedules must be construed as far as possible in their ordinary or popular sense, that is, how the common man and persons dealing with it understand it. The Court held that in both the

cases the customers, the practitioners in Ayurvedic medicine, the dealers and the licensing officials treated the products in question as Ayurvedic medicines and not as Allopathic medicines, which gave an indication that they were exclusively Ayurvedic medicines or that they were used in the Ayurvedic system of medicine, though they were patented medicines. Consequently, it was held that the said products had to be classified under the Chapter dealing with medicaments.

30. B.P.L. Pharmaceuticals Ltd. v. Collector of Central Excise, Vadodara - (1995) Suppl. (3) SCC 1 = 1995 (77) E.L.T. 485 (S.C.) was a case in which product "Selsun Shampoo" was under consideration for the purpose of classification under the Tariff Act. According to the manufacturers this shampoo was a medicated shampoo meant to treat dandruff which is a disease of the hair. This Court held that having regard to the preparation, label, literature, character, common and commercial parlance, the product was liable to be classified as a medicament. It was not an ordinary shampoo which could be of common use by common people. The shampoo was meant to cure a particular disease of hair and after the cure it was not meant to be used in the ordinary course.

31. Therefore, what flows from a reading of the aforementioned decisions is that in the absence of a statutory definition in precise terms; words, entries and items in taxing statutes must be construed in terms of their commercial or trade understanding, or according to their popular meaning. In other words they have to be constructed in the sense that the people conversant with the subject-matter of the statute, would attribute to it. Resort to rigid interpretation in terms of scientific and technical meanings should be avoided in such circumstances. This, however, is by no means an absolute rule. When the Legislature has expressed a contrary intention, such as by providing a statutory definition of the particular entry, word or item in specific, scientific or technical terms, then, interpretation ought to be in accordance with the scientific and technical meaning and not according to common parlance understanding.

Classification of 'Soft-Serve'

32. *In light of these principles, we may now advert to the question at hand, viz. classification of 'soft serve' under the appropriate heading. As aforesaid, the Tribunal has held that in view of the technical literature and stringent provisions of the PFA, 'soft serve' cannot be classified as "ice-cream" under Entry 21.05 of the Tariff Act. We are of the opinion, that in the absence of a technical or scientific meaning or definition of the term "ice-cream" or 'soft serve', the Tribunal should have examined the issue at hand on the touchstone of the common parlance test.*

33. *As noted before, Headings 04.04 and 21.05 have been couched in non-technical terms. Heading 04.04 reads "other dairy produce; edible products of animal origin, not elsewhere specified or included" whereas Heading 21.05 reads "ice-cream and other edible ice". Neither the headings nor the chapter notes/section notes explicitly define the entries in a scientific or technical sense. Further, there is no mention of any specifications in respect of either of the entries. Hence, we are unable to accept the argument that since 'soft serve' is distinct from "ice-cream" due to a difference in its milk fat content, the same must be construed in the scientific sense for the purpose of classification. The statutory context of these entries is clear and does not demand a scientific interpretation of any of the headings. Therefore, in the absence of any statutory definition or technical description, we see no reason to deviate from the application of the common parlance principle in construing whether the term "ice-cream" under Heading 21.05 is broad enough to include 'soft serve' within its import.*

34. *The assessee has averred that 'soft serve' cannot be regarded as "ice-cream" since the former is marketed and sold around the world as 'soft serve'. We do not see any merit in this averment. The manner in which a product may be marketed by a manufacturer, does not necessarily play a decisive role in affecting the commercial understanding of such a product. What matters is the way in which the consumer perceives the product at the end of the day notwithstanding marketing strategies.*

Needless to say the common parlance test operates on the standard of an average reasonable person who is not expected to be aware of technical details relating to the goods. It is highly unlikely that such a person who walks into a "McDonalds" outlet with the intention of enjoying an "ice-cream", 'softy' or 'soft serve', if at all these are to be construed as distinct products, in the first place, will be aware of intricate details such as the percentage of milk fat content, milk non-solid fats, stabilisers, emulsifiers or the manufacturing process, much less its technical distinction from "ice-cream". On the contrary, such a person would enter the outlet with the intention of simply having an "ice-cream" or a 'softy ice-cream', oblivious of its technical composition. The true character of a product cannot be veiled behind a charade of terminology which is used to market a product. In other words, mere semantics cannot change the nature of a product in terms of how it is perceived by persons in the market, when the issue at hand is one of excise classification.

