

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Excise Appeal No. 2660 of 2010

[Arising out of Order-in-Appeal No. 256/2010-CE dated
27.09.2010 passed by the Commissioner of Central Excise
(Appeals-I) Bangalore]

MTR Foods Pvt. Ltd.

Plot No. 77 & 78,

Bommasandra Industrial Area,

Hosur Road,

Bangalore

.....**Appellant**

VERSUS

C.C.E, Bangalore - I

P.B. No. 5400, C.R. Building

Queens Road,

Bangalore – 560 001

.....**Respondent**

Appearance:

Mr. H.R. Vishwanathan, Advocate for the Appellant

Mr. Dyamappa Airani, Authorised Representative for the
Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 21300 / 2023

Date of Hearing: 21/07/2023

Date of Decision: 21/11/2023

Per: Pullela Nageswara Rao

M/s. MTR Foods Ltd. the appellants are manufacturers of
Masala instant food mixes and Ready-to-eat packaged food and
frozen food falling under Chapter 9, 21 etc., of the Central Excise
Tariff Act, 1985. The appellant had manufactured and cleared

"Badam Milk Drink-Ready to Drink" at "Nil" rate of duty from October 2007 onwards by classifying this final product under Chapter Heading 0402 9990 of the Central Excise Tariff Act, 1985. Prior to the amendment to Central Excise Tariff Act, 1985 in 2004, wherein 8-digit classification Code was introduced in place of 6-digit, the appellant was classifying the product "Badam Milk Drink-Ready to Drink" as flavoured milk, which was specifically mentioned in Chapter Sub-heading 0401.11 in the erstwhile Central Excise Tariff Act, 1985. After introduction of 8-digit classification Code, the appellant has classified this product under Chapter 04 of Central Excise Tariff Act, 1985 on the ground that the change from 6 to 8 digits will not change the classification. Hence the appellant was clearing Badam Milk as flavoured milk under Chapter sub-heading 0402 9990 of the Central Excise Tariff Act, 1985. The appellant was issued with a show-cause notice dated 17.10.2008 alleging that they had manufactured and cleared "Badam Milk Drink - Ready to Drink" at 'Nil' rate of duty from October 2007 onwards, classifying under Chapter Sub-Heading 0402 9990. In the show-cause notice the Department alleged that this final product is rightly classifiable under Chapter sub-heading 2202 9030 as 'Beverages containing Milk' and that as per the HSN notes to Chapter Heading 2202.90 under the heading 'other', at Sl. No. 4 reads as 'Certain other beverages ready for consumption, such as those with a basis of milk and cocoa' and that Rule 3(a) of the General Rules for the Interpretation of Central Excise Tariff stipulates that the heading, which provides the most specific description shall be preferred to heading providing a more general

description. Hence the Department has classified the item under Chapter Sub-heading 2202 9030. The adjudicating authority has confirmed the classification of "Badam Milk Drink - Ready to Drink" manufactured by the appellant under Chapter Sub-Heading 2202 9990 of the Central Excise Tariff Act, 1985 for the period October 2007, onwards. Aggrieved by the Order-in-Original, the appellant filed an appeal before the Commissioner (Appeals), who has rejected their appeal vide the impugned order. Hence, this appeal was filed before the Tribunal.

2. In the submissions the appellant contended that; from the process of making "Badam Milk Drink - Ready to Drink" the product is nothing but milk in Badam Flavour; the learned Commissioner (Appeals) did not appreciate the difference between "beverages containing milk" and "milk itself in some flavor"; therefore the product is nothing but milk in badam flavor and is rightly classifiable under Chapter 04 as milk and not under Chapter 22 as beverages, which is a general entry; they have never contended that Badam Milk is not a beverage but it is classifiable under Chapter 4 and not under Chapter 22; as per the Wikipedia encyclopaedia the definition of 'flavoured milk' is "sweetened dairy drink made with milk, sugar, colorings and artificial or natural flavourings and that flavoured milk is often pasteurized using ultra high temperature (UHT) treatment, which gives a longer shelf life than the plain milk" and that the process undertaken by them is exactly the same as per the definition of 'flavoured milk' in the Wikipedia encyclopaedia. They further submitted that learned Commissioner (Appeals) upholding the

Badam Milk drink manufactured and cleared by them is more appropriately classifiable under heading 2202 9030 is contrary to the definition of 'flavoured milk' and the provisions of Rule 3(a) of the General Rules for the interpretation of Central Excise Tariff since Chapter 4 specifically covers milk including flavoured milk and therefore heading 0402 9990 is the specific entry, when compared to chapter sub heading 2202 9030 and that the introduction of 8 digit tariff will not call for any reclassification, since the 8 digit tariff cannot be interpreted so as to change the classification of the product from one chapter to another. Therefore, by virtue of 8-digit tariff, the flavoured milk i.e. Badam Milk in this case will not go out of Chapter 4 to get reclassified under Chapter 22. In view of the above the appellant has submitted that the impugned order should be set aside.

