Commnr.Of Central Excise,New Delhi vs M/S.Connaught Plaza Rest.(P)Ltd.N.D on 27 November, 2012

Equivalent citations: AIRONLINE 2012 SC 597

Author: D.K. Jain

Bench: Jagdish Singh Khehar, D.K. Jain

REPORTABLE

IN THE SUPREME COURT OF INDIA			
CIVIL APPELLATE JURISDICTION			
CIVIL APPEAL NOS. 5307-5308 0F 2003			
COMMISSIONER OF CENTRAL EXCISE, NEW DELHI	–		APPELLANT
VERSUS			
M/S CONNAUGHT PLAZA RESTAURANT (P) LTD., NEW DELHI	–	RESPONDENT	

J U D G M E N T

D.K. JAIN, J.

1. The short question of law for consideration in these appeals, filed by the revenue, under Section 35L of the Central Excise Act, 1944 (for short "the Act") is whether 'soft serve' served at the restaurants/outlets commonly and popularly known as McDonalds, is classifiable under heading 21.05 (as claimed by the revenue) or under heading 04.04 or 2108.91 (as claimed by the assessee) of the Central Excise and Tariff Act, 1985 (for short "the Tariff Act").

2. During the relevant period, the respondent-assessee was engaged in the business of selling burgers, nuggets, shakes, soft-serve etc. through its fast food chain of restaurants, named above. In so far as the manufacture and service of 'soft serve' is concerned, the assessee used to procure soft serve mix in liquid form from one M/s Amrit Foods, Ghaziabad; at Amrit Foods, raw milk was pasteurised, skimmed milk powder was added (the milk fat content in the said mixture is stated to be 4.9%, not exceeding 6% at any stage); sweetening agent in the form of sugar or glucose syrup and permitted stabilizers were added; the mixture, in liquid form, was then homogenized, packed in polyethylene pouches and stored at 0 to 40C. This material was then transported to the outlets under the same temperature control, where the liquid mix was pumped into a 'Taylor-make' vending machine; further cooled along with the infusion of air, and finally, the end product, 'soft serve', was drawn through the nozzle into a wafer cone or in a plastic cup and served to the customers at the outlet.

3. For the periods from April 1997 to March 2000, three show cause notices came to be issued to the assessee. These alleged that the 'soft serve' ice-cream was classifiable under Chapter 21, relating to "Miscellaneous Edible Preparations" of the Tariff Act, attracting 16% duty under heading 21.05, sub-heading 2105.00 -"Ice-cream and other edible ice, whether or not containing cocoa". Invoking the proviso to sub-section (1) of Section 11A of the Act, additional duty was also demanded. A proposal for imposing penalty on the assessee and on their Managing Director was also initiated.

4. While adjudicating on the first show cause notice, vide order dated 31st May, 2000, the adjudicating authority held that : 'soft serve' was classifiable under heading 04.04. Describing the goods as "other dairy produce; edible products of animal origin, not elsewhere specified or included", it held that the process undertaken by the assessee amounted to manufacture and the extended period of limitation was not applicable. However, while adjudicating on the second show cause notice, vide order dated 28th September, 2001, the adjudicating authority concluded that:

> soft serve was classifiable under heading 21.05; the process undertaken by the assessee for conversion of soft serve mix to 'soft serve' amounted to manufacture and that the assessee was not entitled to small scale exemption because of use of the brand name "McDonalds". While adjudicating on the third show cause notice, the adjudicating authority reiterated that : 'soft serve' was classifiable under heading 21.05; the process undertaken by the assessee for conversion of soft serve mix to 'soft serve' amounted to manufacture and small scale exemption was not available to the assessee because of use of the brand name "McDonalds". In an appeal filed by the assessee, the Commissioner of Central Excise (Appeals) reversed the above finding and classified 'soft serve' under the sub-heading 2108.91.

