

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4337 OF 2006

COMMISSIONER OF CENTRAL EXCISE ... Appellant

VERSUS

M/S AMRIT FOOD
(A DIVISION OF AMRIT CORPORATION LTD.) ... Respondent

O R D E R

The classification of the two products of the respondent-assessee is the issue which arises for consideration in the present appeal. These are milk shake mix and soft serve mix.

The Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as CESTAT) has classified these products under Chapter sub-Heading 0404.90 accepting the contention of the respondent-assessee in this behalf. However, the endeavour of the appellant-Revenue is to have the same covered under Chapter sub-Heading 1901.19.

These two entries, viz., 04.04 and 19.01 reads as under: -

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.

0404.19 Other

0404.90 Other

19.01 Malt extract, food preparations of flour, meal, starch or malt extract, not containing cocoa or containing less than 40% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included; food preparations of goods of heading Nos. 04.01 to 04.04, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included.

Put up in unit containers :

1901.11 For instant use.
1901.19 Other
1901.91 Malt extract.
1901.92 Food preparations containing malt or malt extract or cocoa powder in any proportion.
1901.99 Other"

Admitted facts are that the aforesaid two items are meant for institutional sales only and not for retail sale. The product soft serve mix is maintained at a degree of 8-9 centigrade and milk shake is maintained at temperature of 30-40 degree centigrade. The process of manufacture of soft serve mix/ milk shake mix is the same as in the case of ice-cream except that the process of incorporation of air and freezing are not undertaken in the factory of the assessee. Otherwise all the basic ingredients required for manufacturing of ice-cream were available in the aforesaid produce and even the aging process at temperature is 0 to 4 degree centigrade takes place in the factory of the assessee. It is also an admitted fact that the ingredients

of the products are milk to which sugar, glucose and milk powder are added.

On the aforesaid basis, we have to determine as to whether it falls in one or the other competing entries mentioned above.

Chapter Heading 04.04 deals with other dairy produce; edible products of animal origin not elsewhere specified or included. Thus, all the dairy produce other than those which are specified elsewhere (for example, ice cream is covered by chapter Heading 21) are covered by Chapter Heading 04.04. We would also like to mention here that Heading 04.01 which is the main heading gives the description of goods as: -

- "04.01 Milk and Cream, concentrated or containing added sugar or other sweetening matter
 - *In or in relation to the manufacture of which any process is ordinarily carried on with the aid of power:*
 - 0401.11 - Flavoured milk, whether sweetened or not, put up in Nil unit containers and ordinarily intended for sale
 - 0401.12 - Skimmed milk powder, specially prepared for feeding infants
 - 0401.13 - Milk powder, other than powder specially prepared for feeding infants, put up in unit containers and ordinarily intended for sale.
 - 0401.14 - Concentrated (condensed) milk, whether sweetened or not, put up in unit containers and ordinarily intended for sale.
 - 0401.19 - Other

It is clear from the aforesaid that all the products of milk and cream would be covered by this Chapter Heading and the addition of sugar or other sweetener would not make any difference.

Since the products in question are the mix of milk as well as milk powder, as far as milk, viz., flavoured milk is concerned, it is covered by sub-Heading 0401.11 and, skimmed milk powder and milk powder are covered by 0401.12 and 0401.13 respectively. Since the products in question are the mixture of the two, assessee seeks to cover it under 0401.19, viz., 'Other'. From the description of the products given aforesaid along with the Chapter Heading 04.01, in the first blush, it becomes clear that it is to be covered under 0404.90. However the submission of the learned counsel for the appellant-Revenue is that since stabilizer is added while preparing the aforesaid goods, it does not remain a dairy produce and on the contrary, it becomes food preparation and therefore, would be classified under Chapter Heading 19.01. In this behalf, she has also referred to Head Note 4 to Chapter 4 which reads as under: -

"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."

