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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-17-1998

Reported in : (1999)(110)ELT735TriDel

Appellant : Wander Limited

Respondent : Collector of Central Excise

Judgement :

1. These are two appeals filed by (1) M/s. Wander Ltd., Bombay against order-in-appeal 9-1-1989, and the other filed by M/s. Frozen Foods Pvt.

Ltd., Kolhapur against order-in-appeal dated 16-2-1988, both the orders passed by the Collector, of Central Excise (Appeals), Bombay. In both the appeals the matter relates to the classification and the rate of central excise duty with regard to the product marketed under the brand name of 'spert'. Both the appeals were heard together and are being disposed of by this common order.

2. The matter relates to the classification of the product marketed under the brand name 'Spert'. The appellants had sought classification of the spert under sub-heading No. 0404.00 of the Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as the "Tariff"), as "other dairy produce; edible products of animal origin, not elsewhere specified or included". Chapter 4 of the Tariff covered dairy produce; edible products of animal origin hot elsewhere specified or included. The Revenue had classified the product in question under sub-heading No. 2107.91 of the Tariff which covered edible preparations not elsewhere

specified or included, put up in unit containers and ordinarily intended for sale, other than prasad or prasadam and sterilised or pasturised miltone. Chapter 21 of the Tariff covered miscellaneous edible preparations. The Collector Central Excise (Appeals) in Appeal No. 2645/89-D had observed that the calcium caseinate an ingredient of the final product was not dairy product and that it might be made from milk (milk as the raw material) but that does not make the calcium caseinate a dairy product. In Appeal No.E/1403/88-D the Collector, Central Excise (Appeals) had observed that the mere presence of calcium caseinate which was a chemical extract from milk could not be a ground for considering the Spert as one of the various types of direct milk products and that the product of dairy processing industries like caseine and caseine preparation was not the same as dairy product such as butter milk, curdled milk, cream, yogurt, whey, curd and product consisting of natural milk constituent whether or not containing added sugar or other sweetening matter of flavoured, or containing added fruit or cocoa.

3. The matter was posted for hearing on 28-1-1998 when Shri D.B.Shroff, Advocate with Shri J.B. Verma, Advocate appeared for the appellants. Shri Satnam Singh, SDR represented the respondent/revenue.

4. Shri D.B. Shroff, Advocate submitted that the product "Spert" was a dairy produce and was correctly classifiable under sub-heading No.0404.00 of the Tariff. He referred to the erstwhile Central Excise Tariff under which their product was classifiable under Item No. IB of the said erstwhile tariff and enjoyed exemption from payment of central excise duty under Notification No. 17/70-C.E., dated 1-3-1970 (as amended). He referred to the various ISI specifications for protein isolates, protein concentrates and protein rich concentrated nutrient supplementary foods, and pleaded that the product 'spert' was not a protein concentrate and thus was not classifiable under sub-heading No.2107.91 of the Tariff. He invited attention to the various certificates given by the experts and referred to the Tribunal decision in the case of Collector of Central Excise, Pune v. Frozen Foods Pvt. Ltd. [1987 (27) E.L.T. 195 (Tribunal)] wherein it had been held that the 'spert' was a milk food and was not a preparation with a basis of malt extract and milk foods and that it was a protein rich concentrated nutrient supplementary food. He also submitted that no reasons were given in the show

cause notice for classifying the product 'spert' under sub-heading No. 2107.91. He referred to the reply to the show cause notice filed by M/s. Wander Ltd. and submitted that they had produced technical literature, various certificates and the case law in support of their plea that their goods were correctly classifiable as dairy produce.

5. In reply Shri Satnam Singh, SDR stated that the final product marketed and traded under the brand name 'Spert' was food supplement and not a dairy produce. While some of the ingredients could be the products of dairy, the final prepared product was not a dairy produce.

It was an edible preparation and as it was not a dairy produce. It was correctly classifiable under Chapter 21 of the Tariff which covered miscellaneous edible preparations. As it was put up in unit containers and was intended for sale and as it was not covered by other edible preparations as specifically classified under Heading Nos. 21.01 to 21.06, it was correctly classifiable under sub-heading No. 2107.91 of the Tariff.

6. In rejoinder the ld. Advocate referred to the certificates given by the experts advising that as a protein food supplement, 'Spert' derived practically its entire proteins from calcium caseinate and skimmed milk powder which in turn were both wholly derived from natural milk.

