

the impugned order, Annexure P. 5 itself cannot be said to be beyond the pail of arbitrariness as for retiring the petitioner prematurely the vital and relevant consideration to the decision, i.e., whether this retirement was subservient to public interest, was ignored in the light of instructions Annexure P. 3 and on the contrary obsolete material, i.e., service record prior to April 1, 1979, the date with effect from which the petitioner had crossed the efficiency bar was taken into consideration. The order is also bad on account of the non-disposal of the representations of the petitioner prior to the passing of the same.

(11) We, therefore, set aside the order Annexure P. 5 and declare that the petitioner continued to be in service upto the date of superannuation in the normal course. It is further clarified that the petitioner would be granted all the benefits in terms of pay, increments, promotion, etc. which flow from the passing of this order. He is also held entitled to the costs of this litigation which we assess at Rs. 1000.

S.C.K.

Before G. C. Mita' . Amarjeet Choudhary, JJ.

FOOD SPECIALITIES LIMITED, MOGA (PUNJAB),—Petitioner.

versus

UNION OF INDIA AND ANOTHER,—Respondents.

Civil Writ Petition No. 6381 of 1989.

27th March, 1990.

Central Excise Tariff Act, 1985 (5 of 1986)—Chapter 4, Heading 04.01 Sub-heading 0401.13 & 0401.29—Indian Standard Specification (ISS) for Milk Powder issued by ISI—Cls. 2.1.1., 2.1.2., 2.1.3. & 3.2—Prevention of Food Adulteration Rules, 1955—Cl. 11, Appendix 'B', Sub cls. 11.01.10, 11.02.16 & 11.03—Petitioner manufacturing products known as 'Nestle Everyday Daily Whitener for Tea and Coffee'—Packing showing ingredients as 'partly skimmed milk and Sucrose'—Levy of excise duty on product—Partly skimmed milk powder and skimmed milk powder—Distinction—Partly skimmed milk powder not excisable to duty under sub-heading 0401.13—Item falls under residuary sub-heading 0401.19—Levy of duty illegal—Refund ordered.

Food Specialities Limited, Moga (Punjab) v. Union of India and another (G. C. Mital, J.)

*Held*, that in view of the fact that partly skimmed milk powder is commercially known as a separate marketable commodity as compared to skimmed milk, merely because in sub-heading 0401.13 the exception provided is for 'Milk Powder specially prepared for feeding infants' would not justify to read in that sub-heading the partly skimmed milk is covered by that sub-heading. In sub-heading 0401.12 skimmed milk powder specially prepared for infants was excluded from the levy of excise duty and, therefore, by making it further clear in the following sub-heading would not mean that partly skimmed milk powder would be covered by that sub-heading.

(Para 11)

*Held*, that partly skimmed milk powder does not fall under sub-heading 0401.13 and would thus be covered by the residuary sub-heading 0401.19, as partly skimmed milk powder is a separate marketable commodity known in the commercial world. It is also known to the authorities, who prepared the Central Excise Tariff for levy of excise duty on milk and milk products, and was also known to the authorities who framed Rules under the Prevention of Food Adulteration Act, 1954, and the authorities who prepared ISI specifications for products.

(Para 13)

*Held*, that partially skimmed milk powder, which under the Excise Tariff is not subject to excise duty and hence, the collection of excise duty is without jurisdiction and the petitioners are entitled to refund of the amount of excise duty collected by them on the commodity in dispute with effect from 1st March, 1989.

(Paras 17 & 18)

*Petition inter alia under article 226 of the Constitution of India, praying that this Hon'ble Court may be graciously pleased to:—*

- (i) *call for the records of the case from the respondents ;*
- (ii) *issue a writ of certiorari or a writ in the nature thereof or any other appropriate writ, order or direction directing the respondents to classify the petitioners' product namely 'Every Day Dairy Whitener for Tea and Coffee' under sub-heading 0401.19 ;*
- (iii) *issue a writ of certiorari or a writ in the nature thereof, or any other appropriate writ, order or direction declaring that the petitioner's product namely 'Every Day Dairy Whitener for Tea and Coffee' is partly skimmed milk powder sweetened and is classifiable under Sub-heading No. 0401.19 and not under Sub-heading No. 1401.13 ;*

