

Collector of Central Excise Vs. Reckitt and Colman of India Ltd.

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SooperKanoon Citation : sooperkanoon.com/6901

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-21-1992

Reported in : (1992)(42)LC38Tri(Delhi)

Judge : H Chander, Vice, V T K.S.

Appellant : Collector of Central Excise

Respondent : Reckitt and Colman of India Ltd.

Judgement :

1. Collector of Central Excise, Calcutta-I, Collectorate Calcutta, has filed an appeal being aggrieved from the order passed by the Collector of Customs and Central Excise (Appeals), Calcutta. The said appeal was received in the Registry at Calcutta on 12th January, 1989. Thereafter, a miscellaneous application No. E/Misc./428/89-D was received in the Registry on 17th August, 1989 making a prayer for raising the following additional grounds of appeal: 1. Collector (Appeals) of Central Excise, Calcutta in his order in Appeal No. 122/Cal.-I/88 have classified 'Robinson's Patent Barley' under sub-heading No. 1101.90 in preference to sub-heading No. 1901.19. This classification is not correct in Law for the following reasons: (a) According to General Explanatory Note No. 1 to Rules for the interpretation of the Schedule, where the description of an article or group of articles under a heading is preceded by "-", the said article or group of articles shall be taken to be a sub-classification of the article or group of articles covered by the said subheading. Where, however, the description of an article or group of articles is preceded by "- -", the said article or group of articles shall be taken to be

a sub-classification of the immediately preceding description of an article or group of articles which has"-".

(b) Collector (Appeals) has classified the impugned product under sub-heading 1101.90 which is preceded by a single dash "-" ignoring the fact that main heading 11.01 have been sub-classified in two parts viz. "-" put up in unit containers and ordinarily intended for sale and "-" others.

The sub-classification "-" put up in unit container and ordinarily intended for sale has been further sub-divided in two parts preceding with double dash"- -" one i.e. 1101.11 "- -" grain, hulled, rolled, flaked, pearled, sliced or kibbled of barley or oats and"- -" others. In the instant case it is not disputed that the impugned product is put up in unit containers and ordinarily intended for sale. Therefore, assuming but not admitting that the impugned goods is classifiable under Chapter 11 it should have classified under sub-heading 1101.19 and not under subheading 1101.90 as claimed by the assessee and as admitted by Collector (Appeals). 1101.90 is for such goods as are not put up in unit containers.

2. It is further submitted that Hon'ble CEGAT has already classified the impugned product as "Prepared food" in the erstwhile Central Excise Tariff under Tariff Item 1B vide . Since there is no change in the composition of the impugned product should be classified under sub-heading 1901.90 of the new Central Excise Tariff.

Shri L.C. Chakraborty, the learned JDR has appeared on behalf of the appellant and Shri Deepankar Ghosh, Senior Advocate with Shri Jatin Ghosh, Advocate, Shri M.M. Guha, Advocate, and Shri D.R. Kohli, Consultant and Shri P.R. Sain Gupta, Secretary of the respondent company have appeared on behalf of the respondent.

2. At the outset of the hearing, Shri L.C. Chakraborty, the learned JDR made a request that first the application No. 428/89-D making a prayer for grant of permission for raising of the additional grounds of appeal may be permitted to be taken up. Shri L.C. Chakraborty, the learned JDR stated that respondents M/s. Reckitt & Colman of India Ltd. are central excise licence holders and besides other things, the respondents also manufacture Robinson's Patent Barley 400 gm/100

gm tins classifiable under sub-heading 1101.90 under Chapter 19 (sic), whereas the Collector of Central Excise (Appeals) had ordered assessment of Robinson's Patent Barley under sub-heading 1101.90 in preference to sub-heading 1901.19. Shri Chakraborty pleaded that in case the applicant's prayer for raising the additional grounds of appeal is not allowed, the appellant shall suffer irreparable loss. He further argued that the additional grounds of appeal are being raised on the basis of the material already available on record and no fresh evidence is being filed for the same. He argued that additional legal ground can always be raised at any stage. In support of his argument, he cited the following decisions: Precision Fasteners Ltd., Bombay v. Collector of Central Excise, Bombay 6. Collector of Customs v. Photogravurs (India) Pvt. Ltd. Shri L.C. Chakraborty, the learned JDR has pleaded for the acceptance of the miscellaneous application.

3. The respondents have also filed a counter miscellaneous application which has been registered by the Registry as miscellaneous application No. 491/89-D. Shri Deepankar Ghosh, the learned Senior Advocate has appeared on behalf of the respondent. He referred to the show cause notice and argued that the fresh ground of appeal raised by the appellant is against the basis of the show cause notice. He pleaded that granting of permission for raising the additional grounds of appeal at this stage will amount to injustice. In support of his argument, he referred to the following decisions: 2. 141 ITR 301 Commissioner of Income-tax, Gujarat-II v. Orient Prospecting Co.

He has pleaded for the rejection of the application for the grant of permission for raising the additional grounds of appeal.

4. We have heard both the sides and have gone through the facts and circumstances of the case. We have also considered the decisions cited by both the sides. The additional grounds of appeal raised by the appellant can be decided on the basis of the evidence already available on record. No fresh evidence is to be filed for the same. Hon'ble Andhra Pradesh High Court in the case of Commissioner of Income-tax v. Gangappa Cables reported in 116 ITR 778 has held as under: The Appellate Tribunal disposing of an appeal under the I.T. Act

has got the power to allow the assessee to put forward a new claim, notwithstanding the fact that such a claim was not raised by him before the ITO or the AAC, provided there is sufficient material on record to allow such a claim.

The assessee, for the first time, raised a plea in second appeal before the Appellate Tribunal that the expenditure incurred by the assessee before it went into commercial production was an admissible deduction for the purpose of Section 80J(1) of the I.T. Act. The revenue resisted the claim on the ground that the said claim having not been put forward by the assessee before the ITO or the AAC, it could not be raised in second appeal. The Tribunal held that the directors' report accompanied by balance-sheet and profit and loss account and other statements were filed by the assessee before the ITO and practically all the details for allowing a claim under Section 80J(1) of the Act were on record and hence it was open to the Tribunal to allow such a claim. On a reference: Held, that the Tribunal was correct in allowing the claim of the assessee as there was material on record for allowing the same.

Hon'ble Patna High Court in the case of Hindusthan Malleables and Forgings Ltd. v. Commissioner of Income-tax reported in 191 ITR 110 has held as under: The question relating to the jurisdiction of the Tribunal to allow new grounds to be raised before it for the first time has many facets as has been considered by courts under varying circumstances, namely, (i) when a particular issue relating to assessment was neither raised before the departmental authorities nor considered by them, and (a) relevant materials for adjudicating the issue are already on the record, or, (b) relevant materials are not on the record for adjudication of the issue and investigation into fresh facts was necessary; (ii) a particular claim was made on the basis of a certain plea before the departmental authorities but for the first time before the Tribunal, an alternative plea or reasoning was advanced in support of the said claim; (iii) an issue was raised before the departmental authorities but no ground in relation thereto was set forth in the memorandum of appeal and was sought to be raised by the appellant before the Tribunal subsequently.

There are a catena of cases decided by various High Courts answering the various facets of the problem indicated above. But, for the questions referred to

this Court, in my opinion, it is not necessary to examine the cases in detail. In my view, the ambit of the jurisdiction of the Tribunal with regard to entertainment of a new ground raised for the first time before it has been well-defined by the Supreme Court in the case of CIT v. Mahalakshmi Textile Mills Ltd. in which it has been held that (at p. 713) "There is nothing in the Income-tax Act which restricts the Tribunal to the determination of questions raised before the departmental authorities. All questions, whether of law or of facts, which relate to the assessment of the assessee, may be raised before the Tribunal.

