

Glaxo India Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-08-1991

Reported in : (1992)(37)ECC33

Appellant : Glaxo India Ltd.

Respondent : Collector of Central Excise

Judgement :

1. Short question involved is whether the product 'Complan' manufactured by the appellants herein can be classified under s. No. 14 of Notification No. 17/70 dated 1-3-1970 which gives a list of dutiable items under Tariff Heading 1B of the erstwhile Central Excise Tariff.

2. In order to appreciate the controversy we reproduce below the Tariff Entry 1B as well as relevant extracts from Notification 17/70 dated 1-3-1970 :- 1B Prepared or preserved foods put up in unit containers and ordinarily intended for sale including preparations of vegetables, fruits, milk, cereals, flour starch, birds, eggs, ... the Central Government hereby exempts prepared or preserved foods falling under Item No. 1B of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), other than those specified in the Schedule hereto annexed from the whole of the duty of excise leviable thereon :- 12. Skimmed milk powder but excluding such powder specially prepared for feeding of infants; 13. Condensed milk and condensed skimmed milk, in both cases whether sweetened or not; 14. Preparations with a basis of flour, of starch, of malt extract, or of malted barley, and milk foods, which by simply mixing with, boiling in milk or water, can be used

for making beverages, invalid foods and gruels, whether or not containing cocoa, but excluding baby foods, that is to say, foods specially prepared for feeding infants.

2.1. Composition of 'Complan' is given by the appellants in an affidavit of one Dr. V.S. Mohan, who is a consultant for Food Products manufactured at Aligarh factory of the appellants. Relevant extracts from the affidavit dated 10-4-1990 of the said Dr. V.S. Mohan are given below showing the ingredients and composition of 'Complan' :- "Complan is obtained from the following ingredients which are also printed on every tin of Complan :- Skimmed milk powder, vegetable oil containing permitted anti-oxidants, sugar, maltodextrin, minerals, vitamins and wherever necessary added flavours and permitted colours.

The composition of Complan is derived from its ingredients as follows :- (a) 20% of protein is provided by approximately 53 parts of skimmed milk powder ; (c) 55% of carbohydrate is provided by approximately 26% lactose occurring naturally in the skimmed milk powder that is used, 16% cane sugar and 13% maltodextrin." 3. Now the contention of the appellants is that since the product 'Complan' does not have the basis either of flour or of starch or of malt extract or of malted barley and it does not contain any of these ingredients, it would not fall under s. No. 14 of Notification No.17/70.

3.1. He has also contended that Maltodextrin contained in 'Complan' is not an ingredient referred to in Item 14 of the Schedule to Notification No. 17/70 dated 1-3-1970. It is distinct and different from Malt or malt-extract which are predominantly obtained from barley and sometimes from Sorghum (Jawar) or wheat. Maltodextrin is also distinct and different from flour or starch or malted barley.

3.2. Maltodextrin is obtained from Corn or Tapioca which are subjected to a process of wet milling and the slurry so obtained is purified and is then subjected to a process of hydrolysis or Saccharification. In the process of hydrolysis the slurry is broken down. If there is a complete hydrolysis, then glucose which is also described as a Mono-Saccharide is obtained. However, if the hydrolysis is partial and not complete, then some di-saccharide molecules and some higher

Polysaccharide molecules may be obtained. "The product obtained on partial hydrolysis is described as Dextrin or maltodextrin since this material produces maltose during digestion in the body. It is emphasised by him in the affidavit that maltodextrin is totally free from starch.

3.3. Learned advocate, Shri Ravindra Narain, for the appellants has placed reliance on the Tribunal's judgment in the case of CCE Pune v.Frozen Foods (P) Ltd. [1987 (27) ELT195 (Tribunal)]. That judgment of the Tribunal by a majority of 2:1 held that the product 'Spert' containing glucose, Skimmed Milk Powder, Calcium Casienate, Malt Extracts, Sugar and Vitamin C was not covered by S. No. 14 of the Schedule to Notification 17/70 dated 1-3-1970, mentioned supra. The majority view therein held agreeing with the respondents therein i.e.

Frozen Foods (P) Ltd., that Item 14 in the Schedule to Notification 17/70 should be read as follows :- In this view of the matter, there does not seem to be any warrant for aggregating the proportions in which malt extract and skimmed milk powder are present in the product SPERT in order to arrive at a conclusion on the question whether the product conforms or not to entry No. 14." 3.4. Later on, however, the majority view held that, on the basis of lack of evidence from the department's side and on the basis of certain opinions of Shri D.V. Rege, Professor of Food Technology and Director, Department of Chemical Technology, University of Bombay, Dr. V.H.Potty, Head Industrial Development and Consultancy Services of the Central Food Technological Research Institute, Mysore, Dr. A.S. Aiyar, Executive Director of the Protein Foods and Nutritional Development Association of India, affidavits of a few dealers, druggists, provision storekeepers adduced by the respondents in CCE v.Frozen Foods (P) Ltd., mentioned supra, the department has not been able to discharge its burden that the commodity SPERT falls under Entry No. 14 of the Schedule to Notification 17/70 and hence it was declared to be as exempted from duty.

