CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
KOLKATA
REGIONAL BENCH – COURT NO. 2

Customs Stay Application No. 75162 of 2020
(on behalf of appellant)
And
Customs Appeal No. 75195 of 2020

[Arising out of Order-in-Appeal No. KOL/CUS (CCP)/AKR/299/2020 dated 08/06/2020 passed by the Commissioner of Customs (Appeals), Kolkata]

Commissioner of Customs (Prev.), West Bengal, Kolkata
(West Bengal,
Kolkata.)

...Appellant

Versus

M/s Anutham Exim Private Limited
Plot No. 1143, 1144 and 1146, P.O. Chalsa,
Dist. Jalpaiguri, Siliguri,
West Bengal – 735 225. **...Respondent**

APPEARANCE:

Shri M.P. Toppo, Authorised Representative for the Department
Shri B.L. Narasimhan, Advocate and Shri Rahul Tangri, Advocate for the respondent (s).

CORAM:
HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 18.01.2021
DATE OF DECISION: 25.01.2021

STAY PETITION ORDER NO.75002/2021
FINAL ORDER No.75031/2021

P.V. SUBBA RAO

This appeal and stay application were filed by the Revenue. In this appeal, Revenue is assailing order-in-appeal No.KOL/CUS(CCP)/AKR/299/2020 dated 08/06/2020 passed by the Commissioner of Customs (Appeals), Kolkata. In this regard, the respondent/assessee had approached the Hon'ble High Court of Calcutta by filing W.P.A./8405 of 2020. The Hon'ble High Court of Calcutta was pleased to pass the following order on 04/01/2021:

"I have heard learned Counsel appearing on behalf of all the parties and perused the materials placed on record and upon suggestion of the Court, the parties have consented to the following order being passed :-

a) **The Customs Excise and Service Tax Appellate Tribunal (CESTAT) is directed to decide the main appeal bearing Customs Appeal No. 75195 of 2020 within a period of three weeks from date**.

b) The petitioner shall be at liberty to pursue its remedy before the Customs Excise and Service Tax Appellate Tribunal (CESTAT) against the order passed by the Principal Commissioner of Customs dated December 07, 2020 as well as the order dated December 15, 2020 passed by the Deputy Commissioner of Customs before the Appellate Authority."

2. Accordingly, the matter was heard on a priority basis on 18 January 2021 for final disposal.

3. The issue which falls for consideration in this appeal is whether the goods imported by the respondent, such as, Big Cola, Big Orange Cola, Big Lemon etc., which they described as "carbonated beverage with fruit juice" are classifiable under Customs Tariff Heading 22021090 and 22021020 as claimed by the Revenue or are classifiable under 22029920 as claimed by the respondent/importer.

4. The respondent is an importer of branded drinks namely Big Lemon with fruit juice, Big Kids Jeera with fruit juice, Big Kids Orange with fruit juice, Big Lemon Lime with fruit juice etc. They classified these products as **"fruit pulp or fruit juice based drinks" under Customs Tariff heading 22029920**. Goods which are imported are chargeable to customs duty as per the Custom Tariff and are also chargeable to Integrated Goods and Services Tax (IGST) as is applicable to the corresponding goods sold in India. The rates of IGST are specified by the Government by Notification No. 1/2017 - Integrated Tax (rate) dated 28/06/2017 as amended from time to time. Relevant portion of this Notification is as follows:

"IGST Rates for specified goods – Schedules I to VI

In exercise of the powers conferred by sub-section (1) of Section 5 of the Integrated Goods and Service Tax Act, 2017 (13 of 2017) [readwith sub-section (5) of Section 15 of the Central Goods and Service Tax Act, 2017 (12 of 2017)], the Central Government, on the recommendations of the Council, hereby notifies the rate of the integrated tax of –

(i) 5 per cent in respect of goods specified in **Schedule I**,

(ii) 12 per cent in respect of goods specified in **Schedule II**,

(iii) 18 per cent in respect of goods specified in **Schedule III**,

(iv) 28 per cent in respect of goods specified in **Schedule IV**,

(v) 3 per cent in respect of goods specified in **Schedule V**, and

(vi) 0.25 per cent in respect of goods specified in **Schedule VI**,"

Schedule II- 12%		
S.No.	Chapter/Heading/Sub-heading/Tariff Item	Description of the goods
48	22029920	Fruit pulp or fruit juice based drinks

Schedule IV- 28%		
S.No.	Chapter/Heading/Sub-heading/Tariff Item	Description of the goods
12	220210	All goods (including aerated waters), containing added sugar or other sweetening matter or flavoured.