5. Being aggrieved, cross appeals were filed, both by the revenue as also the assessee, before the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi, as it then existed, (for short "the Tribunal"). The appeals arising from the first two show cause notices were disposed of by the main order, dated 29th January, 2003. The appeal arising from the third show cause notice was disposed of by the Tribunal vide order dated 3rd August, 2004, following its earlier decision in order dated 29th January, 2003. The Tribunal came to the conclusion that the process undertaken by the assessee, namely, conversion of soft serve mix to 'soft serve' amounted to manufacture and that 'soft serve' was classifiable under sub-heading 2108.91, describing the goods as "Edible preparations, not elsewhere specified or included" – "not bearing a brand name", attracting nil rate of duty. The Tribunal held thus :-

> "In view of the technical literature, ISI Specification and provisions made in Prevention of Food Adulteration Act, 1955 and Rules made thereunder, the impugned product cannot be classified as ice-cream merely on the ground that the consumer understood the same as ice-cream or the ingredients of both the products are same. The statement given by the Managing Director also cannot be a basis for determining the exact classification of the product in the Central Excise Tariff. The ratio of the decision in the case of Shree Baidyanath Ayurved Bhavan Limited case is not applicable to the facts of the present matter. The dispute in the said case was as to

whether the 'Dant Manjan Lal' is Ayurvedic medicine or 'Tooth Powder'. In that context, the Supreme Court observed that resort should not be had to the scientific and technical meaning of the terms and expressions used but to their popular meaning, which does not mean that if a particular product is not ice-cream it can be classified as ice-cream because some consumers treated it as ice-cream. Accordingly, the product in question is not classifiable under Heading 21.05 of the Central Excise Tariff."

6. It is manifest that the Tribunal based its conclusion on the technical meaning and specifications of the product "ice-cream", stipulated in the Prevention of Food Adulteration Act, 1955 (for short "the PFA") and rejected the common parlance test, viz. the consumers' understanding of the product. Being aggrieved by the said approach, the revenue is before us in these appeals.

7. Mr. Arijit Prasad, learned counsel appearing for the revenue, submitted that the enquiries conducted by the revenue revealed that in common trade parlance, 'soft serve' is known as "ice-cream"; all the ingredients used and the process of manufacture adopted for preparation of 'soft serve' is essentially the same as is adopted for manufacture of an "ice-cream"; and therefore, manufacture of 'soft serve' cannot be said to be distinct from the manufacture of "ice-cream". It was urged that the specifications for manufacture of "ice-cream" under the PFA are irrelevant in so far as the question of classification of goods under the Tariff Act is concerned. It was asserted that the identity of 'soft serve' is associated with how the public at large identifies it, and not by the parameters or specifications indicated in other statutes including the PFA in relation to "ice-cream". According to the learned counsel 'soft serve ice-cream', 'soft ice-cream' and 'Softies' are commonly taken as different kinds of "ice-cream". Finally, it was submitted that since the product is sold from the outlets of "McDonalds", the brand is in the customer's mind when he/she enters the outlet and therefore, it cannot be covered under sub- heading 2108.91, as erroneously held by the Tribunal.

8. Mr. V. Lakshmi Kumaran, learned counsel appearing for the assessee, on the other hand, asserted that but for heading 21.05, "ice-cream" itself was a dairy product and would have been classified under heading 04.04. Therefore, 'soft serve' would also be classifiable under heading 04.04. It was argued that 'soft serve' cannot be referred to as "ice-cream" even by applying the common parlance test, in as much as 'soft serve' is sold throughout the world not as "ice-cream" but only as 'soft serve'. "Ice- cream", the world over, is commonly understood to have milk fat content around 10% whereas 'soft serve' does not contain milk fat of more than 5%.