3. The learned Advocate has submitted that Badam Milk drink is undisputedly a flavoured milk and the composition and list of ingredients is as below:

| Component | % of component in goods |
|--|--------------------------------|
| Toned Milk | 89% |
| Almond/Badam | 1% |
| Sugar, Milk Solids, Cardamom powder, Saffron, and Maltodextrin | 10% |
| Total | 100% |

3.1. He has further submitted that the Department's case is that Chapter 04.02 covers milk added with sweetening matter only and that Badam Milk manufactured by them has not been added with sweetening agents like sugar but on the other hand flavoured with badam powder, cardamom, saffron, Maltodextrin and garnished with badam flakes. Such flavoured products fall under the category of 'beverages' and are rightly classifiable under Chapter 2202 9990. The item cannot be used as a milk perse in view of the addition of flavour added to it and it has to be considered as a beverage and the product is a beverage as there are number of essential flavouring agents added to the milk and it cannot be considered under chapter heading 04 for the purpose of classification. The learned Advocate submits that Badam Milk drink is a flavoured milk made from milk added with sugar and flavours of Badam, Cardamom, Saffron, etc., adding of which do not alter its essential character of milk. The natural constituents of the milk are water, fat, proteins, lactose, minerals and vitamins. If those constituents are replaced with any other substance, only then the flavoured milk could not fall under Chapter 04. However, the goods in question retained all the constituents since not replaced with any constituents and the processes in the preparation of 'Badam Milk Drink' such as UHT, homogenization, pasteurization etc., are only to provide shelf life and to ensure that the milk does not curdle. The process does not in any way alter the essential character of milk so as to go out of Chapter 04. Further he submits that commonly manufacture is the end result of one or more processes through which the original commodity experiences a change and the

processed commodity should be recognized as a new and distinct article. In this case the flavoured milk would continue to be milk despite the fact that sugar and flavour has been added only for increasing tastiness. As per Wikipedia, encyclopaedia 'Flavoured milk' is a sweetened dairy drink made with milk, sugar, flavourings, and sometimes food colourings. It may be sold as a pasteurized, refrigerated product, or as an ultra-high-temperature (UHT) product not requiring refrigeration. It may also be made in restaurants or homes by mixing flavourings into milk. The description and the process undertaken by the appellant to produce 'Badam Milk Drink' is exactly as per the definition of 'flavoured milk' in the Wikipedia encyclopaedia. Further Chapter 04 is specifically covering "Dairy produce, birds' eggs, natural honey, edible products of animal origin, not elsewhere specified or included". Further sub-heading 04 02 covers "milk and cream, concentrated or containing added sugar or other sweetening matter." In the erstwhile Central Excise Tariff, flavoured milk, whether sweetened or not, put up in unit containers ordinarily intended for sale was specifically covered under Chapter sub-heading 0401.11 and in the present eight-digit tariff, Badam Milk would be classified under Chapter 04 only and accordingly, sub-heading 0402 9990 is the most appropriate and specific entry. Merely because 8-digit tariff is introduced that by itself does not call for reclassification.

3.2. As per the Food Safety and Standards Act, 2006, Section 2(f) of the Milk and Milk Products Order, 1992 'milk' means "milk of cow, buffalo, sheep, goat, or a mixture thereof either raw or processed in any manner and includes pasteurized, sterilized,

recombined, flavoured, acidified, skimmed, toned, double toned, standardized or full cream milk.” Hence, ‘milk’ includes pasteurised, sterilized and flavoured milk. Hence, the product is covered under ‘milk’ i.e. Chapter 04. Chapter 22 covers Beverages, Spirits and Vinegar. Note 3 of Chapter 22 reads that “for the purpose of heading 2202, the term non-alcoholic beverages mean beverages of an alcoholic strength by volume not exceeding 0.5% volume. This chapter covers predominantly the water-based beverages and milk is not covered under the heading 2202. Sub-heading 2202 9930 covers beverages containing milk. There is a difference between beverages containing milk and the milk itself in some flavour. Since milk itself is a beverage, it cannot say milk containing milk. Therefore, flavoured milk or milk in Badam flavour is rightly classifiable under Chapter 04 as milk and not under Chapter 22 as a beverage, which is a very general entry. As per rule 3(a) of the General Rules for the interpretation to Central Excise Tariff, “the heading which provides the most specific description shall be preferred to headings providing a more general description.” In the instant case, heading for Chapter 22 is “Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured and other non-alcoholic beverages, not including fruit or vegetable juices of heading 2009”. As the Chapter heading does not cover any milk or milk-based product, there is no requirement to go into the chapter sub-heading and tariff item level classification.