Explanation (iii) and (iv) to the notification read as follows**:**

For the purposes of this Schedule,

(i).....

(ii**).....**

(iii) "Tariff item", "sub-heading" "heading" and "Chapter" shall mean respectively a tariff item, sub-heading, heading and chapter as specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975).

(iv) The rules for the interpretation of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), including the Section and Chapter Notes and the General Explanatory Notes of the First Schedule shall, so far as may be, apply to the interpretation of this notification".

5. From the above explanation to the notification, it is clear that there is no separate classification of goods for the purpose of IGST and the classification of the goods under the Customs Tariff holds good for IGST as well. The Customs Tariff Act, 1975 provides for Rules of interpretation which aid in classifying the goods and these Rules also apply to IGST. If the imported goods are classified under Customs tariff Heading 220210 as "all goods (including aerated waters), containing added sugar or other sweetening matter or flavoured", IGST @ 28 per cent is to be levied on the imported goods. On the other hand, if they are classified under Customs Tariff Heading 22029920 as "fruit pulp or fruit juice based drinks", IGST @ 12 per cent is to be levied. On a

specific query by the Bench, the learned Counsel for the respondent explained that they have been importing these goods in the past and have always been classifying them under 22029920 as "fruit pulp or fruit juice based drinks" and Customs department has been clearing them accordingly. After the present show cause notice was issued and an order confirming the demand has been passed by the Assistant Commissioner, the learned Commissioner has issued to them a Show Cause cum demand for all the previous consignments alleging suppression of facts and invoking extended period of limitation seeking to change the classification of the goods. He has passed an "Order-in-Original" confirming the demand of differential duty. They are yet to file appeal against the order of the learned Commissioner.

6. A perusal of the records and the labels of the product shows that the imported products are being sold as "carbonated beverages with fruit juice" under the brand names Big Cola (with fruit juice), Big Kids Orange, Big Kids Apple, Big Kids Jeera, Big Kids Lime and Big Lemon. All these contain carbonated water, sugar, fruit juice, acidity regulator and preservative, caramel and colour. The respondents classified them under Customs Tariff Heading 22029920, whereas the Department wants to classify them under 22021020 (drinks containing lime) and 22021090 (drinks containing other fruit). The relevant Tariff entries of the Custom Tariff Act are as follows:

Tariff Item	**Description of goods**	**Unit**	**Rate of** Standard	**Duty** Preferential Areas
2202	**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**			
220210	- *Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured* :			
2202 10 10	--- Aerated waters	1	30%	
2202 10 20	**--- Lemonade .....**	**1**	**30%**	
2202 10 90	**--- Other .....**	**1**	**30%**	
	- Other			
2202 91 00	--- Non-alcoholic beer	1	30%	
2202 99	--- Other :	1	30%	
2202 99 10	--- Soya milk drinks, whether or not sweetened or flavoured	1	30%	
2202 99 20	**--- Fruit pulp or fruit juice based drinks**	**1**	**30%**	
2202 99 30	--- Beverages containing milk	1	30%	
2202 99 90	--- Other	1	30%	

7. Learned Assistant Commissioner held that the primary quality of the imported product is a beverage with overwhelming constituent being carbonated water with an extremely small percentage of fruit juice

between 2.5% and 5% and therefore the HSN Code 22029020 under which the assessee claimed the classification is not correct. This tariff entry pertains to fruit pulp or fruit juice based drinks. As the defining character of the products is carbonated beverages and the fruit juice is a secondary character, they need to be classified under Customs Tariff Heading 22021020 in case of Lime based drinks and 22021090 in case of others. Being Aggrieved by this order, the importer filed an appeal before the Commissioner (Appeals), who, by the impugned order, held that the drinks are classifiable under 22029920 and set aside the order of the Assistant Commissioner. His reasonings are as follows:

> (a) there is no guidance in the Customs Tariff Act, 1975 regarding what constitutes fruit juice based drinks and what percentage of fruit juice is required to qualify a beverage as fruit juice based drinks and not as carbonated water. The HSN has no entry for "fruit juice based drinks". The Adjudicating Authority has merely gone by percentage of fruit juice content to draw his conclusion;
>
> (b) under the pre-GST regime the classification of Appy fizzz and Nimbooz (which also have fruit juice and carbonated water) was decided by the Hon'ble Supreme Court in **Parle Agro (P) Ltd. versus Commissioner of Commercial Taxes, Trivandrum[2017 (352) E.L.T. 113 (S.C.)]** as follows :-
>
> *"15. Shri Jaideep Gupta, learned senior counsel, appearing for the State of Kerala refuting the submissions of Shri K.K. Venugopal contends that High Court has rightly held that product is an 'aerated branded soft drink' within the meaning of Section 6(1)(a). He submits that after deletion of Entry 71(4) by S.R.O. No. 119 of 2008 which provided "Fruit pulp or fruit based drink", it was clear indication of the legislation that the 'fruit based drinks' are out of Entry 71 and have to be covered into 'aerated branded soft drinks' under Section 6(1)(a). He submits that it is not disputed that 'Appy Fizz' is a branded drink and further it is aerated by CO_2, hence, it is aerated drink. He submits that amendment of Entry 71 by S.R.O. No. 119 of 2008 made the legislative intent clear and the High Court has rightly relying on the said amendment has held that product is not covered under Entry 71 and is liable to tax @ 20% under Section 6(1)(a). Learned counsel for the respondent, further, submits that CESTAT ruling has no relevance with regard to the classification under Act, 2003, since, the CESTAT ruling considered the different headings under Central Excise Tariff Act, 1975 which is not relevant. Learned counsel submitted that under the Rules of interpretation as contained in the Act, 2003, the product being not covered with any of HSN number common parlance or commercial parlance test has rightly been applied by the High Court. Under the common parlance even if the product contained more than 10% fruit concentrate it is a soft drink as commonly known and tax liability @ 20% has rightly been imposed.*
>
> *16. Learned counsel for the parties have placed reliance on various cases which shall be referred to while considering the submissions in detail".*

(c) the Larger Bench of the CESTAT in the case of **Brindavan Beverages Pvt. Ltd. versus Commissioner of Customs, Central Excise & Service Tax, Meerut [2019 (29) G.S.T.L. 418 (Tri. – LB)]** also held that Nimbu Masala Soda and Nimbooz are classifiable under 22029020 as the fruit juice content of Lime in Nimbooz is not less than 5% and the total soluble solid is also not less than 10% as required under FSSAI Regulations ;

(d) The FSSAI Regulations 2.3.30 pertaining to carbonated beverages or fruit drinks was amended w.e.f. 25/10/2016 whereby Clause 3A has been inserted providing for beverages containing more than 5% of fruit juice (2.5% for lime) but less than 10% (5% for Lime) would also fall under Regulation 2.3.30 as "carbonated beverages with fruit juice".

8. In the present appeal, Revenue has assailed the impugned order on the following grounds:-

(i) the Commissioner (Appeals) has failed to take note of the food category description in Appendix A of the FSSAI Regulations which clarifies that the beverages based on fruit and vegetable juices are to be classified under food categories 14.1.4.2 whereas carbonated beverages, fruit juice, such as, one being imported by the respondent are covered under 14.1.4.1 of the FSSAI Regulations ;

(ii) The Commissioner (Appeals) has erred in relying on the judgment of the Hon'ble Apex Court in the case of **Parle Agro** (supra) as it works in respect of Appy fizz in which the apple fruit content was more than 10%, whereas in the present case, the juice content is only 5% or 2.5% (in case of Lime) ;