7. We have carefully considered the matter. The issue for our consideration in both these appeals is whether the product 'Spert' is a dairy produce for the purposes of classification under Chapter 4 of the Tariff subheading No. 0404.00 which covered "other dairy produce".

Chapter 4 of the Tariff covered dairy produce; edible products of animal origin, not elsewhere specified or included. Heading No. 04.01 covered milk and cream, concentrated or containing added sugar or other sweetening matter. The expression "milk" meant full cream milk or partially or completely skimmed milk. Heading No. 04.02 covered butter whether pasteurised or Notification Heading No. 04.03 covered cheese pasteurised or processed. The products obtained by the concentration of whey and with the edition of milk or milk fat were classifiable as cheese provided that they had the following three characteristic :- (b) a dry matter content by weight of at least 7% but not exceeding 85%; and The dairy produce and the edible products of animal origin which were covered by Chapter 4 of the Tariff, but were not otherwise classifiable under Heading Nos. 4.01, 4.02 and 4.03 were classifiable under sub-heading No. 04.04. Heading No. 4.04 applied 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.

8. 'Spert' was marketed as "superior protein efficiency ratio" said to contain "all the essential amino acids, vitamins and minerals conforming to the reference pattern of FAO/WHO expert groups". Spert is a registered brand/trade name. On the label of the product, it is a claimed that it is a delicious easily assimilable food supplement with high nutrient density in which proteins and calories are perfectly balanced. It was made from maltodextrins, non-fat milk solids, calcium caseinate, sucrose and pre-digested cereal extracts. Its composition each hundred gram as per label was as under:Proteins (with balanced essential ammo acids) 23 g.Fats 1 g.Carbohydrate 70 g.Vitamin A 750 MCGVitamin D3 4.2 MCGVitamin E 17 MGVitamin Bl 1.5 MGVitamin B2 1.8 MGVitamin B4 3.6 MGVitamin B12 2 MCGVitamin C 38 mg NICACINIMIDE 32 mgFolic acid 263 MCGCalcium 500 MGIron 9MGIodine 183 MCGCalories 380 MCG In reply dated 2-9-1986 to the Show Cause Notice dated 11-7-1986 M/s.

Wander Ltd. had given the composition of 'spert' per hundred gm as follows :--Ingredients Spert plain Spert chocolate Spert strawberry--Liquid glucose 41.30gm 41.30 gm 41.30 gmSkimmed Milk Powder 24.30 gm 24.30 gm 24.30 gmCalcium Caseinate 18.00 gm 18.00 gm 18.00 gmMalt Extract 5.30 gm 5.30 gm 5.30 gmSugar 10.00 gm 5.00 gm 10.00 gmVitamins & Flavours 1.10 gm 1.10 gm 1.10 gmCocoa powder - 3.80 gm -Liquid caramel - 1.20 gm - 100.00 gm 100.00 gm 100.00 gm 9. Dairy is an establishment for the sale and distribution of milk and milk products. The important dairy products are butter cheese, casein, milk, sugar, cream and milk powder. The various milk products as shown at page 427 of the Encyclopedia Britannica - Macropaedia volume 5 are as under :Product water fat protein lactose ash calcium other (%) (%) (%) (%) (%) (mg.lOOg) (%)Milk 87.0 3.9 3.5 4.9 0.7 118Half-and-Half 80.2 11.5 3.1 4.5 0.7 10818% cream 74.5 18.0 2.S 4.1 0.6 10230% cream 63.3 30.0 2.5 3.6 0.6 8536% cream 58.0 36.0 2.2 3.3 0.5 75Plastic cream 18.2 80.0 0.7 1.0 0.1 -Dry cream 0.7 65.0 13.4 17.9 3.0 -Butter 16.0 80.6 0.6 0.4 2.4 20Butter oil 0.2 99.5 0.3 - - -Sweet-cream -buttermilk 91.0 0.4 3.4 4.5 0.7Skim milk 90.5 0.1 3.6 5.1 0.7 121Culturedbuttermilk 90.5 0.1 3.6 4.3 0.7 121 lactic acid 0.8Yogurt 89.0 1.7 3.4 5.2 0.7 120Plain co- *ndensed 66.0 12.7 18.4 2.9 -skim milkskim milk 28.0 0.3 11.2 16.3 2.5 - sucrose 42.0milk 26.5 8.1 8.1 11.4 1.6 262 sucrose 44.3Evaporated 73.8 7.9 7.0 9.7 1.6 252milkIce cream 65.2 10.6 4.5 6.6 0.9 146 sugar 14.2Ice milk 66.7 4.8 7.0 1.0 156 sugar 15-4Sherbetorange 67.0 7.2 0.9 1.4 0.1 16 sugar trace lactic acidmilk 2.0 27.5 26.4 38.2 5.9 909Dry skimmilk 3.0 0.8 35.9 52.3 8.0 1308 Dry maltedmilk 2.6 8.3 14.7 20.0 3.6 288 maltose and dextrinCheese, fibre 0.3Cheddar 37.0 32.2 25.0 2.1 3.7 750whey(Cheddar) 93.0 0.3 0.9 4.9 0.6 51 lactic acid 0.2 *These values represent average composition of consumer products, not legal minimum standards.