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- (iv) issue a writ of certiorari or a writ in the nature thereof or any other appropriate writ, order or direction directing the respondents to forthwith refund to the petitioner, the duty by it on 'Every Day Dairy Whitener for Tea and Coffee' on and from March 1, 1989 ;
  - (v) exempt the requirement of filing of certified copies of annexures filed with the present petition in view of the urgency of the matter ;
  - (vi) dispense with the requirement of serving advance notice of this petition on the respondents in view of the urgency of the matter ;
  - (vii) pending the hearing and disposal of the present petition, permit the petitioner to clear its product 'Every Day Dairy Whitener for Tea and Coffee' under Sub-heading 0401.19 ;
  - (viii) pass-ad-interim ex parte orders in terms of prayer (vi) above and confirm the same after notice to the respondents ;
  - (ix) award costs of the present petition to the petitioner herein ;
  - (x) pass such other or further order or orders or such directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and to meet the ends of justice.

And for this act of kindness your petitioner as in duty bound shall ever pray.

Ravinder Narain, Sr. Advocate with R. C. Setia, Advocate, for the Petitioner.

Anand Swroop, Sr. Advocate with Ajay Tewari, Advocate, for the Respondents.

#### JUDGMENT

Gokal Chand Mital, J.

(1) Purely a legal issue arises in the writ petition, whether partly skimmed milk powder is a separate marketable commodity as compared to skimmed milk powder and whether both the commodities are subject to levy of excise duty under sub-heading 0401.13 of

Food Specialities Limited, Moga (Punjab) v. Union of India and another (G. C. Mital, J.)

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Chapter 4 of the Central Excise Tariff. In case partly skimmed milk powder is not leviable to central excise, question regarding the jurisdiction of the respondents to levy central excise would be the next for determination.

This legal issue arises on the following facts:—

Food specialities Ltd., (hereinafter referred to as 'the petitioner'), is manufacturing a product known as "Nestle Everyday Daily Whitener for Tea and Coffee" and on the packing the ingredients mentioned are 'partly skimmed milk and Sucrose' and the analysis of the contents of milk fat are mentioned 19.0 per cent. A copy of the label is Annexure P-1 to the petition.

From 1st March, 1983 to 28th February, 1989, skimmed milk powder was exempted from excise duty. During that period excise duty was sought to be levied on the item in dispute and ultimately the petitioner succeeded that excise duty was not leviable. (See order Annexure P-7). Although the contention of the petitioner was that its product was partly skimmed milk and since even on skimmed milk no excise duty was leviable, the following observations were made in the concluding part of the order.

"There is no distinction in the tariff itself between the completely and partly skimmed milk".

In spite of the aforesaid finding, the product in question was classified under sub head 0401.13. Since no excise duty was levied on the product in dispute, it was not necessary for the petitioner to go up further in appeal on the finding that the product in dispute was covered by sub head 0401.13.

(2) When with effect from 1st March, 1989, skimmed milk powder was subjected to excise duty, by making amendment in the sub-heading 0401.13, the petitioner immediately filed classification list on 3rd March, 1989 saying that its product was covered by sub-heading 0401.19, the residuary clause under Chapter 4 of the Central Excise Tariff, and it did not fall under sub-heading 0401.13. For this contention, detailed reasons were furnished by the petitioner. Since the product could not be taken out of the factory premises without payment of excise duty, the petitioner paid excise duty under

protest and sought determination of the point raised by it. The respondents gave no decision on the matter and kept on collecting the excise duty on the basis of the earlier decision, Annexure P-7, and since the petitioner was being subjected to heavy excise duty, it approached this Court through civil writ petition under Article 226 of the Constitution of India to challenge the levy of excise duty and also claimed refund of the amount of excise duty already collected by the respondents on the product in question.

(3) The relevant central excise tariff relating to milk and its products as contained in Chapter 4 deserves to be reproduced:

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Chapter 4	Dairy Produce, etc.	4.1
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1. The expression "Milk" means full cream milk or partially or completely skimmed milk.

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Head ing No.	Sub- head ing No.	Description of goods	Rate of duty
(1)	(2)	(3)	(4)

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04.01 MILK AND CREAM, CONCENTRATED OR CONTAINING  
ADDED SUGAR OR OTHER SWEETENING MATTER.

— In or in relating to the manufacture of which any process is ordinarily carried on with the aid of power :

0401.11—Flavoured Milk, whether sweetened or not, put up in unit containers and ordinarily intended for sale. Nil

0401.12—Skimmed milk powder, especially prepared for feeding infants. Nil.