(iii) The Hon'ble Tribunal in the case of **Brindavan Beverages** (supra) held that as per FSSAI Regulations even when lime juice is added but the fruit content of lime or lemon juice is not less than 5%, the product could be classified as fruit juice based drinks but if the lime or lemon juice is less than 5%, then it would be classified as lemonade. In the present case the content of lime juice is less than 5% ;

(iv) the Advance Ruling Authority of the Tamilnadu State Appellate Authority for Advance Ruling under GST had classified carbonated beverages with fruit juice having content of lime juice – apple juice of 2.5% / 5% under 22021020/22021090 which should have been followed by the learned Commissioner (Appeals) ;

(v) the GST Council also supported the classification of carbonated beverage with fruit juice under 22021020/22021090

(vi) the major content of the imported drink is carbonated water and sugar which gives the essential character of the product and the fruit juice content is miniscule 2.5% to 2% ;

(vii) the Appellate Authority has failed in differentiating between terms carbonated fruit drinks of beverages and carbonated beverage with fruit juice which was inserted in as Clause 3A under sub-regulation 2.3.30 of FSSAI Regulations ;

(viii) one of the products is named "Big Kids Jeera" and the name suggest it would be made of Jeera and there is no discussion as to whether any fruit juice content is available in this product.

9. In view of the above, the Revenue prays to set aside the order of the learned Commissioner (Appeals) and classify the imported products namely Big Cola, Big Kids Orange and Big Kids Apple under 22021090 and Big Kids Lime, Big Lemon under 22021020. Learned Authorized Representative for the Department vehemently asserted the above arguments.

10. Rebutting the above arguments, learned Counsel for the respondent submits as follows:

(1) the onus of proving that the classification adopted by the importer is incorrect, rests on the Department and the Department has not discharged this burden through any positive evidence, test report, market enquiry, by expert evidence, common parlance test, etc. to prove that the subject goods are recognised as aerated water in the market ;

(2) up to 20 April 2020, the same goods were being allowed clearance by the Department under Tariff item 22099920 and it has been the long standing practice which should not be changed unless there is adequate evidence to change it ;

(3) the Tariff Heading 220910 under which the Revenue seeks to classify their products, covers only beverages which are prepared with flavours. They do not cover fruit pulp or fruit juice based drinks, such as, the flavoured waters contemplated under sub-heading 220210 or containing flavoured agents which impart only the sensation and odour.Reliance is placed on the Larger Bench decision of **Brindavan Beverages** (supra) which was followed by the Tribunal in the case of **Varun Beverages Ltd. versus Commissioner of CGST, Dehradun [2019 (368) E.L.T. 701 (Tri. – Del.)]** ;

(4) the subject goods are fruit juice based drinks because they contain fruit pulp or fruit juice with or without additional flavours or sweetners as can be seen from the labels of all the products which were not disputed in any of the test reports. The term "base" is defined in various dictionaries means "a principal ingredient or element to which other substances can be added. The manner in which the product is advertised labelled and brought or sold in the market leaves no doubt that fruit juice is an essential ingredient of the product. The Hon'ble Supreme Court, in the case of **Parle Agro** (supra) has held that an identical product, namely Appyfizz, which also has apple juice as well as carbonated water and other ingredients is classifiable under 22029020 ;

(5) FSSAI Regulations can be relied upon to determine the classification of the products in question. Regulation 2.3.30 has Clause 3A wherein beverages with less than 10% fruit juice, but

more than 5% fruit juice have been classified as carbonated beverages with fruit juice under the larger category of carbonated fruit beverages or fruit drinks (2.3.30). Learned Counsel submits that this insertion has been made w.e.f. October 2016. Therefore, the FSSAI which regulates their product as "carbonated beverage with fruit juice" which is precisely how they described their products;

(6) As far as the Ruling of the Advance Ruling Authority under GST is concerned, Section 103 of the CGST Act provides that the order of the Advance Ruling Authority and the Appellate Authority for Advance Ruling would apply only to the assessee who has sought the decision and his jurisdictional offices. Therefore, that ruling cannot be applied to their case and it was not binding on the learned Commissioner (Appeals) as asserted in this appeal by the Revenue. The ruling of the Advance Ruling Authority is certainly not binding on this Tribunal.