35. Besides, as noted above, learned senior counsel, appearing for the assessee quoted some culinary authorities for the submission that ice-cream must necessarily contain more than 10% milk fat content and be served only in a frozen to hard stage for it to qualify as "ice-cream". It was argued that classifying 'soft serve', containing 5% milk fat content, as "ice-cream", would make their product stand foul of requirements of the PFA which demands that an "ice-cream" must have at least 10% milk fat content.

36. Such a hard and fast definition of a culinary product like "ice-cream" that has seen constant evolution and transformation, in our view, is untenable. Food experts suggest that the earliest form of ice-cream may have been frozen syrup. According to Maguelonne Toussaint-Samat in her History of Food, "They poured a mixture of snow and saltpeter over the exteriors of containers filled with syrup, for, in the same way as salt raises the boiling-point of water, it lowers the freezing-point to below zero." The author charts the evolution of "ice-cream" in the landmark work from its primitive syrupy form to its

contemporary status with more than hundred different forms, and categorizes 'soft serve' as one such form.

37. Noted author C. Clarke states the following in "The Science of Ice-Cream" :

"The legal definition of ice-cream varies from country to country. In the UK 'ice-cream' is defined as a frozen food product containing a minimum of 5% fat and 7.5% milk solids other than fat (i.e. protein, sugars and minerals), which is obtained by heat-treating and subsequently freezing an emulsion of fat, milk solids and sugar (or sweetener), with or without other substances. 'Dairy ice-cream' must in addition contain no fat other than milk fat, with the exception of fat that is present in another ingredient, for example egg, flavouring, or emulsifier.' In the USA, ice-cream must contain at least 10% milk fat and 20% total milk solids, and must weigh a minimum of 0.54 kg I-' Until 1997, it was not permitted to call a product 'ice-cream' in the USA if it contained vegetable fat.

Ice-cream is often categorized as premium, standard or economy. Premium ice-cream is generally made from best quality ingredients and has a relatively high amount of dairy fat and a low amount of air (hence it is relatively expensive), whereas economy ice-cream is made from cheaper ingredients (e.g. vegetable fat) and contains more air. However, these terms have no legal standing within the UK market, and one manufacturer's economy ice-cream may be similar to a standard ice-cream from another."

Therefore, while some authorities are strict in their classification of products as "ice-cream" and base it on milk fat content, others are more liberal and identify it by other characteristics. There is, thus, no clear or unanimous view regarding the true technical meaning of "ice-cream". In fact, there are different forms of "ice-cream" in different parts of the world that have varying characteristics.

38. On the basis of the authorities cited on behalf of the assessee, it cannot be said that "ice-cream" ought to contain more than 10% milk fat content and must be served only frozen

and hard. Besides, even if we were to assume for the sake of argument that there is one standard scientific definition of "ice-cream" that distinguishes it from other products like 'soft serve', we do not see why such a definition must be resorted to in construing excise statutes. Fiscal statutes are framed at a point of time and meant to apply for significant periods of time thereafter; they cannot be expected to keep up with nuances and niceties of the gastronomical world. The terms of the statutes must be adapted to developments of contemporary times rather than being held entirely inapplicable. It is for precisely this reason that this Court has repeatedly applied the "common parlance test" every time parties have attempted to differentiate their products on the basis of subtle and finer characteristics; it has tried understanding a good in the way in which it is understood in common parlance.

39. Learned counsel for the assessee had strongly relied on Akbar Badruddin Jiwani (supra) to buttress his claim, that in matters pertaining to classification of commodity taxation, technical and scientific meaning of the product will prevail rather than the commercial parlance, and hence on this basis, Headings 04.04 and 21.05 were to be harmoniously construed so that 'soft serve' would be classified under Heading 04.04. We are afraid, reliance on this judgment is misplaced and out of context. It would be useful to draw a distinction between the contexts of Akbar Badruddin Jiwani (supra) and the present factual matrix.