In view of the law laid down by the Supreme Court in Mahalakshmi Textile Mills Ltd.'s case , in my view, the Tribunal was not correct in refusing to entertain the ground of appeal raised before it relating to deduction under Section 80J of the Act merely on the ground that the same did not arise out of the order of the Appellate Assistant Commissioner as it was not even raised in the grounds of appeal before the Appellate Assistant Commissioner. No doubt, in Mahalakshmi Textile Mills' case , the Supreme Court was considering the ambit of the power of the Tribunal under Section 33(4) of the Indian Income-tax Act, 1922, but the same is *pari materia* with Section 254 of the present Act and, therefore, the dictum still holds good. This court has not been called upon to answer the question relating to the Tribunal's discretion to entertain a new ground for the first time for any other consideration and, as such, advisedly, I am refraining from entering into those aspects.

Since, in view of the above discussion, the Tribunal will now be required to consider the question of entertainment of the claim under Section 80J of the Act raised by the assessee which was taken as a ground in the memorandum of appeal, it is not necessary to examine and give any opinion in respect of questions Nos. (ii) and (iii).

Accordingly, my answer to question No. (i) is in the negative, i.e.

in favour of the assessee and against the Department. Questions Nos.

(ii) and (iii) need not be answered. There will be no order as to costs.

Hon'ble Patna High Court had relied on two earlier decisions of the Supreme Court. In view of the above discussion, we are of the view that if raising of the additional grounds of appeal is not permitted, it will amount to injustice. In the present matter, the Collector (Appeals) has changed the classification under a different heading and against this change in the classification by the Collector (Appeals), the appellant has agitated the same under a new sub-heading.

Accordingly, we are of the view that the appellant was prevented by sufficient cause in not raising the additional grounds of appeal as reproduced above. We order that the additional grounds of appeal as reproduced above be read after the grounds of appeal already raised in the main appeal memo.

5. In the result, the miscellaneous application for raising the additional grounds of appeal is allowed and this judgment was pronounced in the open court.

6. Now we are coming to the merits of the matter. For the proper appreciation of the correct position, brief facts of the case are as below: 7. The respondents M/s. Reekitt & Colman of India Ltd. are holders of a central excise licence for the manufacture of excisable goods. They had submitted one classification list for approval under Rule 173B of Central Excise Rules, 1944 bearing No. 3/85-86 effective from 28th February, 1986. In item No. 6 of the said classification list the respondents had declared, among others, the following products under sub-heading numbers of the Schedule to the Central Excise Tariff Act, 1985:_____SI

No. Product Sub heading No.1.

Purity India Barely 1101.90 400 gm/100 gm/50 gm Tins2.

Robinson's Patent Barely 1101.90 400 gm/200 gm/200 gm/100 gm Tins3.

Robinson's Nutran Nutritional 1101.90 Food Supplement 400 gm Tins In item 7 of the said classification list they had also declared, among others "Fodder Husk" with a remark "Exempted as per notification No.55/75-CE dated 1.3.1975 as amended by notification No. 181/80-CE dated 12.10.1980." On scrutiny of the said classification list with reference to the said Schedule, the adjudicating authority

observed that (i) the products "Purity Indian Barley" and "Robinson's Patent Barley" are likely to fall under sub-heading No. 1901.19 as because these products being preparations of Barley flour conform to the description given against Heading No. 19.01 of the said Schedule; (ii) The product "Robinson's Nutran Nutritional Food Supplement" is likely to fall under sub-heading No. 1901.19 of the said Schedule as because the description given by the respondents against column 2 of item 6 of the said classification list showed that this product was put in unit container and was, obviously, ordinarily intended for sale; (iii) The product "Fodder Husk" as declared against serial No. 4 of item No. 7 of the said classification list is likely to be classified under Chapter 23 of the said Schedule and as such should be declared in item No. 6 of the said classification list if not already declared in item 6 of any other classification list submitted to any other central excise authority. A show cause notice vide C. No. V-19(3)15/Cal. D/86/3088 dated 13th June, 1986 was issued to the respondent to show cause as to why the products, namely (i) Purity Indian Barley, (ii) Robinson's Patent Barley and (iii) Robinson's Nutran Nutritional Food Supplement declared in the said classification list should not be classified under sub-heading No.1901.19 of the said Schedule and the product "Food Husk" appearing in item 7 of the said classification list should not be declared by them in item 6 of the said classification list quoting correct Heading/Sub-heading number of the said Schedule. The detailed reasons for proposed action were also incorporated in the said notice to show cause dated 13.6.1986.

7A. In reply to the said show cause notice the respondents vide their letter dated 11th August, 1986 did not discuss the merit of the proposed action. Instead the respondents alleged that the said show cause notice had been issued without jurisdiction and/or was in excess of jurisdiction and directly in disobedience of the order passed by the Hon'ble Calcutta High Court arising out of similar classification dispute in respect of same/similar products. The respondents further alleged that the said show cause notice was altogether bad in law as the same was related to the subject matter of a pending writ petition in the Hon'ble Calcutta High Court and pending appeal in the Supreme Court and they had requested not to proceed with the said show cause notice till disposal of pending cases. They had also submitted in details the dispute regarding the applicability of notification No.17/70-CE in

respect of their products 'Purity Indian Barley' and 'Robinson's Patent Barley' falling under erstwhile II No. IB and the orders passed in this connection by the CEGAT and the Calcutta High Court. It was also further contended that further proceedings would amount to contempt of court. At the time of personal hearing on 20th November, 1986, the respondents stressed on the following points: (1) Regarding "Purity Indian Barley" - Shri Sengupta submitted that the Starch content of the product is about 90% which is much higher than 45% as provided in Note 2 of Chapter 11. Shri Sengupta pleaded that in view of above fact the product should be classified under sub-heading No. 1101.19 instead of 1901.19 as alleged in the said show cause notice.

(2) Regarding "Robinson's Patent Barley" Shri Sengupta stressed that this product can never fall under sub-heading No. 1901.19, because this product is not a "flour" at all. The term "flour" has a definite connotation; in common parlance it means "Maida" and to decide the question whether the goods could be treated as flour or not, one has to go by the common parlance theory. In this connection, Shri Sengupta cited the decision of Hon'ble Calcutta High Court in the case of Atlantis (East Ltd.) v. Additional Member, Board of Revenue, West Bengal. Shri Sengupta submitted a copy of the said decision and stressed that before deciding the instant issue similar points involved in that case should be taken into consideration.

(3) Regarding "Robinson's Nutran Nutritional Food Supplement" Shri Sengupta submitted that this point was previously agitated before the undersigned in connection with classification dispute of the same under erstwhile Tariff Item No. IB. The arguments advanced in that connection in reply to the Department's show cause notice dated 25.2.1986 will be equally applicable to this case also.

(4) Regarding the product "Fodder Husk" Shri Sengupta submitted that this is not a product of Food Industries of Chapter 23 and not leviable to Central Excise duty at all.

The Assistant Collector in his order had observed that "Purity Indian Barley" was manufactured from barley grains and to arrive at the finished product no process was done which could be called preparation on the basis of flour and as such, this product should not fall under sub-heading No. 1901.19 as alleged in the said show

cause notice, and the product was correctly classifiable as "flour of barley" under sub-heading 1101.90 as on 28th February, 1986 and under sub-heading No.1101.19 with effect from 1.3.1986 (in view of changes made in Finance Act, 1986).

7B. In respect of the product "Robinson's Patent Barley" he was of the view that this product was obtained by addition of other substances like calcium carbonate and iron to barley flour with a view to its use as food preparation. The fact that the barley flour predominated by weight in the said product could not take it out of the description "Food preparation of flour". In view of the above, the product was correctly classifiable under sub-heading No. 1901.19 of the said Schedule as preparation of barley flour put in a unit container for sale. For coming to this conclusion the Assistant Collector had also considered the decision of the Calcutta High Court in the case of Atlantis (East Ltd.) v. Additional Member, Board of Revenue, West Bengal as cited by the representative of the respondents at the time of personal hearing. In this particular case (matter No. 433 of 1969) the Calcutta High Court's observation to the effect that the word "flour" appearing in item 2 of the Schedule to "The Bengal Finance (Sales Tax) Act, 1941 should be taken to mean "Maida" wheat flour in popular sense of the word, had been arrived at only in deciding the question whether "Barley Powder" would fall under item 1 of Schedule 1 to the Bengal Finance (Sales Tax) Act, 1941 as a "kind of cereal" or under item 2 of the Schedule as "flour". Though no definition of "flour" has been given in the said Schedule, description of heading No. 1101 clearly shows that "flour" has the meaning of flour of any cereals and not only of wheat. Therefore, the word "flour" appearing in the description of heading No. 19.01 could safely be taken as flour of any cereal.