From the aforesaid Note 4, it is argued that stabilizer is not mentioned therein and therefore, addition of stabilizer while making the aforesaid preparation would take it out from Heading 04.01. Thus, it needs to be determined as to whether the addition of stabilizer would make it a food preparation and therefore, it would no more remain diary produce and would be covered under Heading 19.01.

Learned counsel for the appellant drew our attention to the ingredients of stabilizers which are used in the product in question and these are carbox methyl cellulose, gur gum, carageenam, monoglycerides, di-glycerides, tri-glycerides, etc. It is argued that none of these substances are common to substance mentioned in Note 4 reproduced above and therefore, addition of these stabilizers while making the preparation in question would be treated as food preparation. Once, we understand the purpose for which the aforesaid ingredients of stabilizer are used, answer to the arguments of learned counsel for the appellant would be in the negative.

The Commissioner has himself noted that no chemical name of the stabilizer is used and the role played by the aforesaid ingredients of the stabilizer is to maintain a uniform emulsion of oil in water, throughout the shelf life and to improve the body and texture and to impart smoothness

to the products. Thus, as far as the basic product is concerned, it demonstrates the same and the purpose is only to impart smoothness to the product and to maintain the product consistency during storage and transportation and throughout its shelf life.

We find from the aforesaid that the main purpose is to maintain the product consistency during storage and transportation as well as to improve the shelf life. Merely because it improves the body and texture of the product and adds some smoothness thereto, that would not change the basic character of the produce. We also note that the CESTAT has concluded from the Hawley's Condensed Chemical Dictionary Eleventh Edition meaning of the substance and the aforesaid dictionary defines stabilizer as: -

"Any substance which tends to keep a compound, mixture, or solution from changing its form or chemical nature. Stabilizers may retard a reaction rate, preserve a chemical equilibrium, act as antioxidants, keep pigments and other compounds in emulsion form, or prevent the particles in a colloidal suspension from precipitating."

Insofar as Chapter Note 4 on which reliance is placed by the learned counsel for the appellant is concerned, we are of the opinion that even that would not advance the case of the appellant. It has to be noted that the description given there is open ended inasmuch as the Chapter Note itself uses the expression "*inter alia*". Further, while mentioning the products which would be covered under the

said Chapter Heading 04.04, and stating about the additions which could be made, the crucial words are "whether or not". Therefore, the additives which can be added while making the product are illustrative only and merely because stabilizer is not mentioned therein would not mean that after adding the stabilizer the product in question ceases to be dairy produce.

In view of the aforesaid, we are of the opinion that the view taken by CESTAT is perfectly in tune with legal position and does not call for any interference. We, thus, do not find any merit in this appeal, which is, accordingly, dismissed.

....., J.
[A.K. SIKRI]

....., J.
[ROHINTON FALI NARIMAN]

New Delhi;
September 03, 2015.

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Civil Appeal No. 4337/2006

COMMISSIONER OF CENTRAL EXCISE

Appellant(s)

VERSUS

M/S AMRIT CORPORATION LTD.

Respondent(s)

(With office report)

Date : 03/09/2015 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN

For Appellant(s)

Ms. Nisha Bagchi, Adv.
Ms. Binu Tamta, Adv.
Mr. K. Parameshwar Nair, Adv.
Ms. Pooja Sharma, Adv.
Mr. B. Krishna Prasad, Adv.

For Respondent(s)

Mr. S. Ganesh, Sr. Adv.
Mr. Kamal Budhiraja, Adv.
Mr. Aman Gupta, Adv.
Mr. Abhinav Mukerji, Adv.

UPON hearing the counsel the Court made the following
O R D E R

An oral prayer is made by the learned senior counsel appearing for the respondent that the name of the respondent company may be read as 'M/s. Amrit Food (A division of Amrit Corporation Ltd.). The said prayer is accepted. Cause title is amended accordingly.

The appeal is dismissed in terms of the signed order.

(Nidhi Ahuja)
COURT MASTER

(Renu Diwan)
COURT MASTER

[Signed order is placed on the file.]