

S. Narendra Kumar Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-04-1991

Reported in : (1992)(37)ECC54

Appellant : S. Narendra Kumar

Respondent : Collector of Central Excise

Judgement :

1. This appeal relates to the classification of Everest brand 'Milk Masala' manufactured by the appellants for which they had filed Classification List No. 1 dated 8-5-1986 claiming its classification under subheading 0801.10 and exemption from duty under Notification 29/86-C.E., dated 10-2-1986. Their claim was not accepted and the 'Milk Masala' was classified under sub-heading 2107.91 as edible preparations, not elsewhere specified or included and put up in unit containers and ordinarily intended for sale.

2. The Assistant Collector relied upon Note 5(b) of Chapter 21 of the Central Excise Tariff which is as under :- (b) preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk or other liquids), for human consumption." 3. The Assistant Collector held that milk masala is used with milk to give better taste and flavour and, in his opinion it was correctly classifiable under sub-heading 2107.91 and would attract 15% duty.

4. Collector (Appeals) upheld this order on the ground that, being manufactured by grinding nuts viz., almonds, cashew nuts, pista with a mixture of other constituents

viz., cardamom, nutmeg, javatri, saffron, the product milk masala emerges with a distinct name, character and use. He further held that the milk masala prepared in this manner could not, by any stretch of imagination, be called as nuts in any form because it is a mixture of nuts as well as other constituents. He also referred to Note 5(b) to Chapter 21 which was relied upon by the Assistant Collector for upholding the classification under sub-heading 2107.91.

5. The appellants' ground in appeal is that milk masala is nothing but basically a mixture of various nuts classifiable under Chapter 8. The ingredients indicated in the appeal are as under :- "Nuts Others Almonds -42.36% Cardamom - 9.00% Cashewnuts -24.05% Nutmeg - 6.36% Pista -16.95% Javantri - 0.64% Saffron - 0.64% 6. It is claimed that since nuts constitute 83.36% of the total ingredients and the other ingredients being marginal, the correct classification of milk masala should be as "edible fruit and nuts" put up in unit containers and ordinarily intended for sale, whether or not containing any added ingredient, including sugar or other sweetening matter under sub-heading 0801.10 by application of Rule 2(b) of the Rules for Interpretation of the Schedule to the Central Excise Tariff Act, 1985. The further claim is that the essential character of the nuts in the milk masala is physically and otherwise identifiable.

Further, Assistant Collector's decision regarding classification of the product being based on his personal opinion, the order is bad in law having made without any market enquiry or evidence of persons conversant with the goods. One other plea is that since mixing of various ingredients does not amount to manufacture under Section 2(f) of the Central Excises & Salt Act, 1944, duty of excise is not attracted on milk masala. Reliance has also been placed on Explanatory Notes to Chapter 21 wherein it is specifically explained that Heading 21.06 (which corresponds to Heading 21.07 of the Central Excise Tariff) applies to Note (b) only when the goods in question are not covered by any other heading of the Nomenclature.

7. During the hearing, Shri R.K. Jain, the learned Advocate for the appellants, elaborated on the grounds of appeal and reiterated that the milk masala should be classified under sub-heading 0801.10 and given exemption from duty under Notification 29/86.

8. Smt. J.M. Shanti Sundram, the learned SDR, submitted that Chapter 8 deals with edible fruit and nuts, whereas the goods in question are described and known in common parlance as milk masala. They cannot, therefore, fall under Chapter 8 and it is not necessary to refer to the Rules for Interpretation since the goods can be classified with reference to the headings/sub-headings/section notes and Chapter Notes.

She placed reliance for this purpose on the decision of the Tribunal in the case of L.M. Van Moppes Diamond Tools India Ltd. v. Collector of Customs, Madras 9. Smt. Shanti Sundaram also invited attention to the decision of the Tribunal in the case of Reckitt & Colman of India Ltd., Calcutta v. Collector of Central Excise, Calcutta [1985 (22) ELT 216] in which the Tribunal had held that the word 'preparations' as used in Item 14 of the erstwhile Central Excise Tariff would have to be a product prepared by addition, mixing or other such similar process to the original commodity in order to derive a new commodity. She submitted that same meaning should be given to the product milk masala which was an edible preparation.