7C. Regarding "Robinson's Nutran Nutritional Food Supplement" the Assistant Collector had observed that the respondents had declared this product in the said classification list under heading No. 19.01 of the said Schedule but its sub-heading number had been declared as 1901.90.

Sub-heading Nos. of heading No. 19.01 read as under: put up in unit containers and ordinarily intended for sale; 1901.11

For infant use The Assistant Collector had observed that from the above it was clear that sub-heading No. 1901.90 related only to those products which were not put up in unit containers and ordinarily intended for sale. The description of this product as given by the respondents on the body of the said classification list clearly showed that it was put up in unit containers and it was obviously intended for sale. Therefore, this product was rightly classifiable under sub-heading No. 1901.19. The respondents also did not put any argument against the action proposed to be taken in the said show cause notice in respect of this product.

7D. As regards the product "Fodder Husk" declared by the respondents in item 7 of the said classification list, the Assistant Collector found that the respondents' contention in this respect was not acceptable in view of the fact that this product was obtained as waste from milling of cereals as evident from its "very description. On going through the description of heading No. 23.01 and Chapter Note 2 of Chapter 11 he was of the opinion that this product was correctly classifiable under sub-heading No. 2301.00 of the said Schedule.

7E. In view of these observations, the Assistant Collector had ordered the classification of the products (1) "Purity Indian Barley" appearing in Sl. No. 1 of item 6 of the said classification list under sub-heading No. 1101.90 as on 28th February, 1986 and No. 1101.19 with effect from 1st March, 1986 of the said Schedule, (2) "Robinson's Patent Barley" appearing in serial No. 2 of item 6 of the said classification list under sub-heading No. 1901.19 of the said Schedule, (3) "Robinson's Nutran Nutritional Food Supplement" appearing in serial No. 3 of item 6 of the said classification list under sub-heading No.1901.19 of the said Schedule, and (4) "Fodder Husk" appearing in serial No. 4 of item 7 of the said classification list under sub-heading No.2301.00 of the said Schedule and approved the said classification list with modification as above and with appropriate rate of duty recorded on its body.

8. Being not satisfied with the order passed by the Assistant Collector, an appeal was filed before the Collector of Central Excise (Appeals), Calcutta. The Collector (Appeals) in his order had observed the respondents had a good case on merits. The Collector (Appeals) had observed as under: I have considered the matter. I

am convinced that appellants to have a case on merit, I find that the Asstt. Collector has classified the product under Chapter 19 as food preparation out of flour barley added with calcium and iron rejecting the appellants' contention for classification of the product under chapter 11 as barley and not a preparation of flour. I find Asstt. Collector's conclusion is based on the fact that the impugned goods is obtained by addition of other substances. This addition would be done to improve the flour of the cereal-in the case barley. In this context a reference may be made to the explanatory notes to Harmonised Commodity Description and Coding System in respect of Chapter 11 dealing with "Products of the milling industry's Malt, Starches, Insulin, wheat gluten" which is akin to chapter 11 dealing with the above goods only under the CET Act 1985. Chapter sub-heading No. 11.01 of the Explanatory Notes covers products of milling industry including flours among others, of cereals. In terms of the said explanatory notes (pages 72-73 of Vol. 1) under heading No. 11.02 covering Cereal flour other than of wheat or Meslin flours of the heading continues to be even if under this heading improved by addition of very small quantities of mineral phosphates, anti-oxidants, emulsifiers, vitamins or prepared baking power. The appellants contend that in the case of impugned goods two minerals are mixed which consist of less than 2% and that their product fulfils the condition of notes (2) of Chapter 11 CET Act 1985.

That being the case, classification of the impugned product under sub-heading 1901.19 in preference to sub-heading No. 1101.90 was not in order and cannot be endorsed. The impugned product is rightly classifiable under sub-heading No. 1101.90.

5. In the result, the appeal succeeds and is accordingly allowed.

The impugned order is set aside with consequential relief.

9. Shri L.C. Chakraborty, the learned JDR has appeared on behalf of the appellant. Shri Chakraborty pleaded that the revenue wants assessment under 1901.19, whereas the Collector (Appeals) had ordered classification under heading 1101.90. The respondents want classification under heading 1101.90. The Assistant Collector had made the assessment under heading 1901.19. Shri Chakraborty, the learned JDR at the outset of the hearing also raised an

objection that the Jadavpur University certificate was not filed before the lower authorities. To this Shri Jatin Ghosh, the learned senior advocate stated that this certificate was filed before the Collector (Appeals) and he makes a statement across the Bar. Shri Chakraborty, the learned JDR drew the attention of the Bench to the small container filled with "Robinson's Patent Barley" fortified with calcium and iron 0.028% reduced iron and 1.5% Calcium Carbonate IP. Shri Chakraborty, the learned JDR pleaded that the barley water can be taken as a cooling drink. He also argued that barley water can also be taken as a light diet. Barley water also helps in stomach disorder. It can be taken as a light food during fever. He also brought to the notice of the Bench the description as given in Chapter (sic) 11.01. The respondents say that the barley is a cereal, whereas department says it is a food preparation of flour. Shri Chakraborty, the learned JDR pleaded that the finding of the Collector (Appeals) is erroneous. He made a reference to internal page 2 of the order-in-appeal. Shri Chakraborty, the learned JDR referred to Note 2 to Chapter 11 and had also referred to Explanatory Notes. Shri Chakraborty pleaded that substances added are calcium carbonate and reduced iron. Shri Chakraborty referred to pages 72 and 73 of the Explanatory Notes of Harmonized Commodity Description and Coding System Volume 1 and drew attention of the Bench to heading 11.01 and the heading relates to wheat or meslin flour and para 2 in this heading describes that flour of this heading may be improved by the addition of very small quantities of mineral phosphates, anti-oxidants, emulsifiers, vitamins or prepared baking powders (self-raising flour). Wheat flour may be further enriched by an addition of gluten, generally-not exceeding 10%. Para 4 relates to flours, which have been further processed or had other substances added with a view to their use as food preparations are excluded (generally heading 19.01). Shri Chakraborty laid special emphasis on the words "are excluded" (generally heading 19.01). He further stated that heading 11.02 relates to cereal flours other than of wheat or meslin and referred to heading 1102.90 Other. Shri Chakraborty also referred to para 2 at page 73 wherein it has been mentioned that products of the milling rye, barley, oats, maize' (corn)(including whole cobs ground with or without their husks) grain sorghum, rice or buckwheat are classified in this heading as flours if they fulfil the requirements as to starch content and ash content set out in paragraph (A) of Chapter Note 2

(see General Explanatory Note) and comply with the criterion of passage through a standard sieve as required by paragraph (B) of that Note. In the next para it has been described that flours of this heading may be improved by the addition of very small quantities of mineral phosphates, anti-oxidants, emulsifiers, vitamins or prepared baking powders (self-raising flour). Flours which have been further processed or had other substances added with a view to their use as food preparations are excluded (generally heading 19.01). Shri Chakraborty pleaded that the additional test has the starch content.

Shri Chakraborty also argued that it has to be seen whether the product of the milling industry is the product of the milling industry or not. Shri Chakraborty pleaded that the correct classification of the respondent's product is. under heading 19.02 as it is a food preparation of flours. He referred to HSN Notes Chapter 19 pages 139 and 140 and Chapter (sic) 19.01 pertains to food preparations of flour.

He pleaded that the product in dispute is a food preparation of flour.

He referred to page 140 of HSN Notes II which is reproduced below: (II) Food preparations of flour, meal, starch or malt extract, not containing cocoa powder or containing cocoa powder in a proportion by weight of less than 50%, not elsewhere specified or included.

This heading covers a number of food preparations with a basis of flour or meal, of starch or of malt extract, which derive their essential character from such materials whether or not these ingredients predominate by weight or volume.