**Food Specialities Limited, Moga (Punjab) v. Union of India and  
another (G. C. Mital, J.)**

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0401.13—Skimmed milk powder, other than powder specially prepared for feeding infants, put up in unit container and ordinarily intended for sale.	15%
0401.14—Concentrated (condensed) milk, whether sweetened or not, put up in unit containers and ordinarily intended for sale.	15%

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(1)	(2)	(3)	(4)
0401.19	— other		NIL

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A reading of opening part 1 of the tariff would show that the expression 'Milk' means full cream milk or partially or completely skimmed milk. Skim milk is also known to be of two types according to the tariff itself, namely partial skimmed milk or completely skimmed milk.

(4) When we go to the heading 04.01 of the Central Excise Tariff, it has 5 sub-headings, out of which first two and the last are not subject to any excise duty, whereas the 2nd and the 3rd sub-headings are subject to excise duty. Skim milk powder specially prepared for feeding infants is exempted from excise duty. (See sub-heading 0401.12). However, under sub-heading 0401.13, skimmed milk powder is subjected to 15 per cent duty which we are informed has been reduced to 10 per cent. While in the heading of the Excise Tariff, there is reference of partially skimmed milk, in the sub heading, there is no separate sub-clause for partially skimmed milk. While the argument of the department is that the partly skimmed milk also falls in the sub-heading 0401.13, the case of the petitioner is that it falls in sub-heading 0401.19, that is, 'Milk of kinds other than shown above this clause'. To put it more precisely, the case of the petitioner is that since partially skimmed milk is not specifically covered by sub-heading 0401.13, it will necessarily fall under sub-heading 0401.19, that is, the residuary clause 'other', and, since sub-heading 0401.19 is duty free, partly skimmed milk is also duty free.

(5) In support of the argument, besides relying on the expression 'Milk' contained in the Central Excise Tariff, which recognised

partly skimmed milk as a separate item of milk product, the petitioner has strongly relied upon the 'Indian Standard Specifications For Milk Powder' issued by the Indian Standard Institution (for short 'ISI'), and the Prevention of Food Adulteration Rules, 1955 (for short 'P.F.A. RULES'), framed under the Prevention of Food Adulteration Act, 1954, (hereinafter called 'the 1954 Act'). For facility of reference, they are being reproduced hereunder:—

Indian Standard Specification for Milk Powder issued by ISI.

IS: 1165—1975.

Clause 2.1: The material shall be of the following three types:

- (a) Whole milk powder,
- (b) Partly skim milk powder, and
- (c) Skim milk powder.

Clause 2.1.1 deals with Whole Milk Powder and clause 2.1.2 deals with partly skim milk powder, whereas clause 2.1.3 talks of skim milk powder. Clause 3.2 says that the milk powder shall also comply with the requirements given in table 1. The relevant data of table 1 is as follows:

TABLE 1. REQUIREMENTS FOR MILK POWDER  
(Clause 3.2)

Sr. No.	Characteristic	Requirement for Milk Powder			Method of Ref. to
		Whole	Partly Skim	Skim	
(vi)	Fat, per cent by mass	Not less than 26.0	Above 1.6 and below 26.0	Not more than 1.5	

(6) *Prevention of Food Adulteration Rules, 1955.*—Rule 5 of the Rules provides for standard of quality of the various articles of Food specified in Appendix B to the Rules. Clause 11 of the

Food Specialities Limited, Moga (Punjab) v. Union of India and another (G. C. Mital, J.)

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Appendix B to the Rules. Clause 11 of the Appendix B relates to Milk and Milk products. Sub-clause 11.0110 relates to skimmed milk and the distinction is as follows:—

“11.0110.—SKIMMED MILK means the product prepared from milk from which almost all the milk fat has been removed mechanically.”

Sub-clause 11.01.11 prescribes the standard for different classes and designation of milk and against item skimmed milk it is provided that milk fat is not to be more than 0.5 per cent.

(7) Sub-clause 11.03 describes the various products obtained from milk and this description includes “Milk Powder, Skimmed Milk Powder and Partly Skimmed Milk Powder. Sub-clause 11.02.15 gives the meaning of Skimmed Milk Powder and it provides that skimmed milk powder shall not contain more than 1.5 per cent milk fat. Sub-clause 11.02.16 describes the meaning of partly skimmed milk powder and it provides that such a product shall contain fat more than 1.5 and less than 26.0 per cent. Under sub-clause 11.02.14 Milk powder shall contain milk fat not less than 26 per cent.