10. Replying to the arguments of the learned SDR, Shri Jain submitted that Pan Masala which is a similar preparation has been included under sub-heading 2106.11 although it is not a product finding place in the original HSN. He contested the arguments that all preparations would necessarily fall under Chapter 21 and submitted that Chapter 8 too covered preparations containing edible fruit and nuts. He also submitted that the Nomenclature was not the final guide in these matters. He requested that the matter be remanded for determining the classification afresh after taking into consideration all these submissions.

11. We have given our earnest consideration to the matter and have perused the case records. It appears to us that the question of classification of milk masala would have to be considered primarily on the basis of the common parlance test while, no doubt keeping the composition of the product in view. We observe that Chapter 8 refers to edible fruits and nuts, and though sub-heading 0801.10 does refer to edible fruit and nuts whether or not containing any added ingredient, the product being described and known as milk masala, goes out of Chapter 8.

Collector (Appeals) has rightly held that after grinding the nuts and mixing other ingredients the product that is formed is called milk masala and has a distinct name, character and use. It ceases to retain its identity as edible nuts because it is not known, described and marketed by that name.

12. Rule 2(b) of the Rules for Interpretation says that any reference in a heading to a material or substance shall be taken to include "a reference to mixtures or combination of that material or substance with other materials or substances". This would mean that for the rule to be applicable, the reference has to be to the material. If the product was not referred to as milk masala but as edible nuts, the rule would have been applicable. No one would know that milk masala is a mixture of edible nuts until he first ascertains its composition. This itself means that the identity of the nuts is lost the moment the product is given the name of milk masala. This is so because that is the name by which it is known and marketed. Thus, the contention that Rule 2(b) should be applied cannot be sustained.

13. We have perused the Assistant Collector's order and observe that he has come to this conclusion on the basis that milk masala is used with milk to give better taste and flavour and has also referred to Note 5(b) to Chapter 21 in his order. It cannot, therefore, be said that it is a non-speaking order as was contended by Shri Jain during the hearing. In view of this, we do not think that it suffers from any infirmity.

14. The plea that mixing of various ingredients does not amount to manufacture under Section 2(f) has to be subjected to test of the well-settled law laid down by the Courts that mixing would amount to manufacture provided a new article comes into existence which has a different use and commercial name in the market. Reference may be made for this purpose on *State of Maharashtra v. GP. Managanese* (AIR 1977 SC 879); *Brooke Bond India v. Union of India* [1985 (15) ELT 32 (AP)] and *State of Tamilnadu v. Rallis India* [1974(34) STC 532]. It was held by the Allahabad High Court in *Ashok Griha Udyog Kendra Pvt. Ltd., Kanpur v. Collector of Central Excise, Kanpur* [1982 (10) ELT 309 (All.)] that :- "If different spices are mixed in certain proportion and they are powdered, then the original property of the particular ingredient is lost and is mixed with the properties of the

other ingredients with the result that a new and a different article having a distinct name, character or use emerges." 15. The analogy of mixing of spices cited in the above case is fully applicable to the case of milk masala which is also prepared by mixing nuts and other ingredients and grinding them after which the identity of the ingredients is lost and a new and different article having a distinct name, character and use emerges. Thus, this plea also fails.

16. The last plea is the reference to the Explanatory Notes to Chapter 21 about the scope of Heading 21.06 (which corresponds to Heading 21.07 in the Central Excise Tariff). Even if we apply the principle that the heading 'Miscellaneous Edible Preparations' applies to Note (b) only when the goods in question are not covered by other heading of the Nomenclature, we would notice that Milk Masala not being classifiable under Chapter 8, the only other Heading in which it can fall is the Residuary Entry 21.07 and specifically under sub-heading 2107.91. In fact, we notice that Note (a) in the Explanatory Note which is the same as Note 5(b) of the Central Excise Tariff covers a product like 'milk masala' specifically.

17. Shri Jain had also submitted that Pan Masala falls under Chapter 21 only because of a specific inclusion in that Chapter and milk masala being a similar preparation, it would not fall in that Chapter without specific inclusion. That this argument is devoid of any merit is evident from the fact that Chapter 21 deals with 'Miscellaneous Edible Preparations', and sub-heading 21.07 with the residuary entry - not elsewhere specified or included." 18. Thus, having considered all the grounds in the appeal and arguments of the learned counsel Shri R.K. Jain, we come to the conclusion that sub-heading 2107.91 is the most appropriate classification for Everest Milk Masala. There is no need, therefore, to remand the matter as requested by Shri Jain at the hearing. The appeal fails and is rejected.

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