Source : B.H. Webb and A.H. Johnson. Fundamentals of Dairy Chemistry, 1965, and Composition of Foods, USDA Haldbook No. 8,1963.

At page 434 of the said publication it had been stated that the skim milk, butter milk, casein, whey and whey components including lactose or milk sugar are by-products of the dairy industries. The skim milk is a source of casein and lactose which are prepared from it. Whey is a by-product of cheese and casein manufacture and is an important source of whey protein and lactose. Butter milk is a by-product of the churning cream.

According to the Kirk-Othmer Encyclopedia of Chemical Technology III Edition Volume 15 page 568, milk containing proteins and essential amino acids. Casein, a mixture of several protein, is the principal protein in the skim milk (non-fat) portion of milk (3-4% of the weight). After it is removed from the liquid portion of milk, whey remains. Casein is used to fortify flour, bread and cereals. Casein also is used for glues and micro biological media. Calcium Caseinate is made from a pressed casein, by rinsing treating with calcium hydroxide, heating and mixing, followed by spray drying. A product of 2.5 -3% moisture is obtained. Many so-called non-dairy products such as coffee cream topping and icings utilise caseinates. In addition to fulfilling a nutritional role, the caseinates impart creaminess, firmness, smoothness and consistency of products. Imitation meats soups etc., use caseinates as an extender and to improve moistness and smoothness.

10. While Casein is a by-product of the dairy industry, the product with which we are concerned in these proceedings is not the casein or the calcium caseinate made from pressed casein by rinsing, treating with calcium hydro-oxide, heating and mixing followed by spray drying.

The calcium caseinate contained in the product 'spert' was reported to be 18%. The dispute is not whether the ingredients of the product "spert" were or were not dairy product. The issue to be decided is whether the product 'spert' as such was a dairy produce. The appellants had referred to a number of publications in their attempt to show that some of the ingredients of the product - casein and calcium caseinate - were covered by the description of dairy products. According to the publications referred to by the appellants casein was a protein fraction of milk and was made by acidification of skim milk. Caseinates are produced by suspending acid precipitated casein in water and unneutralising the solution with alkali. For the dry calcium caseinate the hydro chloric acid is used as a precipitating agent. Calcium chloride and di-sodium phosphate could also be used to precipitate the casein in skim milk. Caseinates improve smoothness and texture of foods. According to the "principles of dairy processing" by James N.Warner, Casein is of two kinds - industrial or commercial casein, and edible or food casein. Several casein preparations for use as foods had been developed by the dairy processing industry. They are the product of dairy processing industry and not of the milk processing plant.

According to the publication "Dairy Chemistry" by Edgar R. Ling, casein had uses in cold water paints, horticulture sprays and for putting a finish on paper and leather. It is used in a number of proprietary foods, invalid diets and medicines.

11. Thus it is seen that the casein and calcium caseinate in themselves were the product of chemical reaction and are produced in dairy processing industry and

not by the milk processing plant. The final product 'Spert' with which we are concerned was neither a product of milk processing plant nor of the dairy processing industry. It was manufactured in a separate factory with some of the ingredients which were the product of milk processing plant and of dairy processing Industry. In itself it was neither produced in a milk processing plant nor in dairy processing industry.