9. Referring to the technical meaning of "ice-cream", given in Kirk-Othmer Encyclopedia of Chemical Technology, Third Edition – Volume 15 and "Outlines of Dairy Technology" by Sukumar De, learned counsel vehemently submitted that all these books describe "ice-cream" as a dessert, which is frozen to a hard stage, whereas, soft serve dispensed through the Taylor machine is served in a semi-solid state, by processing the pre-mix by blowing air into it. 'Soft serve' is not as hard as an ice-cream is, and thus, cannot be called as "ice cream" even if tested on the touchstone of the common parlance test. The main thrust of the submission of the learned counsel was that if the assessee markets 'soft serve' as "ice-cream", they will be liable to prosecution under the PFA, because the milk fat content in 'soft serve' is less than 10%, a statutory requirement for manufacture

of “ice-cream”. In support of the submission, learned counsel commended us to the decision of this Court in State of Maharashtra Vs. Baburao Ravaji Mharulkar & Ors.[1], wherein it was held that a person selling ice-cream with 5% milk fat content instead of minimum 10% milk fat, was selling adulterated ice-cream and was liable to prosecution. Reliance was also placed on the decision of this Court in Akbar Badrudin Giwani Vs. Collector of Customs, Bombay[2], to contend that in matters pertaining to classification of a commodity, technical and scientific meaning of the product is to prevail over the commercial parlance meaning.

10. Lastly, Mr. V. Lakshmi Kumaran urged that even if we were to hold that ‘soft serve’ is an “ice-cream”, under notification No.16/2003-CE (NT) dated 12th March, 2003, granting exemption to “softy ice-cream” dispensed through a vending machine, issued under Section 11C of the Act, the assessee will not be liable to pay any Excise duty in respect of “softy ice-cream” during the relevant period.

11. In short, the case of the assessee is that “soft serve” is a product distinct and separate from “ice-cream” since the world over “ice-cream” is commonly understood to have milk fat content above 8% whereas ‘soft serve’ does not contain more than 5% of milk fat; it cannot be considered as “ice-cream” by common parlance understanding since it is marketed by the assessee the world over as ‘soft serve’; “ice-cream” should be understood in its scientific and technical sense; and hence, for these reasons, ‘soft serve’ is to be classified under heading 04.04 as “other dairy produce” and not under heading 21.05. On the other hand, Revenue claims that “ice-cream” has not been defined under heading 21.05 or in any of the chapter notes of Chapter 21; upon conducting enquiries it was found that ‘soft serve’ is known as “ice-cream” in common parlance; and hence, it must be classified in the category of “ice-cream” under heading 21.05 of the Tariff Act.

12. Before we proceed to evaluate the rival stands, it would be necessary to notice the length and breadth of the relevant tariff entries that have been referred to by both the learned counsel.

“Chapter 4	Dairy Produce, etc.	312	
04.04	Other dairy produce; Edible products of animal origin, not elsewhere specified or included		
	-Ghee :		
0404.11	--Put up in unit containers and bearing a brand name	Nil	
0404.19	--Other	Nil	
0404.90	--Other	Nil	

Heading No.	Sub-heading No.	Description of goods	Rate of duty
(1)	(2)	(3)	(4)
21.05	2105.00	Ice cream and other edible ice, whether or not containing cocoa	16%
21.08		Edible preparations, not elsewhere specified or included	

| | |2108.91 |-Not bearing a brand name |Nil" |

13. Chapter 4 of the Tariff Act reads "dairy produce; edible products of animal origin, not elsewhere specified or included." Heading 04.04 is applicable to "other dairy produce; or edible products of animal origin which are not specified or included elsewhere." As is evident from Chapter note 4, the terms of heading 04.04 have been couched in general terms with wide amplitude. Chapter note 4 reads:

> "4. Heading No. 04.04 applies, inter alia, to butter-milk, curdled milk, cream, yogurt, whey, curd, and products consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter or flavoured or containing added fruit or cocoa and includes fats and oils derived from milk (e.g. milkfat, butterfat and butteroil), dehydrated butter and ghee."