4. The learned JCDR, Smt. Vijay Zutshi, on the other hand, contended that the product under consideration is a preparation with a basis of starch/modified starch and milk foods. Elaborating this argument, she has contended on the strength of evidence of Mr. Badri Prasad, Chief Chemist, Central Revenues Control

Laboratory that maltodextrin is a modified starch. The affidavit of Mr. Badri Prasad dated 10th day of July, 1990, further stated that starches or modified starches provide a large proportion of calorific requirements, they are energy foods and the dietary function is the same whether the pure starch is added as such or in its modified form to a prepared food and eaten along with other food elements. Learned JCDR has placed on record a plethora of authorities and technical literature showing that malto-dextrin is a modified starch.

4.1. On the aforesaid basis, learned submitted that the product under consideration is a preparation with a basis of starch and would, therefore, be covered by Entry No. 14 of the Schedule to the Notification 17/70. Explaining the term "basis" she has stated that according to Black's Law Dictionary, "basis" has been defined as follows :- "Fundamental principle; groundwork; support; the foundation or groundwork of anything ; that upon which anything may rest or the principal component parts of a thing." She stated that in the present context the correct meaning of the term "basis" occurring in S. No. 14 of the Schedule to the Notification No.17/70 would be the last of the meanings given in the Black's Law Dictionary i.e. the principal component parts of a thing. Since maltodextrin and skimmed milk powder are the chief or principal components of 'Complan', therefore, they form the basis of the product and would be covered by the said S. No. 14.

4.2. She further contended that in any case, the product 'Complan' is a milk food having regard to the composition of the product already set out above. She also relies, in her support on the certificates from National Institute of Nutrition, (Indian Counsel of Medical Research) Hyderabad dated 17-10-1983 and National Dairy Research Institute (Indian Council of Agricultural Research), Karnal, dated 11/12-10-1983.

In order to appreciate the contents of the certificates, we reproduce the relevant extracts therefrom :- This has reference to your office letter No. V-17(I-B)VC/37/82 dated 5-10-1983 regarding milk products. From the available data provided from your letter, the product can be considered as 'milk food'. We are not familiar with the regulations in regard to Central Excise Duty etc. In regard to the actual

composition and the label regulations, kindly refer to the State Public Health Labs. or Asst.

Director-General (PFA), Nirman Bhavan, New Delhi-1. It may be also referred to Indian Standards Institute, Manak Bhavan, New Delhi, for voluntary certification.

Please refer to your letter No. V-17(I-B)/VC/37/82/5253 dated 5th October, 1983 on the above subject. From the information given regarding the composition of the product, it appears that all items other than first three, are only additives, to fortify the product with vitamins and minerals. The protein is exclusively derived from milk and it is likely that the carbohydrate may also be derived from milk atleast in part and the remainder must have been added as Sugar which can be considered as an additive. In this manner, milk constitutes a major part of the main ingredients and the product can be classified as having originated from milk and thus a Milk derived product or Milk Food. I trust this gives you the desired information. In case you need any further clarification, you may kindly write."

4.3. As regards the application of Tribunal's judgment in Frozen Foods (P) Ltd., mentioned supra, the learned JCDR has stated that the said judgment is not applicable to the present product because it related to different product called SPERT. Majority view in Frozen Foods (P) Ltd., in respect of SPERT in coming to its conclusion that it is not a milk food was on account of lack of evidence from the side of the department. In the instant case, she has submitted, there is enough evidence in the form of certificates from the two well-known institutes dealing in dairy products and nutritional products, namely the certificate of National Institute of Nutrition and National Dairy Research Institute, Karnal. Now that sufficient evidence is available characterising the product of the appellants herein as 'milk food', the ratio of Frozen Foods (P) Ltd., should not be applied. This case, according to her is thus distinct from the facts of Frozen Foods (P) Ltd.

4.4. Smt. Vijay Zutshi, learned JCDR has highlighted another angle of the decision in Frozen Foods (P) Ltd. She has submitted that both the minority view and the majority view have held that Entry No. 14 of the Schedule to Notification 17/70 cannot be read as the department in that case wanted to read namely as follows :- In other words, according to her, there is a unanimity of views of all the Members of the Tribunal comprising the Bench in the case of Frozen Foods (P) Ltd., that Entry 14 related to

items :- She has, therefore, urged that the contention of the appellants in any case is repelled by the unanimous view of the Tribunal in Frozen Foods (P) Ltd. 4.5. In his rejoinder, Shri Ravindra Narain, learned advocate for the appellants has submitted that the majority view in Frozen Foods (P) Ltd., is correct. The majority view, according to him is that S. No. 14 lays down two conditions, namely, that for the product to fall under that serial number (1) it should have a basis of flour or starch etc.

and (2) it should also have milk food. Since the product under consideration does not have either flour or starch or malt extract or malted barley, the product 'Complan' would not be covered by the said serial number.