12. We have already referred to Chapter Note 4 under Chapter 4 of the Tariff which provided as under : "Heading No. 04.04 applies inter alia to butter milk, curdled milk, cream, yogurt, whey, curd and products consisting of natural milk consti- tuents, whether or not containing added sugar or other sweetening matter or flavoured or containing added fruit or cocoa." Butter milk, curdled milk, cream, yogurt and curd are the dairy products consisting of natural milk constituents. The expression "products consisting of natural milk constituents" could not cover a food supplement of the nature of 'Spert'. The various experts whose opinion had been cited by the appellants had referred to the product 'Spert' as a food supplement, protein food supplement, supplementary food and protein supplement. Professor A. Sreenivasan had described the product as under : "as a protein food supplement, Spert derives practically its entire proteins from calcium caseinate and skim milk powder which in turn are both wholly derived form natural milk." While skim milk powder is a milk product and a dairy produce, caseinate is a dairy by-product. The food supplement, the supplementary food and the protein supplement even when deriving their proteins from milk products and dairy by-products could not in itself be called a dairy produce.

13. The products of dairy are items of common consumption. They cater to the daily needs of the people. In terms of the general usage and known denomination of the trade and the language employed in the various headings under Chapter 4 of the Tariff, the manufactured branded product 'Spert' could not be considered as a dairy product.

14. The appellants have claimed that their branded product 'Spert' was manufactured in accordance with the ISI specification 8220 -1976 which is the specification for protein rich concentrated nutrient supplementary foods. ISI 8220-

1976 is not for dairy products. Indian standards on dairy products (refer page 127 - Exhibit HA In Appeal No.1403/88-D) covers the following :1165-1967 Milk powder (whole and skim) (revised)1166-1973 Condensed milk (first revision)1967-1965 Casein (edible quality) (revised)1517-1968 Infant milk food (first revision)1656-1969 Processed cereal weaning foods (first revision)1806-1961 Malted milk food2003-1962 Malted milk food containing cocoa powder2785-1964 Hard cheese, processed cheese and processed cheese spread2802-1964 Ice cream3922-1966 Recommendations for ghee refinery4079-1967 Canned RASOGOLLA6387-1971 Vegetable protein infant food with milk6397-1971 Code for pasteurization of milk There is no mention of protein rich concentrated nutrient supplementary foods therein. The protein rich concentrated nutrient supplementary foods find mention only in the Indian standards on nutritious foods which include the following: 3137-1974 High protein mixes for use as food supplement (first revision) 4875-1975 Edible groundnut flour (solvent extracted) (first revision) 7021-1973 Protein rich foods supplements for infants and preschool children 15. According to the Explanatory Notes to the Harmonised Commodity Description and Coding System (HSN) the dairy products covered by Chapter 4 of the HSN (which is similar to Chapter 4 in the Central Excise Tariff) were the following.

(1) Milk i.e., full cream milk and partially or completely skimmed milk.

(3) Butter milk, curdled milk and cream, yogurt, kephir and other fermented or acidified milk and cream.

(5) Products consisting of natural milk constituents not elsewhere specified or included.

It is specifically provided that Chapter 4 excluded casein and the food preparations based on dairy products.

16. The Revenue had classified the product 'Spert' under Chapter 21 of the Tariff which covered miscellaneous edible preparations. There is no dispute that the product 'Spert' is an edible preparation. According to Chapter Note 5 Heading No. 21.07 inter alia included : (2) Preparations for use, either directly or after

processing (such as cooking, dissolving or boiling in water, milk or other liquids) for human consumption.

(3) Preparations consisting wholly or partly of food stuffs used in the making of beverages or food preparations for human consumption.

The appellant had contended that the product Spert was not a protein concentrate but a protein rich concentrated nutrient supplementary food. They had referred to several sources of protein and had submitted that on the one hand there were protein isolates having protein concentration as high as 86%, on the other hand were protein concentration having protein concentration between 45 to 70%. They had argued that protein rich concentrated nutrient supplementary food with protein concentration of 20% was different from the protein concentrates. We have already referred to the Chapter Note 5 under Chapter 21 of the Tariff and it is seen that the protein concentrates were not the only products which were covered by Heading No. 21.07. The scope of Heading No. 21.07 was wide enough to cover the products.Collector of Central Excise, Pune v. Frozen Foods Pvt. Ltd. [1987 (27) E.L.T. 195 (Tribunal)] the matter related to the erstwhile Central Excise Tariff. The issue for consideration before the Tribunal was whether the product named 'Spert' was covered by Entry 14 in the Schedule to Notification No. 18/70-CE., dated 1-3-1970. The said notification had a list of dutiable goods falling under the then erstwhile Item No. IB of the erstwhile Tariff, broadly described as prepared or preserved foods. Entry 14 of the notification read as under: "Preparations with a basis of flour, of starch, of malt extract, or of malted barley, and milk foods, which by simply mixing with, or boiling in milk or water can be used for making beverages, invalid foods and gravels, whether or not containing cocoa but excluding baby foods that is to say foods specially prepared for feeding of infants." In that case the manufacturer had pleaded that 'Spert' was not a milk product as commonly understood since it contained calcium caseinate as a major constituent - a non-dairy product. The matter was decided by the Tribunal on the basis of the Entry 14 as given in para 11 of the order as under : The Tribunal referred to the opinion of the experts that the product Spert was not a milk food and came to the conclusion that the product Spert was not covered by Entry 14 of the Schedule to the Notification No. 17/70-C.E., dated 1-3-1970. The expression used in Note 4 of