14. On the other hand, Chapter 21 of the Act is applicable to "Miscellaneous Edible Preparations". Heading 21.05 refers to "ice-cream and other edible ice". It is significant to note that none of the terms have been defined in the chapter. Further heading 2108.91 is a residuary entry of wide amplitude applicable to "edible preparations, not elsewhere specified or included" and "not bearing a brand name".

15. According to the rules of interpretation for the First Schedule to the Tariff Act, mentioned in Section 2 of the Tariff Act, classification of an excisable good shall be determined according to the terms of the headings and any corresponding chapter or section notes. Where these are not clearly determinative of classification, the same shall be effected according to Rules 3, 4 and 5 of the general rules of interpretation. However, it is also a well known principle that in the absence of any statutory definitions, excisable goods mentioned in tariff entries are construed according to the common parlance understanding of such goods.

16. The general rules of interpretation of taxing statutes were succinctly summarized by this Court in Oswal Agro Mills Ltd. & Ors. Vs. Collector of Central Excise & Ors.[3]; as follows :

> "4. The provisions of the tariff do not determine the relevant entity of the goods. They deal whether and under what entry, the identified entity attracts duty. The goods are to be identified and then to find the appropriate heading, sub-heading under which the identified goods/products would be classified. To find the appropriate classification description employed in the tariff nomenclature should be appreciated having regard to the terms of the headings read with the relevant provisions or statutory rules or interpretation put up thereon. For exigibility to excise duty the entity must be specified in positive terms under a particular tariff entry. In its absence it must be deduced from a proper construction of the tariff entry. There is neither intendment nor equity in a taxing statute. Nothing is implied. Neither can we insert nor can we delete anything but it should be interpreted and construed as per the words the legislature has chosen to employ in the Act or rules. There is no room

for assumption or presumptions. The object of the Parliament has to be gathered from the language used in the statute..... ..

*** ***
***

...Therefore, one has to gather its meaning in the legal setting to discover the object which the Act seeks to serve and the purpose of the amendment brought about.

The task of interpretation of the statute is not a mechanical one. It is more than mere reading of mathematical formula. It is an attempt to discover the intention of the legislature from the language used by it, keeping always in mind, that the language is at best an imperfect instrument for the expression of actual human thoughts. It is also idle to expect that the draftsman drafted it with divine prescience and perfect and unequivocal clarity. Therefore, court would endeavour to eschew literal construction if it produces manifest absurdity or unjust result. In Manmohan Das v. Bishun Das : (1967) 1 SCR 836, a Constitution Bench held as follows:

"...The ordinary rule of construction is that a provision of a statute must be construed in accordance with the language used therein unless there are compelling reasons, such as, where a literal construction would reduce the provision to absurdity or prevent manifest intention of the legislature from being carried out."

17. Therefore, in order to find an appropriate entry for the classification of 'soft serve', it would be necessary to first construe the true scope of the relevant headings. As noted above, none of the terms in heading 04.04 and heading 21.05 have been defined and no technical or scientific meanings have been given in the chapter notes. Evidently, 'soft serve' is not defined in any of the chapters aforesaid. Under these circumstances, it becomes imperative to examine if the subject good could come under the purview of any of the classification descriptions employed in the Tariff Act. Having regard to the nature of the pleadings, the issue is whether the term "ice-cream" in heading 21.05 includes within its ambit the product 'soft serve'. That leads us to the pivotal question, whether, in the absence of a statutory definition, the term "ice-cream" under heading 21.05 is to be construed in light of its scientific and technical meaning, or, whether we are to consider this term in its common parlance understanding to determine whether its amplitude is wide enough to include 'soft serve' within its purview.

Common Parlance Test :

18. Time and again, the principle of common parlance as the standard for interpreting terms in the taxing statutes, albeit subject to certain exceptions, where the statutory context runs to the contrary, has been reiterated. The application of the common parlance test is an extension of the general principle of interpretation of statutes for deciphering the mind of the law maker; "it is an attempt to discover the intention of the legislature from the language used by it, keeping always in mind, that the language is at best an imperfect instrument for the expression of actual human

thoughts." [(See :Oswal Agro Mills Ltd (supra)].