3.3. The learned Advocate submits that for classifying the product, one must identify the heading of the chapter, where the

product could fall and then sub-heading and finally tariff item has to be identified. As there is no specific heading in Chapter 22 which covers milk and milk products, classifying the same in Chapter 22 may not be correct. Chapter 4 provides more specific description than Chapter 22, classifying flavoured milk in Chapter 4, which covers 'milk' could be more appropriate. Further, in the matter of classification, the burden is on the Department to prove that a particular product is classifiable under a given entry. In this case the proposed reclassification under Chapter 22 02 is without any basis in as much as the Department has not brought on record any material in support of the classification proposed by them.

3.4. The learned Advocate during the hearing has submitted that the issue is no longer res integra and is covered by the following decisions:

- a. Commissioner of Central Excise Vs. Amrit Foods – 2015 (9) TMI 1269 – Supreme Court*
- b. Gujarat Co-op. Milk Marketing Federation Ltd. Vs. State of U.P.-2017 (6) TMI 91–Allahabad High Court*
- c. M/s. Cavinkare Private Limited Vs. CCE – 2019 (11) TMI 1054 – CESTAT CHENNAI*
- d. Nestle India Limited Vs. CCE (LTU), Delhi – 2017 (3) TMI 1636-CESTAT New Delhi*
- e. Commissioner of Central Excise & Customs, Guntur Vs. Crane Betel Nut Powder Works-2008 (221) ELT 99 (Tri.-Bang.) which was affirmed by Hon'ble Supreme Court reported as 2010 (256) ELT A17 (SC)*

4. The learned Authorised Representative (AR) for the Revenue submitted written submissions, wherein he has contended that

the product/item 'Badam Milk Drink – Ready to Drink' is rightly classifiable under CTH 2202 9030. He has cited the following case-laws:

a. Ernakulam Regional Co-operative Milk Producers Union Ltd. Vs. Commissioner, Cochin (Final Order Nos. 21785 – 21787/2017 dated 24/08/2017)

b. Britannia Industries Ltd. – 2022 (56) G.S.T.L. 36 (App. A.A.R.-GST-T.N.)

4.1. Learned AR has also relied on the Notification No. 17/2008-CE (NT), wherein flavoured milk of animal origin has been classified under CETH 2202 9030, while allowing Section 11AC benefit for the period 25.02.2005 to 14.06.2007. Learned AR has also contended that as per the HSN, Chapter Heading 0402 excludes "Beverages consisting of milk flavoured with cocoa or other substances".

5. Heard both parties and perused the records.

6. We find that in this case the issue is regarding classification of the product manufactured by the appellant i.e. "Badam Milk Drink Ready to Drink". The appellant contends that they have been classifying this item under 0401 11 as flavoured milk is covered under this heading prior to the introduction of 8-digit classification code vide Central Excise Tariff (Amendment) Act, 2004 w.e.f. 28.02.2005. However, post introduction of 8-digit classification, the Department has classified this product/item under CETH 2202 9030 which reads as under:

"Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured and other non-alcoholic beverages, not

including fruit or vegetable juices of heading 20.09” and sub-heading 2202 9030 as beverages containing milk.”

7. The appellant contends that with the change in the Classification Code from 6 to 8 digit, the classification of the product/item should not undergo any change. They have also contended that flavoured milk was specifically covered under Chapter heading 0401 11 and with the introduction of 8-digit Classification Code, Department has now reclassified the item under Chapter Heading 2202 9030. The appellant further submits that the impugned item is flavoured milk i.e., milk flavoured with Badam. Hence, it remains to be the milk. In this regard, they have cited the composition of the impugned product/item. They contended that the heading under which the Department has reclassified as mentioned supra does not mention anything in the chapter heading and in classification matters, when an item is to be classified, there should be a mention of the item in the chapter heading and then go to the chapter sub-heading and then go to the tariff item heading. In this case, the Tariff item Heading 2202 9030 under others is “beverages containing milk”, whereas the chapter heading 2202 does not mention anything with regard to milk. Hence, any item, which predominantly constitutes milk should get classified under chapter heading 0402. The learned AR for Revenue has cited the case-law of Ernakulam Regional Co-operative Milk Producers Union, wherein this Tribunal has held as under:

“6. *After considering the submissions of both the parties, we find that there is no infirmity in the impugned order whereby the Commissioner (Appeals)*

has rightly classified the item under tariff heading 2202 9030 after considering the submissions of the assessee. Further we also find that the Central Government vide Notification No. 17/2008-CE (NT) dt. 27/03/2008 has clarified that the flavoured milk of animal origin will fall under the tariff heading 2202 9030 but no duty will be payable for the period from 28.02.2005 to 14.06.2007. Vide this Notification, the Central Government has exempted the duty for the period mentioned in the notification and in all the three appeals, the period covered is between 28.02.2005 to 16.06.2007. Further we also find that in the case of ERCMPU (MILMA) Vs. CCE, Cochin [2014 (314) ELT 832 (Tri.-Bang.)], the Division Bench of this Tribunal while following the Notification No. 17/2008-CE has held that flavoured milk of animal origin is entitled to benefit of Notification dt. 27.03.2008. By following the ratio of above decision, we hold that there is no infirmity in the impugned order classifying the flavoured milk of animal origin under tariff item 2202 9030 of Central Excise Tariff but the appellants are not required to pay duty in view of the said notification. Accordingly, we dispose of all the three appeals by giving the benefit of notification to the appellant."

8. We find that with the introduction of 8-digit Classification Code, there is a specific entry for beverages containing milk, which was not there in the earlier Central Excise Tariff. Further Tarriff item 0401.11 "flavoured milk whether sweetened or not

put up in unit containers ordinarily is not anymore present under Chapter 04 after the introduction of 8 digit classification code. With the introduction of the 8 digit, since there is a specific classification for the impugned item under Chapter sub-heading 2202 9030 the same has to be classified under this specific heading in view of Rule 3(a) of the General Rules for the Interpretation of Central Excise Tariff, which says that a specific heading should be preferred for a generic heading. In this case, we find that the impugned item i.e. Badam Milk Drink – Ready to Drink is containing flavourings namely badam powder, cardamom, saffron, Maltodextrin and garnished with badam flakes. Further we find that this item has also undergone the process of homogenization and pasteurization and UHT treatment to increase the shelf life of the product. Such items, which are having a longer shelf life because of the above processes are not akin to normal pasteurized, homogenized and toned milk. The Chapter note 1 to Chapter 04 of the Central Excise Tariff, 1985 reads as “the expression, Milk means full cream milk or partially or completely skimmed milk”. Further this item cannot be a substitute for milk in the preparation of beverages made with milk viz. tea and coffee. We find that this item is ready to drink, which is more appropriately classifiable under beverages. The appellant contended that milk is a beverage, hence beverages of milk containing milk means milk containing milk. We find that the Department contended that the product/item is classifiable under 2202 9030 and in support they cited the case-law of Ernakulam Regional Cooperative Milk Producers Union (supra). Further we find that the Board, while

issuing Section 11C Notification No. 17/2008-CE (NT) has classified flavoured milk of animal origin under chapter sub-heading 2202 9030. We find that the Notification is issued after the introduction of 8-digit classification code and after the full alignment of Central Excise Tariff with HSN. This buttresses the contention of the Department that the impugned item is classifiable under the chapter sub-heading 2202 9030.

9. The case-law of Nestle India (supra) cited by the appellant is distinguishable on facts as the issue involved is classification between Chapter heading 0404 and 1904 of mix and not beverage and the case is based on the Central Excise Tariff that existed before 2005 i.e. before alignment of the Central Excise Tariff with the HSN. The appellant has also cited the case-law of M/s. Amrit Foods, wherein the issue involved is classification of Milk shake mix and soft serve mix between Chapter heading 0404 and 1901.19, hence distinguishable. The decision in the case of M/s Cavinkare Pvt., Ltd. (supra) does not have precedential value being less than the monetary limit, hence no appeal was filed by Revenue as per Section 35R of the Central Excise Act, 1944. Further the case of Gujarat Co-operative Milk Federation relates to the VAT case of Uttar Pradesh and is different from Tariff classification under the Central Excise Tariff Act, 1985. In the case of Amrit Foods (supra) the issue is whether milk shake mix and soft serve is to be classified under Chapter Heading 0404.90 or under Chapter 1901.9090 and the issue of classification under 2202.90 was not raised nor discussed. Further the products discussed in this case are not

beverages, hence distinguishable. In the case of Crane Betel Nut Powder Works (supra), the case is regarding classification of Betel Nut under Chapter sub-heading 2106 9030 or Chapter Tariff Heading 0802 9012. The dispute is regarding the classification after the introduction of 8 digit classification code. The facts in the present case are different and hence distinguishable.

10. In view of the above discussion and following the ratio of the decision in Ernakulam Regional Co-operative Milk Producers Union Ltd. (cited supra) of this Tribunal, we do not find any reason to interfere with the impugned order. Hence the appeal filed by the appellant is unsustainable and is rejected.

(Order pronounced in Open Court on 21/11/2023)

(D.M. Misra)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

iss/pr