(8) Rule 37 of the Rules provides that a label shall not contain a false or misleading statement consisting the food contained in the package or the quality or the nutritive value etc. The meaning is that the label should contain the correct particulars of the contents regarding quality etc. Rule 42 of the Rules provides for the form of labels. Label at clause (f) has been provided for partly skimmed milk powder and label at clause (g) has been provided for skimmed milk powder. The contents of the two powders have to give the percentage of milk fat contained therein.

(9) International Standard of milk and milk products issued by joint venture of FAO/WHO, on Food Standard programme was also produced before us. There also, whole milk powder has to contain minimum milk fat of 25 per cent, partly skimmed milk powder has to have minimum milk fat of more than 1.5 per cent and less than 26 per cent; and skimmed milk powder has to have maximum milk fat contents of 1.5 per cent. The Indian Standard matches with the International standards.

(10) A reading of the ISI standards, PFA Rules, as also the International Standard shows that whole milk powder is separate



from partly skim milk powder and partly skim milk powder is different from skim milk powder. All the three qualities of milk powder are universally known and recognised and that is why even in the Central Excise Tariff, in the very opening skim milk powder and partly skim milk powder have been separately mentioned, while giving the meaning of the expression 'Milk'. Therefore, it was well known to the authorities making the tariff that partly skimmed milk powder is separate from skimmed milk powder and it was open to them to levy the excise duty on both the items or any one of them or on none. As already noticed, earlier to 1st March, 1989, there was no excise duty leviable on skimmed milk powder, whether partly or completely but with effect from 1st March, 1989, the skimmed milk powder was sought to be subjected to excise levy under sub-heading 0401.13. Under sub-heading 0401.12, skim milk powder especially prepared for feeding infants was specifically excluded from levy of excise duty and merely because under sub-heading 0401.13 it was again mentioned by way of abundant caution "other than powder specially prepared for feeding infants" would not mean that partly skim milk powder would stand covered by the sub-heading relating to the skim milk powder. That is why, all types of milk or milk powder not specifically provided for in sub-headings 0401.11 to 0401.14 would fall in the residuary sub-heading 0101.19, that is relating to "other kinds of milk and products", on which there is no excise duty.

(11) In view of the fact that partly skimmed milk powder is commercially known as a separate marketable commodity as compared to skim milk, merely because in sub-heading 0401.13 the exception provided is for 'Milk Powder specially prepared for feeding infants' would not justify to read in that sub-heading that partly skimmed milk is covered by that sub-heading. It is necessary to repeat here that in sub-heading 0401.12 skimmed milk powder specially prepared for infants was excluded from the levy of excise duty and, therefore, by making it further clear in the following sub-heading would not mean that partly skimmed milk powder would be covered by that sub-heading.

(12) The only other argument raised on behalf of the respondents to bring the partly skimmed milk under sub-heading 0401.13 is that earlier in the case of the petitioner, decision was rendered,—vide order, Annexure P-7 to the effect that partly skimmed milk powder is covered by sub-heading 0401.13, and since that order was

Food Specialities Limited, Moga (Punjab) v. Union of India and  
another (G. C. Mital, J.)

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not appealed against by the petitioner, that binds them. We have carefully gone through the order, Annexure P.7. Although it is 7 pages long but on a reading of the same it shows that six pages are the reproduction of the reply of the petitioner to the show cause notice and only in the end in few lines the entire controversy has been decided, which reads as under:

“I have carefully gone through the records, reply to the show cause notice and submissions made at the time of personal hearing. There is no distinction in the Tariff itself between the completely and partly skimmed milk. As such ‘Every Day Whitener is correctly classifiable under sub-heading 0401.13.”

Since the Excise Authority found that there was no distinction in the Tariff between completely and partly skimmed milk powder, the excise liability was deleted and the matter was decided in favour of the petitioner. The wrong view taken by the authority to bring the product in dispute under sub-heading 0401.13, did not effect the right of the petitioner to challenge it whenever it was sought to be subjected to excise duty on the pretext that it was skimmed milk powder. As already noticed, till 28th February, 1989, even skimmed milk powder was exempted from excise duty, and, therefore, proceedings were wrongly initiated to levy the excise duty earlier, in which the petitioner succeeded.