Other substances may be added to these main ingredients, such as milk, sugar, eggs, casein, albumin, fat, oil flavouring, gluten, colouring, vitamins, fruit or other substances to improve their dietetic value, or cocoa powder (in the latter case, in any proportion less than 50% by weight).

It should be noted, however, that preparations containing more than 20% by weight of sausage, meat, meat offal, blood, fish or crustaceans, molluscs or other aquatic invertebrates, or any combination thereof are excluded (Chapter 16).

(A) The terms "flour" and "meal" mean not only the cereal flour or meal of Chapter 11 but, subject to the provisions of Note 3 to Chapter 20, also food flour, meal, and powder of vegetable origin of any Chapter, such as soyabean flour and locust bean endosperm flour.

(B) The term "starch" covers both untransformed starches and starches which have been pregelatinised or solubilised, but not more evolved starch products such as dextrimaltose.

The preparations of this heading may be liquid or in the form of powders, granules, doughs or other solid forms such as strips or discs.

The preparations of this heading may be liquid or in the form of powders, granules, doughs or other solid forms such as strips or discs.

These preparations are often used for making beverages, gruels, infant foods, dietetic foods, etc., by simply mixing with, or boiling in, milk or water, or for making cakes, puddings, custards or similar culinary preparations.

They may also constitute intermediate preparations for the food industry.

(1) Flours obtained by evaporating a mixture of milk with sugar and flour.

Shri Chakraborty, the learned Departmental Representative pleaded that the essential - character must be derived from barley. Shri Chakraborty referred to a judgment of the Tribunal in the case of Singareni Collieries Co. Ltd. v. Collector of Central Excise wherein the Tribunal had held that by mixing of ammonium nitrate of explosive grade with small proportion of fuel oil, a new product emerges. It was further held that though it is prepared by a simple process of mixing of ammonium nitrate and fuel oil, is a distinct product having its own name, character and use. The mixing of the two products has, therefore, to be held to be a process of manufacture. Shri Chakraborty pleaded that in the matter before the Tribunal, the new product emerges with the mixing of calcium carbonate and reduced iron. Shri Chakraborty referred to the earlier decision of the Tribunal in the respondent's own case vide order No. 140/85-D where it was held that: Therefore, so far as Purity Barley, which consists of barley powder only, is concerned, it would not fall

within the description of "preparations with a basis of flour" as mentioned in Item 14 of the Schedule to the notification. But Robinson's Patent Barley, which consists of barley powder with calcium and iron added, would fall within the said description though not within the description of "a preparation with a basis of starch" as held by the Collector. As earlier noted, the appellants do not claim Robinson's Patent Barley to be an infant food to qualify for exemption within item 14 of the Schedule to the Notification No. 17/70.

Therefore, on a careful consideration of the submissions on both sides we hold that the order of the Collector has to be upheld (for the reasons given earlier) in so far as it related to Robinson's Patent Barley but the same has to be set aside so far as it related to Purity Barley.

Shri Chakraborty, the learned Departmental Representative referred to order No. 83/89-D dated 14th March, 1989 in appeal No. E/1535/88-D in the case of Collector of Central Excise v. Roha Dychem Pvt. Ltd. para No. 12 of the said decision, where it was held that Chapter titles do not have any statutory force. Shri Chakraborty further referred to Rule 3(c) of the Interpretative Rules and Chapter 19. Shri Chakraborty also referred to the order-in-original internal page 5 where the Assistant Collector has observed that the product Robinson's Patent Barley is obtained by addition of other substances like calcium carbonate and iron to barley flour with a view to its use as food preparation. The fact that the barley flour predominates by weight in the said product cannot take it out of the description "Food preparation of Flour". He was of the view that the product was correctly classifiable under sub-heading 1901.19 of the said Schedule as preparation of barley flour put in a unit container for sale and he had taken into consideration the decision of the Calcutta High Court in the case of Atlantis (East Ltd.) v. Additional Member, Board of Revenue, West Bengal. Shri Chakraborty also referred to the order-in-appeal passed by the Collector (Appeals) and pleaded that the order passed by the Collector (Appeals) is not correct. He also argued that while disposing of the appeal, the Collector (Appeals) has ignored the wording : "Flours which have been further processed or had other substances added with a view to their use as food preparations are excluded (generally heading 19.01)" on page 73 of HSN Explanatory Notes. He again drew the attention of the Bench to the HSN

Explanatory Notes 19.01 at pages 139 and 140. Shri Chakraborty pleaded that dietary value is increased by adding iron and calcium carbonate. Shri Chakraborty also referred to a decision of the Supreme Court in the case of Akbar Badrudin Jiwani of Bombay v. Collector of Customs, Bombay reported in 1990 (28) ECR 145 (SC) : ECR C Cus 1695 SC. He laid special emphasis on paragraph 56 where the Hon'ble Supreme Court had relied on HSN Explanatory Notes and it was observed that: The HSN Explanatory Notes, therefore, establish that Chapter Heading 25.15 must be construed by its technical sense and not by applying a commercial nomenclature test.

Shri Chakraborty further pleaded that the matter is fully covered by an earlier decision of the Tribunal in the respondent's own case Reckitt and Colman of India Ltd., Calcutta v. Collector of Central Excise, Calcutta argued that the order passed by the Tribunal was stayed by the Hon'ble Supreme Court and it was ordered that status quo be maintained and the order is dated 28th April, 1988. Shri Chakraborty argued that the mere fact that the order has been stayed by the Hon'ble Supreme Court, the lower court's order does not lose its precedent value. Shri Chakraborty again argued that after addition of calcium carbonate and reduced iron not exceeding 1.5% it has become a food product of flour.

Shri Chakraborty again referred to HSN Explanatory Notes page 140. He argued that HSN Explanatory Notes are of considerable value. In support of his argument, he referred to a judgment in the case of Meteor Satellite Ltd. v. Collector of Central Excise Central Excise Tariff Act, 1985 is aligned to Harmonised Description and Coding System (HSN). The headings in Central Excise Tariff Act, 1985 are identical with those in HSN. Hence a reference to the Explanatory Notes to HSN will be appropriate as an aid to the classification of items under Central Excise Tariff Act, 1985.

Shri Chakraborty again argued that the Hon'ble Supreme Court in the case of Akbar Badrudin Jiwani of Bombay v. Collector of Customs, Bombay reported in 1990 (28) ECR 145 (SC) : ECR C Cus 1695 SC and had relied on HSN Explanatory Notes. He also referred to another decision of the Tribunal in the case of Bombay Chemicals Pvt. Ltd. v. Collector of Central Excise HSN Explanatory

Notes are not binding but are of persuasive value, being reflective of international wisdom and expertise in tariff matters which govern international trade and commerce.

He again referred to the earlier decision of the Tribunal in the respondent's own case *Reckitt and Colman of India Ltd., Calcutta v. Collector of Central Excise, Calcutta* and laid special emphasis on paras No. 31, 32, 33, 34 which deal with the preparation and preservation of foods. He also referred to a judgment of the Tribunal in the case of *Collector of Central Excise v. Metallising & Engineering Works*. No doubt it was mentioned by the D.R. that the decision of the Bombay High court has been stayed on appeal. But that would not mean that the ratio of that decision could not be followed in other cases until that decision is upset on appeal. In view of the said decisions (which we respectfully follow) we hold that the order of the Appellate Collector setting aside the classification under T.I. 50 CET requires no interference.

Shri Chakraborty, the learned Departmental Representative also referred to another decision of the Andhra Pradesh High Court in the case of *Koduru Venkata Reddy v. Land Acquisition Officer and R.D.O. Kavali* reported in 1987 (67) STC 424 where the Hon'ble Andhra Pradesh High Court had held that: When a Full Bench judgment of the High Court is the subject matter of an appeal to the Supreme Court and the said judgment is suspended, the only effect of such suspension is that that judgment cannot be executed or implemented. But so long as the Full Bench judgment stands, the dicta laid down therein are binding on all Courts including the single Judges and Division Benches of the particular High Court. The dicta cannot be ignored unless the Court after hearing a particular case doubts the correctness of the dicta and thinks it appropriate that it should be reconsidered.