19. A classic example on the concept of common parlance is the decision of the Exchequer Court of Canada in The King Vs. Planter Nut and Chocolate Company Ltd.[4]. The question involved in the said decision was whether salted peanuts and cashew nuts could be considered to be "fruit" or "vegetable" within the meaning of the Excise Tax Act. Cameron J., delivering the judgment, posed the question as follows:

"...would a householder when asked to bring home fruit or vegetables for the evening meal bring home salted peanuts, cashew or nuts of any sort? The answer is obviously `no'." Applying the test, the Court held that the words "fruit" and "vegetable" are not defined in the Act or any of the Acts in pari materia. They are ordinary words in every-day use and are therefore, to be construed according to their popular sense.

20. In Ramavatar Budhaiprasad Etc. Vs. Assistant Sales Tax Officer, Akola[5], the issue before this Court was whether betel leaves could be considered as "vegetables" in the Schedule of the C.P. & Berar Sales Tax Act, 1947 for availing the benefit of exemption. While construing the import of the word "vegetables" and holding that betel leaves could not be held to be "vegetables", the Court observed thus :

"...But this word must be construed not in any technical sense nor from the botanical point of view but as understood in common parlance. It has not been defined in the Act and being a word of every day use it must be construed in its popular sense meaning "that sense which people conversant with the subject matter with which the statute is dealing would attribute to it."

21. In Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh[6], the Court had to decide whether "charcoal" could be classified as "coal" under Entry I of Part III of Schedule II of the Madhya Pradesh General Sales Tax Act, 1958. Answering the question in the affirmative, it was observed as follows :

"3. Now, there can be no dispute that while coal is technically understood as a mineral product, charcoal is manufactured by human agency from products like wood and other things. But it is now well- settled that while interpreting items in statutes like the Sales Tax Acts, resort should be had not to the scientific or the technical meaning of such terms but to their popular meaning or the meaning attached to them by those dealing in them, that is to say, to their commercial sense....." XXX XXX XXX XXXX "5. The result emerging from these decisions is that while construing the word 'coal' in Entry I of Part III of Schedule II, the test that would be applied is what would be the meaning which persons dealing with coal and consumers purchasing it as fuel would give to that word. A sales tax statute is being one levying a tax on goods must in the absence of a technical term or a term of science or art, be presumed to have used an ordinary term as coal according to the

> meaning ascribed to it in common parlance. Viewed from that angle both a merchant dealing in coal and a consumer wanting to purchase it would regard coal not in its geological sense but in the sense as ordinarily understood and would include 'charcoal' in the term 'coal'. It is only when the question of the kind or variety of coal would arise that a distinction would be made between coal and charcoal; otherwise, both of them would in ordinary parlance as also in their commercial sense be spoken as coal."

22. In Dunlop India Ltd. Vs. Union of India & Ors.[7], at page 251, while holding that VP Latex was to be classified as "raw rubber" under Item 39 of the Indian Tariff Act, 1934, this Court observed:

> "29. It is well established that in interpreting the meaning of words in a taxing statute, the acceptation of a particular word by the trade and its popular meaning should commend itself to the authority." "34. We are, however, unable to accept the submission. It is clear that meanings given to articles in a fiscal statute must be as people in trade and commerce, conversant with the subject, generally treat and understand them in the usual course. But once an article is classified and put under a distinct entry, the basis of the classification is not open to question. Technical and scientific tests offer guidance only within limits. Once the articles are in circulation and come to be described and known in common parlance, we then see no difficulty for statutory classification under a particular entry."