(13) For the reasons recorded above, we are of the view that the partly skimmed milk powder does not fall under sub-heading 0401.13 and would thus be covered by the residuary sub-heading 0401.19, as partly skimmed milk powder is a separate marketable commodity known in the commercial world. It is also known to the authorities, who prepared the Central Excise Tariff for levy of excise duty on milk and milk products, and was also known to the authorities who framed Rules under the Prevention of Food Adulteration Act, 1954, and the authorities who prepared ISI specifications for products.

(14) It will be useful to notice that if proper standard of the goods specified under the law is not made or the label contains mis-description, the manufacturer can be brought to prosecution. The fat contents of skimmed milk and partly skimmed milk are totally different and on the description to be put on the container, correct particulars have to be mentioned. The petitioner has

complied with all this in the present case. It is nobody's case that the contents of the product in dispute are such which come within the definition of skimmed milk and not partly skimmed milk. Facts being beyond dispute that the petitioner sells the product in dispute containing 19 per cent milk fat, it would neither be full cream milk nor skimmed milk, and, therefore, would fall squarely under residuary sub-heading 0401.19 and under this sub-heading, excise duty is not leviable.

(15) Before parting, one more argument raised on behalf of the respondents may be noticed. It was urged that the matter in dispute was appealable. The matter is never appealable. It is the order or the judgment which is appealable, if the remedy of appeal is provided in the Statute. When order Annexure P7 was passed, no excise duty was leviable either on the skimmed milk or the partly skimmed milk. On the product in dispute, excise duty was wrongly levied and the petitioner succeeded before the authority in getting the levy deleted.

It was also urged by the counsel for the respondents that order Annexure P7 should have been appealed against and since no appeal was filed, the writ petition does not lie. We are unable to appreciate this argument either. When petitioner succeeded in getting the levy of excise duty deleted by order Annexure P7, where was the cause for filing of appeal. The cause occurred when the petitioner's product was subjected to excise duty, with effect from 1st March, 1989. The same was objected to, and instead of deciding the objections the petitioner was forced to pay the excise duty under protest to get their goods cleared for sale in the market. No determination was made after 1st March, 1989 and no order was passed, and, therefore, the petitioner could not go up in appeal. Hence, this objection raised on behalf of the respondents is without merit.

(16) Moreover, in the return the stand of the highest authority in the Central Government is that the item in dispute is covered by sub-heading 0401.13 and even if appeal was to be filed, it would have been an exercise in futility. Hence, we find no ground not to entertain the writ petition against the impugned action of the respondents on partially skimmed milk powder, which under the Excise Tariff is not subject to excise duty. Hence, the collection of excise duty is without jurisdiction.

M/s K. K. Mittal and Co. v. Union of India and others  
(Amarjeet Chaudhary, J.)

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(17) For the reasons recorded above, we allow the writ petition and issue a writ of prohibition restraining the respondents from collecting the excise duty on the commodity in dispute, which is admittedly partly skim milk powder under the guise of existing sub-heading 0401.13 and hold that under the existing Tariff, no excise duty is leviable on the commodity in dispute.

(18) We also issue a writ, order and direction to the respondents to refund the amount of excise duty collected by them on the commodity in dispute with effect from 1st March, 1989, to the petitioner within a period of six months from today, failing which the petitioner would be entitled to have interest thereon at the rate of 12 per cent per annum. However there will be no order as to costs.

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R.N.R.

*Before G. C. Mital & Amarjeet Chaudhary, JJ.*

M/S K. K. MITTAL AND CO.,—*Petitioner.*

*versus*

UNION OF INDIA AND OTHERS,—*Respondents.*

*Amended Civil Writ Petition No. 7161 of 1989.*

4th May, 1990.

*Income Tax Act (XLIII of 1961)—Ss. 44AC and 206(c)—Punjab Excise Act (1 of 1914)—L. 13 and L. 14 licences—Direct Tax Laws (Amendment) Act, 1989—S. 10, Inserting proviso to S. 44AC with effect from 1st April, 1989—Country liquor licencees holding L. 13 and L. 14 licences—L. 13 licencees—Whether liable to pay tax at source under section 206(c) in view of the proviso to S. 44AC as introduced by Amendment Act 1989—L. 14 licencees not required to pay Income Tax on excise duty in view of the decision of the Central Board of Direct Taxes, Delhi—Issue price not to form part of purchase price and cannot be considered in determining profits under section 44AC for collection of tax at source—Directions of the Central Board of Direct Taxes in relation to Uttar Pradesh licencees will apply equally to licencees in other States—Principle of non-discrimination.*