Shri Chakraborty pleaded that in view of the submissions made above, the appeal filed by the revenue may be accepted.

10. Shri Somnath Chatterjee, the learned Senior Advocate has appeared with Shri Jatin Ghosh, Advocate, Shri M.M. Guha, Advocate and Shri D.R. Kofili, Consultant. Shri Somnath Chatterjee, the learned Senior Advocate referred to form E.A.-1 with

appeal petition filed before the Collector (Appeals). Shri Chatterjee pleaded that the respondent manufactures in its factory three varieties of barley under three descriptions and separate brand names, namely, "Robinson's Pearl Barley", "Purity Indian Barley" and "Robinson's Patent Barley". Shri Chatterjee referred to para No. 2 in the appeal memo filed before the Collector (Appeals) where the respondent had mentioned as under: 2. All the aforesaid varieties of barleys are manufactured out of barley grains, an agricultural product and are known and sold as barley. The said barley grain after proper cleaning and rying up is treated with the process of dehushing and the de-husked barley grain is known and marketed by the Appellant as Robinson's Pearl Barley.

At this stage the barley grain remains in granule form. Thereafter the de-husked barley is made into powder form through the process of grinding. The powdered barley simpliciter is known and marketed as Purity Indian Barley. The Company mixes with the powdered barley a minimal percentage of iron and calcium, two minerals, to improve the food value of the powdered barley through the process of mixture by a mixing machine and the same is marketed as Robinson's Patent Barley. The said three varieties of barleys are made out of only one cereal, namely, barley grain and no other cereal is mixed in making any of the aforesaid three varieties of barleys. It is only in the case of Robinson's Patent Barley two minerals are mixed which consists of less than 2%.

Shri Chatterjee, the learned Senior Advocate referred to the earlier decision of the Tribunal in the respondent's own case which is a subject matter of appeal before the Hon'ble Supreme Court and made special mention to para No. 8 of the said judgment wherein it has been mentioned that the department was of the opinion that Purity Barley and Robinson's Patent Barley would be comprised in item 14 of the Schedule to the notification and, therefore, wanted the opinion of the Chemical Examiner on that matter.

Shri Chatterjee also read at length the statement of facts filed before the Collector (Appeals). He laid special emphasis on para 7 of the statement of facts where it was mentioned that: Central Excise Tariff was restructured by the Central Excise Tariff Act, 1985 which came into force on and from 1st March, 1986. Chapter 11 of

the First Schedule to the said Act covers products of the Milling Industry, Malt, Starches, Insulin, Gluten, etc. Chapter Note 2, inter alia, provides that products from the milling of cereals including barley would be covered by the said Chapter if they have, by weight on the dry product "with a starch content exceeding 45% and an ash content (after deduction of any added minerals) not exceeding as mentioned in the said Note. In the case of barley, the permissible ash content as specified in the said Chapter Note 3 is 3% of the entire product.

Shri Chatterjee argued that the Assistant Collector had held that patent barley was classifiable under Chapter 19 under heading 1901.19 as food products of flour, whereas the Collector (Appeals) had held that the same falls under heading 1101.90. Shri Chatterjee, the learned Senior Advocate pleaded that he relies on Collector (Appeals)'s order and he read the Collector (Appeals)'s order at length. For the sake of argument he pleaded that assuming that reliance on HSN Explanatory Notes was not correct, it cannot be said that the order of the Collector (Appeals) is wrong. He argued that it is an accepted fact by both the sides that barley is not a product of milling industry. He referred to Chapter Note 2 of Chapter 11 which relates to the products of milling industry; malt; starches; inulin, wheat gluten and it also mentions that products of the milling cereals listed below falls in this Chapter if they have, by weight on the dry product: (b) an ash content (after deduction of any added minerals) not exceeding that indicated in the list.

He pleaded that the HSN Explanatory Notes page 72 pertains to wheat or meslin flour 11.01 HSN 11.02 and 1102.90 and others. He argued that Customs Tariff Act is a statute. Statutes have to be preferred to Explanatory Notes. In support of his argument he cited the following decisions: Collector of Customs, Calcutta v. Indian Cable Co. Calcutta.

(2) National Insulated Cables Co. of India Ltd. v. Collector of Customs, Calcutta.

He also referred to the larger Bench decision of the Tribunal in the case of Saurashtra Chemicals, Porbandar v. Collector of Customs, Bombay where the Tribunal in paras 4 and 7 had 4. The appeals first came up before a Special Bench comprising three Members, as usual, on 30.4.1984. During the hearing, it was brought to the notice of the said Bench that similar goods imported by the same

appellants were earlier the subject matter of a judgment by Special Bench "D" (order No. D-234/83 dated 18/28-4-83 in Appeal No. 245/78-D). This was a majority judgment. Two Members of that earlier Bench had held that the goods were classifiable under Heading 84.65 and accordingly had allowed that appeal No. 245/78-D. The dissenting Member, relying on Note (a) to Chapter 84 of the Tariff, had upheld the Department's classification under Heading 68.01/16(1). During the hearing on 30.4.1984, the appellants relied on the earlier majority judgment of the Bench while the Department's representative relied on the dissenting judgment. After the hearing was over, the Bench reserved its orders. When members of the said Bench discussed the matter among themselves, they noticed that the Section Notes and Chapter Notes in the Customs Tariff Act were a part of the statutory tariff and were thus relevant in the matter of classification of goods under the Customs Tariff. The Bench also noticed that in the earlier majority judgment there was no discussion on the relevant Section Notes and Chapter Notes. In the circumstances, the Bench felt that in the interests of justice to both sides, the two appeals should be heard afresh and decided by a larger Special Bench. The matter was accordingly placed before the President who constituted the larger Special Bench on 14.5.1984. This is how these two appeals have come up before the present larger Special Bench.

7. But we observe that the Customs Tariff Act has not left the matter to be decided just on that basis. The relevant headings in the tariff have to be interpreted and applied in the light of the Section Notes and Chapter Notes which are statutory and binding like the headings themselves. These Section Notes and Chapter Notes sometimes expand and sometimes restrict the scope of certain headings. In other words, the scheme of the Customs Tariff Act is to determine the coverage of the respective headings in the light of the Section Notes and Chapter Notes. In this sense, the Section Notes and Chapter Notes have an overriding force on the respective headings.

He also referred to the decision of the Tribunal in the case of Collector of Central Excise v. Metrowood Engineering Works. The relevant headings in the Tariff have to be interpreted and applied in the light of Section Notes and Chapter Notes which are statutory and binding like the headings themselves. These Section

Notes and Chapter Notes sometimes expand and sometimes restrict the scope of certain headings. In other words, the scheme of Customs Tariff Act is to determine the coverage of the respective headings in the light of Section Notes and Chapter Notes. In this sense, the Section Notes and Chapter Notes have an overriding force on the respective heading.

He also referred to a decision of the Supreme Court in the case of Commissioner of Income-tax, U.P. v. J.K. Hosiery Factory in support of his argument that in case of doubt, the assessee is entitled to an interpretation which is favourable to him.