11. In conclusion he prays that the appeal may be dismissed.

12. We have heard both sides through video conferencing & have gone through the records of the case and considered the submissions made by both sides. We have also examined the labels produced before us by the learned Counsel of the respondent and the test reports. There is no dispute regarding the facts of the case. The goods are sold as 'carbonated beverage with fruit juice'. In the case of lime, the fruit juice content is 2.5% whereas in the case of other fruit, such as, apple the content is 5%. There are also products named Big Orange which has orange flavour but contains 5% apple juice and no orange juice but has only pictures of cut orange. Similarly, Big Kids Jeera does not appear to have any Jeera but only apple juice. To that extent, the representation on the labels appears to be inaccurate but this does not affect the classification of the products since there is no dispute that all these are 'carbonated beverages with fruit juice'. The products in question are not fruit or vegetable juices themselves which would be classifiable under Heading 2009. It is also not in dispute that the Customs Tariff is relevant for determining the rate of IGST payable on the imported goods. The relevant entry in Chapter 22 of the Customs Tariff Heading Act is as follows :-

Tariff Item	**Description of goods**	**Unit**	**Rate of** Standard	**Duty** Preferential Areas
2202	**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**			
220310	- *Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured* :			
2202 10 10	--- Aerated waters	1	30%	
2202 10 20	--- Lemonade	1	30%	

2202 10 90	--- Other	1	30%	
	- Other			
2202 91 00	-- Non-alcoholic beer	1	30%	
2202 99	-- Other :	1	30%	
2202 99 10	--- Soya milk drinks, whether or not sweetened or flavoured	1	30%	
2202 99 20	--- Fruit pulp or fruit juice based drinks	1	30%	
2202 99 30	--- Beverages containing milk	1	30%	
2202 99 90	--- Other	1	30%	

13. The Schedule to the Customs Tariff Act, 1975 (commonly referred to as Customs Tariff) is based on, although it is not identical to, the Harmonised System of Nomenclature (HSN)-an internationally recognised scientific method of classifying all goods. Sometimes there are differences between the HSN and the Customs Tariff in which case, the latter is relevant for determining the duty liability under the Customs Act. In view of the explanation to this effect in the IGST Notification specifying the rates of IGST chargeable on different goods, IGST is also to be charged as per the classification under the Customs Tariff. Customs Tariff, groups goods into Sections, each of which is further divided into Chapters with a two digit Chapter number. Within each Chapter, there are four digit headings which are further divided into six digit and still further divided into eight digit tariff headings.

14. Further, in the Customs Tariff, groups of articles are prefixed by a Single dash (-) or Double Dash (--) or triple dash (---). Wherever there is a single dash, it is to be read as a sub-classification of the article or group of articles covered by the heading preceding it. Similarly, a double dash is to be taken as a sub-classification of the goods covered by a single dash preceding it. A triple dash is a further sub-classification of the goods covered by a double dash preceding it.

15. In this appeal, it is not in dispute that the goods in dispute fall under Tariff item 2202. Under this heading there are two groups of products with a single dash (-) **the first one is numbered 220210 which covers "Waters including mineral waters and aerated waters containing added sugar or other sweetening matters or flavoured" and the second one is for "other" which is not numbered but the further divisions under this single dash are numbered.According to the Revenue, the goods fall under the first Single Dash and according to the Respondent Assessee, under the second Single dash**.