40. In Akbar Badruddin Jiwani (supra) the issue was whether the slabs of calcareous stones (which were in commercial parlance known as marble) being imported by the appellant were to be regarded as "marble" under Item No. 62 of the List of Restricted Items, Appendix 2, Part 8 of Import and Export Policy given that Item No. 25.15 [Appendix 1-B, Schedule I to the Import (Control) Order, 1955] referred to "marble, travertine, ecaussine and other calcareous monumental or building stone of an apparent specific gravity of 2.5 or more and Alabaster.....". Hence, the controversy revolved around whether "marble" should be construed in its scientific and technical meaning, or according to its commercial understanding, in order to determine whether the appellant's goods would come within the ambit of

Entry No. 62 of List of Restricted Items. The Court examined both the entries and opined that Item No. 25.15 referred specifically not only to marble but also to other calcareous stones having specific gravity of 2.5, whereas, Entry No. 62 referred to the restricted item "marble" only. The content of Item No. 25.15 had been couched in scientific and technical terms and therefore, "marble" had to be construed according to its scientific meaning and not in the sense as commercially understood or meant in trade parlance. Hence, in this context this Court held that the general principle of interpretation of tariff entries is of a commercial nomenclature but the said doctrine of commercial nomenclature or trade understanding should be departed from in a case where the statutory content in which the tariff entry appears, requires such a departure. In other words, a trade understanding or commercial nomenclature can be given only in cases where the word in the tariff entry has not been used in a scientific or technical sense and where there is no conflict between the words used in the tariff entry and any other entry in the Tariff Schedule. Thus, these observations of the Court were made in a context where one of the tariff entries was couched in a scientific and technical sense and had to be harmonized with the other entry. It would have run counter to the statutory content of the legislation, to construe the term "marble" in its commercial sense.

41. It is significant to note that the question of classification of 'soft serve' is based on a different set of facts in a different context. Heading 21.05 which refers to "ice-cream and other edible ice" is not defined in a technical or scientific manner, and hence, this does not occasion the need to construe the term "ice-cream" other than in its commercial or trade understanding. Since, the first condition itself has not been fulfilled; the question of harmonizing Heading 21.05 with 04.04 by resort to the scientific and technical meaning of the entries does not arise at all. Hence, we are of the opinion that the ratio of Akbar Badruddin Jiwani (supra) does not apply to the facts of the present case.

42. Learned counsel for the assessee had vociferously submitted that the common parlance understanding of "ice-

cream” can be inferred by its definition as appearing under the PFA. According to Rule A 11.20.08 the milk fat content of “ice-cream” and “softy ice-cream” shall not be less than 8% by weight. Hence, according, to the learned counsel, the term “ice-cream” under Heading 21.05 had to be understood in light of the standards provided in the PFA, more so when selling “ice-cream” with fat content of less than 10% would attract criminal action, as held in Baburao Ravaji Mharulkar (supra).

43. We are unable to persuade ourselves to agree with the submission. It is a settled principle in excise classification that the definition of one statute having a different object, purpose and scheme cannot be applied mechanically to another statute. As aforesaid, the object of the Excise Act is to raise revenue for which various goods are differently classified in the Act. The conditions or restrictions contemplated by one statute having a different object and purpose should not be lightly and mechanically imported and applied to a fiscal statute for non-levy of excise duty, thereby causing a loss of revenue. [See; Medley Pharmaceuticals Limited v. Commissioner of Central Excise and Customs, Daman - (2011) 2 SCC 601 = 2011 (263) E.L.T. 641 (S.C.) and Commissioner of Central Excise, Nagpur v. Shree Baidyanath Ayurved Bhavan Limited - 2009 (12) SCC 419 = 2009 (237) E.L.T. 225 (S.C.)]. The provisions of PFA, dedicated to food adulteration, would require a technical and scientific understanding of “ice-cream” and thus, may require different standards for a goods to be marketed as “ice-cream”. These provisions are for ensuring quality control and have nothing to do with the class of goods which are subject to excise duty under a particular tariff entry under the Tariff Act. These provisions are not a standard for interpreting goods mentioned in the Tariff Act, the purpose and object of which is completely different.