He also referred to Central Excise Interpretative Rule 5. He argued that Chapter 11 read with Chapter Notes is a self-contained chapter and heading 11.01 has got nothing to do with barley. He also referred to HSN Explanatory Notes page 71 Note 2(A)(b) wherein it has been mentioned that products from the milling of the cereals listed in the table below will fall in this Chapter if they have, by weight on the dry product : an ash content (after deduction of any added minerals) not exceeding that indicated in column (3). Otherwise, they fall in heading 23.02. In column No. 3 in the case of barley starch content has been mentioned as 45% and ash content 3%. He argued that in the Tariff Note 2 is there, but Note 2A(b) is not there. Shri Chatterjee pleaded that the Collector has not referred to Note 2 of Chapter 11 and while disposing of the appeal the Collector (Appeals) should have applied his mind and should have looked into Note 2 of Chapter 11 and he has got no objection if the matter is remanded to the Collector (Appeals). He has also referred to the respondent's paper book. He has referred to a judgment of the Tribunal in the case of Collector of Central Excise v. Warner Hindustan Ltd and emphasis on paras 32 and 33 where the revenue had pressed the Chapter Notes under Harmonised System of Nomenclature in support of their plea, but the Tribunal had made an observation in para 34 that "the Central Excise Tariff of 1986-87 is not based on the Harmonised System as cited by the Revenue and the goods will have to be assessed with reference to the provisions of the law as contained under the relevant Central Excise Tariff. He argued that what is not in the Tariff is not relevant and as such, no reliance should be placed on HSN. He pleaded that the revenue wants assessment under heading 19.01 "not elsewhere specified or included". He referred to Statutory Rules of Interpretation and referred

to Rule 3(a) and Rule 3(a) provides that the heading which provides the most specific description shall be preferred to headings providing a more general description. Shri Chatterjee, the learned Senior Advocate referred to a decision in the case of Atlantis (East Limited) v. Additional Member Board of Revenue, West Bengal, Calcutta reported in 36 STC 310 where the Hon'ble Calcutta High Court had held that: The word "flour" is not defined in the Act. Being a word of everyday use it must be construed in its popular sense and not in any technical sense or from the botanical point of view. It must be understood as in common parlance.

Shri Chatterjee, the learned Senior Advocate, argued that the Supreme Court and High Court decisions are binding. The present Tariff and the old Tariff are different and as such, it is not necessary that the Tribunal should follow the earlier decisions. He has also referred to a decision of the Tribunal in the case of Dalmia Dairy Industries Ltd. v. Collector of Central Excise that the Tribunal had taken note of the change in the Tariff. Para No.16 from the said judgment is reproduced below: 16. We have seen the decision of Hon'ble Supreme Court of India in the case of Healthways Dairy Products Co. Gauhati in which it was held that in common parlance, condensed milk and condensed skimmed milk are two different items of milk preparation.

The decision 'milk powder' would not include condensed milk. It is submitted before us that in common parlance 'milk' would mean only full cream milk as milched from the cattle and that it becomes skimmed milk when cream, that is, fat is extracted from milk. It is contended that since the impugned product predominantly contains skimmed milk powder, with other constituents as sweetening and other flavouring agents, it cannot be treated as a food preparation of milk and cream. We find, however, that this decision of the Hon'ble Supreme Court was taken in the context of the then Tariff in which the question of common parlance came up because there was no definition available in the Central Excise Tariff. The position is changed in the new Tariff. Admittedly as per Note in Chapter 4, 'milk' includes skimmed milk. It is true that there is no definition of 'milk' in Chapter 4 'milk' includes skimmed milk. It is true that there is no definition of 'milk' in Chapter 19 but the various provisions of the Tariff have to be construed in a harmonised manner and the fact that the definition 'milk' is contained in Chapter 4

cannot be ignored.

Shri Jatin Ghosh, the learned advocate also argued on behalf of the respondent that the JDR's alternative plea that even if it falls under Chapter 11, it should be classified under heading 1101.90 and not 1101.19. He referred to a decision of the Supreme Court in the case of Indo-International Industries v. Commissioner of Sales Tax, U.P. reported in 1981 ELT 325 (SC) : ECR C 580 SC and laid special emphasis on para No. 4 of the said decision where the Hon'ble Supreme Court had observed that: Any term or expression defined in the enactment must be understood in the light of the definition given in the Act, in the absence of which the meaning of the term as understood in common parlance or commercial parlance must be adopted. Commissioner of Income-tax, U.P. v. J.K. Hosiery Factory where the Hon'ble Supreme Court had held that for the interpretation of statutes in case of doubt, the assessee is entitled to an interpretation which is favourable to him. He also referred to Central Excise Interpretative Rule 5 which provides that: For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub-headings and any related Chapter Notes and, mutatis mutandis, to the above rules, on the understanding that only sub-headings at the same level are comparable. For the purposes of this rule, the relative Section Notes also apply, unless the context otherwise requires.

He also referred to the definition of "manufacture" as given in Section 2(f). He pleaded that Section Notes and Chapter Notes are very relevant and Chapter 11 read with Chapter Notes is a self-contained Chapter and heading 11.01 has got nothing to do with barley and no dictionary meaning or HSN or CCCN etc. should be resorted to. He also pleaded that the judgments cited by the learned JDR do not apply. Shri Jatin Ghosh, the learned advocate pleaded that the decision of the co-ordinate Bench is not applicable. Each case has to be decided as per law as it stood.

He had pleaded for the dismissal of the appeal filed by the revenue.

11. Shri L.C. Chakraborty, the learned Departmental Representative in reply pleaded that the matter is covered by the earlier decision of the Tribunal. He

referred to Chapter Note 2 of Chapter 11 and also referred to Chapter Note 1(b) which provides that this Chapter does not cover prepared flours, meals or starches of heading No. 19.01. He pleaded that prepared flours are out of Chapter 11 of the Central Excise Tariff. He again referred to Chapter Note 2 of Chapter 11 and pleaded that in case these do not fall here, then they will fall under Chapter 23. He again referred to the Decision of the Calcutta High Court reported in 36 STC 210 in the case of Atlantis (East Limited) v. Additional Member, Board of Revenue West Bengal, Calcutta and laid special emphasis on page 214. He pleaded that Chapter 11 does not include barley flour. Commenting on the case of Dalmia Dairy Industries Ltd. v. Collector of Central Excise argued that harmonised view has to be taken. He has referred to page 138 of HSN Explanatory Notes which relates to preparation of cereals, flour, starch or milk. He has referred to Interpretative Rule 3(c) of the Rules for the interpretation of the Schedule relating to Central Excise Tariff which provides that when goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in the numerical order among those which equally merit consideration.

He argued that in the present matter the goods fall in Chapter 19. He has pleaded for the acceptance of the appeal.

12. We have heard both the sides and have gone through the facts and circumstances of the case. For the proper appreciation of the correct legal position extract of the relevant headings of Chapter 11 from the Central Excise Tariff 1986-87 is reproduced below:

No.	Sub-heading	Description	of	goods	Rate	of
Duty						
1			2			3
4						
		11.01 Products of the milling industry including flours, 1101.11 -- Grains, hulled, rolled, flaked, 15% pearled, sliced or kibbled, 1101.19 -- Other 15% 1101.90 - Other				
		Nil				
headings	from	Chapter	19	are	also	reproduced

below:

No.	Sub heading	Description	of goods	Rate	of Duty
2					3
4					
		Malt extract, food preparations of flour, meal, starch or malt extract, not containing			
2					3
4					
		not elsewhere specified or included; food 1901.11 -- For infant use Nil 1901.19 --			
Other	15%	1901.90	-		Other
Nil					

The present matter pertains to the classification list No. 3/85-86 effective from 28th February, 1986. The earlier decision of the Tribunal in the case of Reckitt and Colman of India Ltd., Calcutta v. Collector of Central Excise, Calcutta pertains to the period prior to 28th February, 1986 falling under erstwhile Tariff Item 1B and the appellant in that case had claimed benefit of notification No. 17/70-CE dated 1st March, 1970 and, therefore, a revised classification list was filed on 19th June, 1980 mentioning pearl barley as excisable and the other two as non-excisable being exempted. Erstwhile Tariff Item 1B is reproduced below:

No	Tariff	Description	Rate	of duty.	Item
					1B

Prepared or preserved foods Fifteen percent put up in unit containers ad valorem 14. 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 gruels, whether or nor containing cocoa, but excluding baby foods, that is to say, foods specially prepared for feeding of infants.

A simple perusal of the erstwhile Tariff Item No. 1B and heading 11.01 read with Chapter Note 2 of Chapter 11 shows that there was no requirement of ash content in respect of barley serial No. 2 of the list less than 3%. In case the ash content exceeds.3%, the product may fall under Chapter 23. With the appeal memo filed

before the Collector (Appeals) the respondents had attached a copy of the Jadavpur University test report on barley which appears as annexure 'D' of the respondents' paper book. The same is reproduced below:_____Starch

(dry basis) =86.43% As the product is fortified with 1.5% CaCO₃ and 0.028% reduced iron (as declared on the container) it is evident that the ash content after deduction of the added minerals is less than 1%.