16. Within the first Single dash, there are three categories of products "Aerated waters" (22021010), Lemonade (22021020) and

other (22021090). **Revenue wants to classify the Carbonated beverage with fruit juice containing lime imported by the respondent under 'Lemonade' (22021020) and classify the Carbonated beverage containing other fruit juices under others (22021090).**

17. Under the second Single dash (-) "other", under which the respondent assessee classifies the product, there are two sub-categories, viz., non-alcoholic beer (22029100) and other (220299). Undisputedly, the goods in question are not non-alcoholic beer. Within the"other" (220299), there are four further sub-categories -those containing soya, those containing milk, fruit pulp or fruit juice based drinks and others. The **Respondent assessee classified their product under 22029920 --- fruit pulp or fruit juice based drinks.**

18. The contention of the Revenue is that the main ingredient of all the products is carbonated water and therefore theycannot be called fruit pulp or fruit juice based drinks. Revenue's second contention is that even if the goods have fruit juice in them, they also have sugar and sweetening matter and carbon dioxide and they are sold as carbonated beverage with fruit juice and therefore they should be considered as carbonated beverage, which is the pre-dominant content by weight of the product and only 5% or 2.5% of the total content is fruit juice. It is also the contention of the Revenue that the essential character of the goods in question is Carbonated water and hence they should be classified accordingly.

19. Often, there could be doubt as to how a particular good should be classified when it matches the description of more than one Tariff heading or sub-heading in the Customs Tariff. The General Rules of Interpretation of the Customs Tariff help resolve such differences. The relevant extract of these Rules is below:

> *THE GENERAL RULES FOR THE INTERPRETATION OF IMPORT TARIFF*
>
> *Classification of goods in this Schedule shall be governed by the following principles:*
>
> *1. The titles of Sections, Chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter*

Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished articles has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. ***The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3****.*

3. When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description*. However,* ***when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods****.*

(b) ***Mixtures, composite goods*** *consisting of different materials or made up of different components, and goods put up in sets for retail sale,* ***which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable.***

(c) ***When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration****.*

4. .....

5. .....

20. As can be seen from the above Rules, if a product is mixed with other products, the classification of the product still applies. Further, when classifying, the specific description should prevail over a more generic description (eg: automobiles are largely articles of iron and steel but are classified under the chapter which gives them a more specific description and not under Chapter 72 as Articles of Iron and Steel). The third factor which determines the classification is as to what gives the goods their essential character. If none of these resolve the issue, the last of the conflicting entries in the tariff prevails.

21. Mixtures of articles can sometimes be confounding. A simplistic way of deciding is to go by the predominant weight or volume which can sometimes give absurd conclusions. A cup of coffee, for instance, is predominantly hot water. It also has milk, sugar and (instant) coffee powder. A couple of teaspoons of sugar makes the coffee sweet to taste but a couple of teaspoons of coffee powder makes it too strong and undrinkable. The smallest component of the drink is usually the coffee powder which imparts the drink its essential character and the predominant hot water is irrelevant. Nimbu pani has lime juice, water and sugar of which the lime juice, the smallest component defines the drink.

22. Ice-cream is neither predominantly ice nor cream nor sugar. It is predominantly (at least 50%) air.Water-melon is 99% water. Human body is also predominantly comprised of water. All matter in the universe, with the exception of that in black holes, is mainly space because the nucleus (with its protons and neutrons) is but a very small part of the atom and a few electrons are revolving around it and rest of the atom between the outer edge of atom and the nucleus is just space. Any tablet marked 5mg actually weighs several times more as 5 mg is only the active ingredient and the rest is filler material like talc, glue, etc. Yet, the tablet cannot be classified as product of talc.**Thus,**

predominance of a component may not matter at all in many cases.

23. **In other cases, the predominant ingredient characterises the product and the smaller ingredient only imparts to it some special characteristics or features.** Some manufacturers offer pickles with garlic and without garlic. In such a case, the pickle does not become a product of garlic and the garlic only adds an additional flavour. Similarly, a chocolate with nuts is essentially a chocolate and not a preparation of nuts.

24. **There are still other cases, where more than one component or ingredient of a mixture- regardless of the quantities- characterise the product.** Milk shake, for instance, is made from fruit and milk and can neither be called only milk nor fruit juice. It is the combination of the two which gives its unique character.