Chapter 4 is "Products consisting of natural milk constituents". The manufacturer in the case of Frozen Foods Pvt. Ltd. had pleaded that the calcium caseinate was a non-dairy product (refer para 5 of the order).

More than 60% of the protein in the Spert was contributed by calcium caseinate. According to Dr. V.H. Potty of Industrial Development and Consultancy Services of the Central Food Technological Research Institute, Mysore, skimmed milk powder was not the major source of protein in Spert and that it would be difficult to agree with the view that skimmed milk powder and malt extract formed the basis of Spert.

The calcium caseinate is a product of processing industry. It is not a product of dairy industry. It is not used as such, it is used in different food products. Simply because in a product calcium caseinate is used it will not be taken that the product in which it is used becomes a dairy product.Collector of Central Excise v. Protein Products of India [1988 (38) E.L.T. 749 (S.C.)] the Supreme Court had referred to the definition of the word "product" in Webster's Comprehensive Dictionary as "anything produced or obtained as a result of some operation or work". They observed that the expression "bone products" meant anything produced or obtained from bones, whether such derivation was by a simple physical process or by a chemical reaction would make no difference to the end product. They had illustrated that the butter milk did not cease to be a milk product merely because a chemical process was involved in the transformation. In that case only bones were the raw materials from which the products manufactured by the respondent Company were derived. In the manufacture of ossein and gelatine no other raw materials were used to such an extent as to completely over-shadow or render insignificant the utilisation of bone in the process. The product before us did not emerge from the dairy. It is a product of processing industry and in it there were a number of ingredients which have nothing to do with a dairy. It is a food supplement and not a dairy product.Rollatainers Ltd. v. Union of India [1994 (72) E.L.T. 793 (S.C.)] the Supreme Court had viewed that the question as to whether a printed carton was or was not a product of printing industry had to be decided as how it means to a common man in the trade and in common parlance. The Apex Court agreed with the Division Bench of the Karnataka High Court that a product must be classified having regard to what it means and how it is understood in common parlance and that in a case of such a nature the product had to be classified having regard to their purpose and as how they are understood in ordinary parlance.

20. Reference has also been made to the rules of interpretation in support of the contention that the essential character to the product in question was given by the dairy products. The general rules for the interpretation of the Tariff laid down the principles for the classification of the goods in the Tariff. The basic rule is Rule 1 which lays down that for legal purposes the classification of the goods in the Tariff shall have to be determined according to the terms of the heading and the relative section notes and chapter notes. Resort to the rules other than Rule 1 can only be had when the goods could not be classified in terms of such headings and the notes. If the headings or the notes do not so require, other rules, other than Rule 1 will have no application. Thus, the concept of "essential character" will be relevant only when the goods could not be classified in terms of the headings and the relevant section notes and chapter notes. Further the factors which determines "essential character" will vary as between different kinds of goods and may be determined by the nature of the material or component, its bulk, quantity weight or value or by the role of a constituent material in relation to the use of the goods. The expression "essential character" has been used with regard to mixture and composite goods. We do not consider that we have to go to the rules of interpretation beyond Rule 1 for proper classification of the product in question.

21. Before us the ground relating to the principles of natural justice was not pressed.

22. In view of the above discussion, we consider that the classification of the product "Spert" under sub-heading No. 2107.91 of the Tariff was correct. Taking all the relevant facts and considerations into account we do not find any merit in both these appeals; both the appeals are rejected. Ordered accordingly.