In para No. 8 of the appeal memo internal page 5 of E.A. 1 the respondents had mentioned the submission of the Jadavpur University test report. Para No. 8 is reproduced below: 8. The said Robinson's Patent Barley contains starch more than 45% and ash less than 3% as would appear from the Report of Chemical Test conducted by the Jadavpur University and as such is liable to be classified under the said Chapter Heading 11 in terms of the said statutory definition a copy of the Test Report is annexed and marked with the letter 'A'.

It is also a settled law that Chapter Notes and Section Notes are part of the Tariff. For coming to the conclusion whether the Robinson's Patent Barley is a product of the milling industry it has to be satisfied that the starch content exceeds 45% and the ash content is 3%. Shri L.C. Chakraborty, the learned Departmental Representative had raised a preliminary objection that Jadavpur University Certificate dated 31st March, 1988 was not filed before the lower authorities. To this Shri Jatin Ghosh, the learned Senior Advocate had made a statement across the bar that it was filed before the Collector (Appeals). We have perused the Collector (Appeals)'s order. Rule 215 of the Central Excise Rules, 1944 relates to production of additional evidence before the Collector (Appeals). Rule 215 from the Central Excise Rules 1944 is reproduced below: 215. Production of additional evidence before Collector (Appeals). - (1) The Appellant shall not be entitled to produce before the Collector (Appeals) any evidence, whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the adjudicating authority except in the following circumstances, namely: (a) where the adjudicating authority has refused to admit evidence which ought to have been admitted; or (b) where the appellant was prevented by sufficient cause from producing the evidence which he was called

upon to produce by the adjudicating authority; or (c) where the appellant was prevented by sufficient cause from producing before the adjudicating authority any evidence which is relevant to any ground of appeal; or (d) where the adjudicating authority has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

(2) No evidence shall be admitted under Sub-rule (1) unless the Collector (Appeals) records in writing the reasons for its admission.

(3) The Collector (Appeals) shall not take any evidence produced under Sub-rule (1) unless the adjudicating authority or an officer authorised in this behalf by the said authority has been allowed a reasonable opportunity: (a) to examine the evidence or document to cross-examine any witness produced by the appellant, or (b) to produce any evidence or any witness in rebuttal of the evidence, produced by the appellant under Sub-rule (1).

(4) Nothing contained in this rule shall affect the power of the Collector (Appeals) to direct the production of any document, or the examination of any witness to enable him to dispose of the appeal.

A simple perusal of Sub-rule (1)(a), (b) and (c) shows that the appellant shall not be entitled to produce before the Collector (Appeals) any evidence whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the adjudicating authority and the exception is where the adjudicating authority has refused to admit evidence which ought to have been admitted or the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the adjudicating authority or where the appellant was prevented by sufficient cause from producing before the adjudicating authority any evidence which is relevant to any ground of appeal; and Sub-rule (2) of Rule 215 further provides that no evidence shall be admitted under Sub-rule (1) unless the Collector (Appeals) records in writing the reasons for its admission, and Sub-rule (3) further provides that the Collector (Appeals) shall not take any evidence produced under Sub-rule (1) unless the adjudicating authority or an officer authorised in mis behalf by the said authority has been allowed a reasonable opportunity to examine the evidence or document to cross-examine

any witness produced by the appellant, or to produce any evidence or any witness in rebuttal of the evidence produced by the appellant under Sub-rule (1).

We have perused the order passed by the Collector (Appeals). There is no whisper of the Jadavpur University Certificate on barley dated 31st March, 1988. Shri Somnath Chatterjee, the learned Senior Advocate during the course of arguments had fairly stated that the Collector (Appeals) has not referred to Note 2 of Chapter 11 of the Central Excise Tariff and in case the Bench feels he has got no objection to the remand of the matter. The larger Bench of the Tribunal in the case of Saurashtra Chemicals, Porbandar v. Collector of Customs, Bombay had occasion to deal with the legal force of the Chapter Notes and Section Notes and the Tribunal had come to the conclusion that Chapter Notes and Section Notes are part of the Tariff.

Relevant paras 4 and 7 from the said judgment have already been reproduced at page 25 of this order. A comparative study of erstwhile Item 1B heading 11.01 clearly shows that for bringing the "Robinson's Patent Barley" under the heading the respondents have to satisfy that the ash content is less than 3%. The evidence as to the ash content was neither placed by the appellant nor by the respondents before the adjudicating authority and for holding that the product "Robinson's Patent Barley" falls under Chapter Note 2 of Chapter 11 the respondent had to satisfy that the starch content is more than 45% and the ash content is less than 3%. In the Jadavpur University Certificate Starch (dry basis) is mentioned as 86.43% and total ash (dry basis) as 2.13%.

It has further been mentioned in the said certificate that as the product is fortified with 1.5% CaCO_3 and 0.28% reduced iron (as declared on the container) it is evident that the ash content after deduction of the added minerals is less than 1%. As discussed earlier, there is no finding by the Collector (Appeals) whether this evidence has been admitted or not by him. It is incumbent on the part of the Collector (Appeals) to observe the procedure as laid down under Rule 215 of the Central Excise Rules, 1944 which has been reproduced above.

It appears that the Collector (Appeals) has not complied with the provisions of Rule 215. The earlier decision of the Tribunal in the case of Reckitt and Colman of

India Ltd., Calcutta v. Collector of Central Excise, Calcutta old Tariff and this decision was given by the Tribunal in favour of the revenue. The Tribunal had the occasion to deal with the issue that where there is a decision by the co-ordinate Bench, whether the other Bench is to follow the same or not. These observations were made in the case of Northern Plastics Ltd. v. Collector of Customs and Central Excise, Rajkot in C/Mis./677/89-C and appeal No. C/2720/89-C vide order No. 424/90-C dated 14th March, 1990. Paras No. 31, 32, 33 and 34 from the said judgment are reproduced below: 31. I have perused the order written by my learned brother Shri K.S. Venkataramani, Member (T). I agree with his conclusions. Before I part with this matter, I would like to add my observations.

32. The Tribunal had decided the present matter vide its order dated 14th August, 1989 reported in 1989 (24) ECC 45 and the Tribunal had remanded the matter to the Collector of Customs and Central Excise, Rajkot for re-adjudication, and the Collector had re-adjudicated the matter which is the subject matter of the appeal before us. The present appellants, viz., M/s. Northern Plastics Ltd. being not satisfied with the remand order of the Tribunal had also filed an appeal which is pending before the Supreme Court. Para No. 57 from the Tribunal's earlier order is reproduced below: 57. The next question that arises is as to what will be the legal and just order to be passed. The Collector's order has to be set aside and it is hereby ordered to be set aside. We have given our views about the aspect of licensing, about the necessity for invoking Section 111(d), and, even though directly, the necessity to go into all the facts, circumstances, documents, law, evidence and arguments pertaining to this matter which involves substantial financial stakes. In these circumstances, we felt that it will be fair and just to direct that the Collector should re-adjudicate the matter after keeping in mind what we have said in earlier paragraphs. We further direct that before re-adjudication he should issue a show cause notice in writing as the earlier show cause notice was oral and the respondents are entitled to be informed of the detailed charges against them.

A simple reading of the Tribunal's order shows that the Tribunal had remanded the matter and had given its findings in its earlier paras.

Strictly speaking, res judicata is not applicable in revenue proceedings. Madras High Court in the case of Commissioner of Income-tax, Madras v. S. Devaraj reported in 73 ITR 1 had held as under: There is of course no provision in the Income-tax Act relating to the matter and the doctrine of resjudicata also may not be applicable to orders of the Tribunal. Even so, in our opinion, it is proper and desirable that when the Tribunal takes a particular view on the scope and effect of a statutory provision, it does not contradict itself and come to a diametrically opposite view later; but in such a case, it follows the earlier view and, if and when the aggrieved party applies, should make a reference to this Court of the question. Messrs HA. Shah & Co. v. Commissioner of Income-tax and Excess Profits Tax, Bombay City , had held that it was not open to the Tribunal to come to a different conclusion to the one arrived at by that very Tribunal earlier without any limitation whatsoever. The mere fact that the second Tribunal may look upon the decision of the first Tribunal as erroneous in law would not justify it in coming to a contrary conclusion or reversing the finding of the first Tribunal. Relevant extract from the Bombay High Court judgment is reproduced below: ...and, therefore, it seems to us that the mere fact that the second Tribunal may look upon the decision of the First Tribunal as erroneous in law would not justify it in coming to a contrary conclusion or reversing the finding of the first Tribunal.