25. The question which falls for consideration in the present case is how to view the products in question- (a) as carbonated beverages treating the fruit juice as a secondary character as the Revenue views them or (b) as fruit juice based drinks as the Respondent assessee views them. In our considered view, a decision on this could be made by examining how they are being sold. They are being sold as 'Carbonated beverages with fruit juice'- neither as fruit juice based drinks nor as carbonated beverages although the fruit juice content is only 5% (or 2.5% in case of lime). This gives the products their unique characteristic distinct from both carbonated beverages and fruit juices. The FSSAI regulation (2.3.30 clause 3A) also conceives of such a category of products in the market. Thus, they form a separate specie of products known to the market and are recognised as such by FSSAI. The Customs Tariff, however, does not have a separate entry for such products. We do not agree with the Revenue's contention that the essential character of the products is only carbonated drinks and not the fruit juices. In our view both components are important. As carbonated beverages, they can be classified under 2202 10 20/ 22021090 (as claimed by the Revenue). As fruit juice based drinks, they could as well be classified under 2202 99 20 (as claimed by the assessee). In our view neither carbonated beverage alone nor fruit juice alone gives the essential character of the products in question; both contribute to its essential character. The issue cannot be resolved as per Rule 3(a) and

3(b) of the Rules of Interpretation and therefore we need to resort to Rule 3(c) which reads as follows:

> *3 (c)* ***When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration****.*

Since Customs tariff heading 22029920 comes last in the order, it prevails and the goods are classifiable under this heading.

26. We find that the Hon'ble Supreme Court in the case of **Parle Agro** (supra) examined the classification of appy fizz which was a drink containing apple juice as well as carbonated water and held that the product is correctly classifiable under 22029920. While deciding the matter, the Hon'ble Apex Court has referred to the Regulation 2.3.30 of FSSAI too, inter-alia, found that the product appy fizz met with the conditions in Clause 2 of this Regulation. Revenue's argument is that the appy fizz contained 10% of the apple juice whereas the present products contained only 5% fruit juice (2.5% in the case of lime). It is true that in view of this difference in the composition these goods do not fall under Clause 2 of FSSAI Regulation 2.3.30 but they do fall under Clause 3A. Identical view has been taken by the Larger Bench of the Tribunal in the case of **Brindavan Beverages** (supra).

27. Revenue has relied upon the ruling of the Advance Ruling Authority in the case of IGST and a support to such a decision by the GST Council which are not binding precedents for this Bench. At any rate, the ruling of the Advance Ruling Authority is not even applicable to any assessee other than the one who sought clarification. Therefore, the learned Commissioner (Appeals) is correct in not relying upon such a decision.

28. Revenue has also argued that the food category description in Appendix A of the FSSAI Regulations clarifies that the beverages based on fruit and vegetable juices are to be classified under food categories 14.1.4.2 whereas carbonated beverages fruit juice, such as, one being imported by the respondent are covered under 14.1.4.1. A perusal of Appendix A of the FSSAI Regulations shows that it is a Food Category System. It states that the food category system is a tool for assigning food additive uses in the Regulations. It applies to all food stuffs. The food category descriptors are not to be legal product designations nor are they intended for labelling purposes. Thus, essentially, it is a system

of classification to show which preservatives can be used in what kinds of foods. In our view, this is not relevant for the classification of the products under the Customs Tariff.

29. It was also argued by the Revenue that the Commissioner (Appeals) has erred in relying on the judgment of the Hon'ble Apex Court in the case of **Parle Agro** (supra) as it was in respect of Appy fizz in which the apple fruit content was more than 10% whereas in the present case the juice content is only 5% or 2.5% (in case of Lime). We find no force in this argument because products containing 5% fruit juice (2.5% in case of lime) are now squarely covered by the FSSAI regulations.

30. In view of our above findings and respectfully following the decision of the Hon'ble Supreme Court in the case of **Parle Agro** (supra) and the decision of the Larger Bench of the Tribunal in the case of **Brindavan Beverages** (supra), we hold that the products, in question, have been correctly classified under 22029920 by the learned Commissioner (Appeals) in the impugned order and the same calls for no interference.

31. The impugned order is upheld and Revenue's appeal is rejected. The stay application filed by the Department also stands disposed of.

(Order pronounced in open court on 25 JANUARY 2021)

Sd/

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/
(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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