4.6. As regards the argument that malto-dextrin is a modified starch, the learned advocate has submitted that argument proceeds on the assumption that since starting material is starch, therefore, the product has the basis of a starch. This argument, according to him is fallacious. The product 'Complan' according to him, does not contain any starch at all. It contains maltodextrin and maltodextrin is not starch. He has submitted that, as stated in the affidavit of Dr. V.S.Mohan, maltodextrin is a common ingredient for 'Complan' as well as infant milk food named 'GLACTO' manufactured by the appellants. As per the Prevention of Food Adulteration Rules, 1955 infant milk food is required to be free from starch and antioxidants. He has, therefore, submitted that maltodextrin by no stretch of imagination can be considered as having any starch at all. Secondly, he has submitted on the contention that maltodextrin forms the basis of preparation that this is not so because maltodextrin is not the predominant ingredient.

According to the meaning of the term "basis" given in the Random House Dictionary, he submits that it means principal constituent or fundamental ingredient which in turn would mean that it should be available directly in the product; simply because maltodextrin is purified from starch, it cannot be held, accordingly to the learned advocate, that starch is present in the product 'Complan'.

4.7. On another contention of the learned JCDR that the product should be treated as a milk food and would, therefore, be covered by the said S. No. 14, he has submitted that this was the minority view in the case of Frozen Foods (P) Ltd. If

the minority view is taken to be correct, then Entries at S.Nos. 12 and 13 of the Schedule to Notification 17/70 would become redundant. Elaborating this argument, he has submitted, that if milk foods by themselves were made dutiable under S. No. 14 there was no need to make skimmed milk powder and condensed milk or condensed skimmed milk under S. Nos. 12 and 13 respectively as dutiable separately because the products mentioned against S. Nos. 12 and 13 would have been included in the term 'Milk Foods' occurring in S. No.14 if milk foods are separately termed as dutiable under the latter serial number. He, therefore, submits that Frozen Foods (P) Ltd. is squarely applicable to the facts and circumstances of the case and the Tribunal must follow the ratio of its earlier decision.

5.1. Scope of S. No. 14 of the Schedule to Notification 17/70, has already been set out in the majority view of the Tribunal's judgment in the case of Frozen Foods (P) Ltd., mentioned supra. It has been set out above in para 3.3. It is apparent from the view of the majority that the said S. No. 14 contains two dutiable products. First product is a "preparation with a basis of flour, of starch, of malt-extract, or of malted barley" and the second product is "milk foods". It is in the above context that the majority has held that "there does not seem to be any warrant for aggregating the proportions in which malt extract and skimmed milk powder are present in the product SPERT in order to arrive at a conclusion on question whether the product conforms or not to entry No. 14". The majority view, however, held, as also set out in para 3.4 above, that the department has not been able to discharge its burden that it is a milk food on the basis of the test of Commercial Paralance since the term 'Milk Food' has not been defined in the Central Excise itself. We are, therefore, of the view that the reading of the judgment of the Tribunal by the learned advocate is not correct.

Learned JCDR, Smt. Vijay Zutshi is more to the point when she asserts that both majority view and minority view upheld that 'milk foods' are by themselves covered under S. No. 14. The only difference of opinion between the minority view and the majority view in the case of Frozen Foods (P) Ltd., according to her, is that while the minority view holds Spert as a milk food, the majority view does not hold it so primarily on the basis of lack of evidence from the department and secondarily on

the affidavit of Dr. A.S. Aiyar, Executive Director of the Protein Foods and Nutritional Development Association of India. Lack of evidence which was the major short-coming in the department's case in the Frozen Foods (P) Ltd. is not prevalent in the present matter. The certificates from National Institute of Nutrition, Hyderabad and National Dairy Research Institute, Karnal have already been set out above and they have stated in categorical terms that the product under consideration can be termed as 'milk foods'. We are inclined to give substantial weight to these certificates. We, therefore, hold that the product 'Complan' is a milk food which simply by mixing with or boiling in milk or water can be used for making beverages. The latter part i.e.

mixing with or boiling in milk or water and thereby converting 'Complan' into a beverage is not in dispute from either side.

5.2. The matter, however, does not rest here. The learned advocate, Shri Ravindra Narain for the appellants, has contended that if this view of S. No. 14 is taken, then S. Nos. 12 and 13 would become redundant. In our view this contention has no merit. S. Nos. 12 and 13 are special types of milk products which have been specially carved out as dutiable categories. These milk products, namely skimmed milk powder and condensed milk or condensed skimmed milk do not contain any other ingredient (except the sweetening agent in the case of condensed milk or skimmed milk). On the other hand, milk food mentioned at S. No. 14 may contain any other ingredient. Another important condition occurring in S. No. 14 in relation to milk foods is that it would be capable of being used as beverage by simply mixing with, or boiling in milk or water. Accordingly, we are of the view that 'Complan' falls under S.No. 14 of the Schedule to Notification No. 17/70 dated 1-3-1970. Hence the appeal is rejected.

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