Nor are we satisfied that in order to enable the second Tribunal to depart from the finding of the first Tribunal it is essential that there must be some fresh facts which must be placed before the second Tribunal which were not placed before the first Tribunal.

If the first Tribunal failed to take into consideration material facts, facts which had a considerable bearing upon the ultimate decision, and if the second Tribunal was satisfied that the decision was arrived at because of the failure to take into consideration those material facts and that if the material facts had been taken into consideration the decision would have been different, then the second Tribunal would be in the same position to revise the earlier decision as if fresh facts had been placed before it.

On principle there is not much difference between fresh facts being placed before the second Tribunal and the second Tribunal taking into consideration certain material facts which the first Tribunal failed to take into consideration. It may be said that even though the first Tribunal may take into consideration all the facts, still its decision may be so erroneous as to justify the subsequent Tribunal in not adhering to that decision.

In a case like this, which indeed must be an extreme case, it could be said that the decision of the first Tribunal was a perverse decision, and if the decision of the first Tribunal was either arbitrary or perverse it would justify the second Tribunal in departing from the decision arrived at by the first Tribunal.

Therefore, in our opinion, an earlier decision on the same question cannot be reopened if that decision is not arbitrary or perverse, if it had been arrived at after due inquiry, if no fresh facts are placed before the Tribunal giving the later decision has taken into consideration all material evidence. We should also like to sound a note of warning, especially with regard to a Tribunal like the Appellate Tribunal, that it should be extremely slow to depart from a finding given by an earlier Tribunal.

Even though the principle of *res judicata* may not apply, even though there may be no estoppel by record, it is very desirable that there should be finality and certainty in all litigations including litigation arising out of the Income-tax Act. It is not a very satisfactory thing that one Tribunal came to one conclusion and another Tribunal came to a different conclusion and that the two conclusions are entirely inconsistent with one another.

Therefore, the second Tribunal must be satisfied that the circumstances are such as to justify it in departing from the ordinary principles which apply to all Tribunals to try and give as far as possible a finality and a conclusiveness to decision arrived at. We should also like to lay down a further limitation upon the power of the Tribunal to revise the decision given earlier by that very Tribunal.

The effect of revising his decision should not lead to injustice and the Court must always be anxious to avoid injustice being done to the assessee. If the Court is

satisfied that by depriving the assessee of his rights under the later decision in an earlier year the assessee lost an important advantage or lost some benefit which could have got under the Income-tax Act, then the Court may take the view that departing from the earlier decision leads to injustice or denial of justice and the Court may prevent an Income-tax Authority from doing something which would be unjust and inequitable.

33. In the present appeal before the Tribunal whatever fresh material or evidence was placed, which was not placed before the earlier Bench of the Tribunal, the same has been duly considered and after giving due consideration, my learned brother has come to the conclusion. I do not find that the earlier decision was erroneous or perverse, in any way, and this Tribunal should not differ from the earlier decision and conclusions of the Tribunal. Bombay High Court in the case of Trikamal Maneklal reported in 33 ITR 725 had held that the Tribunal had considered the merits of the contention of the assessee and arrived at a certain decision, the order of remand made by the Appellate Tribunal was final under Section 33(6), and it was not open to the Appellate Tribunal to permit the correctness of that order to be questioned in the proceedings subsequently brought before it against the final order of assessment, merely because the Tribunal at the later stage is advised that the previous order was erroneous in law.

34. In view of the above discussion, I agree with the conclusions of my learned brother Shri K.S. Venkataramani and the appeal is disposed of accordingly.

We have also perused the show cause notice. Para No. 2(b) from the show cause notice is reproduced below: (b) The product "Robinson's Patent Barley" manufactured by the said assessee should not fall under Chapter 11 of the said Schedule as a product of Milling Industry because this product appears to be "Prepared Flour" falling under heading No. 19.01 of the said Schedule being a food preparation on the basis of barley, calcium carbonate and iron vide its composition declared by the said assessee in test memo No. 4/81 dated 27.4.1981) and thus this product appears to be classifiable under subheading No. 1901.19 as a preparation of barley flour put up in unit containers and ordinarily intended for sale.

Relevant extract from the reply to the show cause notice as to the test report is also reproduced below: Since the introduction of Tariff Item 1B in the Central Excise Tariff imposing levy of Central Excise duty on prepared or preserved food, we have been clearing Purity Barley and Robinson's Patent Barley without payment of duty by virtue of the said exemption Notification No. 17/70-CE as amended from time to time and paid duty on manufacture and clearance of Robinson's Pearl Barley as the said item was a specified item in the said Notification. The classification list submitted by us was also approved from time to time by the jurisdictional Central Excise authorities and the Department also proceeded on that basis. The classification list submitted by us in respect of the said two varieties of Barleys in the year 1980 was duly approved by the Assistant Collector of Central Excise having jurisdiction over our said factory on 14th May, 1981. Thereafter on or about 25th July, 1981 the Collector of Excise, Calcutta, issued a Show Cause Notice in pretended exercise of power conferred by Section 35A(2) of the Central Excises and Salt Act, 1944 calling upon us to show cause as to why approval granted by the Assistant Collector should not be set aside in view of the observation of the Chemical Examiner of the Department that the said two products are based on starch and a food preparation not specially prepared for use as baby food. The relevant extract of the said observation in regard to Robinson's Patent Barley is as follows: The sample is in the form of white powder based on starch (barley powder) together with calcium and iron packed in an original unit container labelled as "Robinson's Patent Barley" for infants and invalids.

We were not provided with either the analytical data or the full report. We replied to the said Show Cause Notice and, inter alia, submitted that the said two barleys are not prepared on the basis of starch. The products are made out of barley grain which is a cereal although it contains starch.

In the matter before us, there is no evidence on record whether the copy of the chemical examiner's report of the department was supplied to the respondent. Apparently, it appears to be a fit case for remand.

Order 41 Rule 23 of the Code of Civil Procedure of 1908 is reproduced below: 23. (Section 562) Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

13. In the matter before us, the respondents have claimed that "Robinson's Patent Barley" falls under Chapter 11 heading 1101.90.

Chapter Notes and Section Notes are part of the Tariff. Before an authority can come to a conclusion it has to be satisfied whether the ash content is less than 3%. This was not examined by the Assistant Collector as well as the Collector (Appeals). Before it can be held that it falls under Chapter 11, authorities have to satisfy about the composition in conformity with Chapter Note 2. *New India Life Assurance Co. Ltd. v. Commissioner of Income-tax, Bombay* E.P. Tax, Bombay City had held as under: In appreciating the question that arises before us, one must clearly bear in mind the fundamental difference in the positions of the appellant and the respondent The appellant is the party who is dissatisfied with the judgment; the respondent is the party who is satisfied with the judgment. Now what we have just said is nothing more than really a summary of the provisions with regard to appeals and cross-objections contained in 0.41 of the Civil Procedure Code; and, as we shall presently point out, the position of the Appellate "Tribunal is the same as a Court of appeal under the Civil Procedure Code and the powers of the Appellate Tribunal are identical with the powers enjoyed by an appellate Court under the Code.

15. In view of these above observations, we are of the view that it is a fit case where we should remand the matter. Accordingly, we set aside the impugned order and remand the matter to the Collector (Appeals) with a direction that the

Jadavpur University Certificate on barley dated 31st March, 1988 can be admitted only after complying with the provisions of Rule 215 of the Central Excise Rules, 1944. Since we are remanding the matter, we refrain from making any observation on merits pertaining to classification. It is further ordered that while deciding the appeal afresh, the Collector (Appeals) shall observe the principles of natural justice and both the parties shall be at liberty to produce any other fresh evidence in accordance with law, if they so choose.

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