44. Learned counsel for the assessee also contended that based on Rule 3(a) of the General Rules of Interpretation which states that a specific entry shall prevail over a general entry, ‘soft serve’ will fall under Heading 04.04 since it is a specific entry. We do not see any merit in this contention. The learned counsel for the assessee had himself contended that “ice-cream” was a

dairy product and would have been classified under Heading 04.04 if Heading 21.05 had not been inserted into the Tariff Act. However, in the presence of Heading 21.05, "ice-cream" cannot be classified as a dairy product under Heading 04.04. Hence, it is obvious that in relation to Heading 04.04, Heading 21.05 is clearly a specific entry. Therefore, we cannot subscribe to the claim that Heading 04.04 is to be regarded as a specific entry under Rule 3(a) of the General Rules of Interpretation, since such an interpretation would be contrary to the statutory context of Heading 21.05. In conclusion, we reject the view taken by the Tribunal and hold that 'soft serve' is to be classified as "ice-cream" under Heading 21.05 of the Act.

45. At this stage it may be relevant to refer to Trade Notice No. 45/2001 dated 11th June, 2001 of Mumbai Commissionerate-IV which came to our notice. According to the said notification, "softy ice-cream/soft serve" dispensed by vending machines, sold and consumed as "ice-cream", is classifiable under Entry 21.05 of the Act. The same is reproduced below :

"Classification of Softy Ice-Cream being sold in restaurant etc. dispensed by vending machine

[Mumbai Commissionerate IV Trade Notice No. 45/2001, dated 11-6-2001]

Ice-Cream dispensed by vending machine falling under chapter 21 has been made liable to nil rate of duty vide Sl. No. 8 of Notification No. 3/2001-C.E., dated 1-3-2001.

Doubts have been raised as regards to the classification of softy ice-cream/soft serve dispensed by vending machine and soft serve mix used for its manufacture prior to 1-3-2001. A manufacturer was obtaining soft serve mix and processing it in his restaurant for manufacture of softy ice-cream. The process involved lowering of temperature so that it changes its form from liquid to semi-solid state and incorporation of air, which results in production of overrun, in Tylor Vending Machine.

The product that emerges after this process is a completely different product and is ready to be consumed immediately. It

has all the ingredients of an ice-cream. The product is sold and consumed as ice-cream.

In the circumstances, it is clarified by the Board that softy ice-cream is correctly classifiable under heading 21.05 of Central Excise Tariff. As per HSN Explanatory Notes, heading 19.01 also cover mix bases (e.g. powders) for making ice-cream. It has been further clarified that soft serve mix will be correctly classifiable under heading 19.01.

All the trade associations are requested to bring the contents of this trade notice to the attention of their member manufacturers in particular, and trade in general.

Sd/-

(Neelam Rattan Negi)

Commissioner

Central Excise, Mumbai-IV"

While it is true that the trade notice is not binding upon this Court, it does indicate the commercial understanding of 'soft-serve' as 'softy ice-cream'. Further, as this trade notice is in no way contrary to the statutory provisions of the Act, we see no reason to diverge from what is mentioned therein.

46. In view of the foregoing discussion, we are of the opinion that the Tribunal erred in law in classifying 'soft-serve' under tariff sub-heading 2108.91, as "Edible preparations not elsewhere specified or included", "not bearing a brand name". We hold that 'soft serve' marketed by the assessee, during the relevant period, is to be classified under tariff sub-heading 2105.00 as "ice-cream".

4.5 Commissioner has sought to distinguish this decision of the Hon'ble Apex Court by stating that the common parlance test would be applicable only if there is no statutory definition available. He would for this reason refer to the definitions as available in the other statutes and determine the classification. Even if the Commissioner is assumed to be correct in making such an observation we are unable to agree with the conclusions

arrived at. In para 5.3 of the impugned order, Commissioner has referred to relevant headings and also the HSN explanatory note. In our view HSN explanatory notes very clearly state that **"This heading covers ice cream, which is usually prepared with basis of milk or cream..."**. Para 4 of the show cause notice while describing the process of manufacture specifically notes as follows:-

"4. The manufacturing process of ice cream and Frozen Desert in M/s Dinshaws is as under:

The major ingredients viz. milk or skimmed milk powder and water, sugar, stabilizers are taken In a mixing vat. These ingredients contribute approximately 90% of total weight. This mix is warmed to 60° C so that sugar is completely dissolved in it. Further 10% milk cream or vegetable oil (fat) is added depending upon the type of ice cream to be produced. Products such produced is technically termed as liquid mix. This liquid mix is then homogenized and pasteurized at 83° C for 20 seconds and cooled down immediately to 5° C and held in an ageing vats for a period of 4 to 6 hours. This chilled liquid mix is added with edible colours and permitted flavours and then passed through continuous freezers which produces ice cream at - 5°C which is in a semi solid form. At this stage, fruits, nuts, chocolate chips etc. are incorporated as per requirement depending on the variety of ice cream or frozen desert to be produced. Then it is filled in a suitable packing material viz. cups, cones, party packs, bulk packs as per the requirement. The packed ice cream or frozen desert is then passed through hardening tunnel at -25° C to -35° C. Such hardened ice cream or frozen desert is stored at - 22° C till it is dispatched to subsequent cold chains."

4.6 It is clear that HSN do not prescribe any content of milk fat. The only requirement is that the goods are prepared with the basis of milk or cream. In the present case, even show cause notice records that the goods are manufactured with the basis of the milk. There being so, the impugned goods as per HSN merit classification under heading 2105. Reference to other Acts etc. can come into picture only if the goods could not be classified with reference to the description of the heading and the relevant sections and chapter notes. Definitely HSN

Explanatory Notes do suggest a classification. Reference is also made to US Ruling on the classification of similar goods.

"CLA-2-21:S:N:N7:231 812159

In your letter, dated May 11, 1995, you have requested a tariff classification ruling. The products are non-dairy frozen desserts. They are described thus:

1) Tartofu - chocolate; will be sold for retail and institutional distribution. The ingredients are sugar and/or glucose, margarine (vegetable margarine that may contain palm oil, monoglycerides, and fatty acid polyglycerol esters), soy protein, cocoa powder, dextrose, hazelnut flavor, guar gum, monoglycerides, diglycerides, xanthan gum, polysorbate, carrageen, calcium phosphate, and lecithin.

2) Frozen Tofu - six flavors: amaretto, burgundy cherry, chocolate, maple walnut, moka fudge, and vanilla; will be sold for institutional sale (i.e: hotels, restaurants, institutions, and food service). The ingredients are sugar, glucose, margarine (vegetable margarine, palm oil, monoglycerides, and fatty acid polyglycerol esters), soy protein, dextrose, guar gum, monoglycerides, diglycerides, xanthum gum, polysorbate, carrageen, calcium phosphate, and lecithin. In addition, amaretto contains almonds, hazelnuts, sunflower seed oil, cocoa powder, and natural flavor. Burgundy cherry contains cherries and artificial burgundy cherry flavor. Chocolate contains cocoa powder. Maple walnut contains walnuts and artificial maple flavor. Moka fudge contains fudge ripple (corn syrup, high fructose corn syrup, alkalized cocoa, modified corn starch, potassium sorbate as a mold inhibitor, and natural flavor), and cocoa powder. Vanilla contains natural flavor.

3) Granita - six flavors: black currant, lemon, mango, orange, raspberry, and wild berry; an Italian type sorbet; will be sold for institutional sale (i.e: hotels, restaurants, institutions, and food service). The ingredients are sugar and/or glucose, dextrose, guar bean gum, carob bean gum, cellulose gum, maltodextrine, and vegetable protein. In addition, black currant contains black currant flavor and natural flavor. Lemon contains lemon juice and natural flavor. Mango contains mango pulp and artificial flavor. Orange contains orange flavor and natural flavor. Raspberry contains raspberry flavor and natural flavor. Wild

*berry contains wild berry flavor and natural flavor. **The applicable subheading for the non-dairy frozen desserts will be 2105.00.5000, Harmonized Tariff Schedule of the United States (HTS), which provides for ice cream and other edible ice, whether or not containing cocoa, other, other.** The general rate of duty will be 19.5 percent ad valorem. Additional requirements may be imposed on these products by the Food and Drug Administration. You may contact the FDA at: U.S. Food and Drug Administration 200 C Street, S.W. Washington, DC 20204*

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

5.1 Following the above, we do not have any hesitation in holding that the impugned goods are correctly classifiable under heading 2105 00 00.

5.2 Accordingly the impugned orders do not have any merits and are set aside.

5.3 Appeals are allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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