23. In Shri Bharuch Coconut Trading Co. and Ors. Vs. Municipal Corporation of the City of Ahmedabad & Ors.[8], this Court applied the test as "would a householder when asked to bring some fresh fruits or some vegetable for the evening meal, bring coconut too as vegetable (sic)?" The Court held that when a person goes to a commercial market to ask for coconuts, "no one will consider brown coconut to be vegetable or fresh fruit much less a green fruit. No householder would purchase it as a fruit." Therefore, the meaning of the word 'brown coconut', and whether it was a green fruit, had to be "understood in its ordinary commercial parlance." Accordingly it was held that brown coconut would not be considered as green fruit.

24. In Indian Aluminium Cables Ltd. Vs. Union of India & Ors.[9], this Court observed the following:

> "...This Court has consistently taken the view that, in determining the meaning or connotation of words and expressions describing an article in a tariff schedule, one principle which is fairly well-settled is that those words and expressions should be construed in the sense in which they are understood in the trade, by the dealer and the consumer. The reason is that it is they who are concerned with it and, it is the sense in which they understand it which constitutes the definitive index of the legislative intention".

25. In Collector of Central Excise, Kanpur Vs. Krishna Carbon Paper Co.[10], this Court has opined thus :

> "12. It is a well settled principle of construction, as mentioned before, that where the word has a scientific or technical meaning and also an ordinary meaning according to common parlance, it is in the latter sense that in a taxing statute the word must be held to have been used, unless contrary intention is clearly expressed by the legislature.....
>
> ...But there is a word of caution that has to be borne in mind in this connection, the words must be understood in popular sense, that is to say, these must be confined to the words used in a particular statute and then if in respect of that particular items, as artificial definition is given in the sense that a special meaning is attached to particular words in the statute then the ordinary sense or dictionary meaning would not be applicable but the meaning of that type of goods dealt with by that type of goods in that type of market, should be searched."

26. In Reliance Cellulose Products Ltd., Hyderabad Vs. Collector of Central Excise, Hyderabad-I Division, Hyderabad[11], it was observed:

> "20. In other words, if the word used in a fiscal statute is understood in common parlance or in the commercial world in a particular sense, it must be taken that the Excise Act has used that word in the commonly understood sense. That sense cannot be taken away by attributing a technical meaning to the word. But if the legislature itself has adopted a technical term, then that technical term has to be understood in the technical sense. In other words, if in the fiscal statute, the article in question falls within the ambit of a technical term used under a particular entry, then that article cannot be taken away from that entry and placed under the residuary entry on the pretext that the article, even though it comes within the ambit of the technical term used in a particular entry, has acquired some other meaning in market parlance. For example, if a type of explosive (RDX) is known in the market as Kala Sabun by a section of the people who uses these explosives, the manufacturer or importer of these explosives cannot claim that the explosives must be classified as soap and not as explosive."

27. There is a catena of decisions that has dealt with the classification of Ayurvedic products between the categories of medicaments and cosmetics and in the process made significant pronouncements on the common parlance test.

28. In Shree Baidyanath Ayurved Bhavan Ltd. Vs. Collector of Central Excise, Nagpur[12], at page 404 this Court while applying the common parlance test held that the appellant's product "Dant Lal Manjan" could not qualify as a medicament and held as follows:

> "The Tribunal rightly points out that in interpreting statutes like the Excise Act the primary object of which is to raise revenue and for which purpose various products are differently classified, resort should not be had to the scientific and technical meaning of the terms and expressions used but to their popular meaning, that is to

> say the meaning attached to them by those using the product. It is for this reason that the Tribunal came to the conclusion that scientific and technical meanings would not advance the case of the appellants if the same runs counter to how the product is understood in popular parlance."

29. In Naturalle Health Products (P) Ltd. Vs. Collector of Central Excise, Hyderabad[13], two appeals were under consideration. One was with respect to Vicks Vapo Rub and Vicks Cough Drops while the other was with respect to Sloan's Balm and Sloan's Rub. It was observed that when there is no definition of any kind in the relevant taxing statute, the articles enumerated in the tariff schedules must be construed as far as possible in their ordinary or popular sense, that is, how the common man and persons dealing with it understand it. The Court held that in both the cases the customers, the practitioners in Ayurvedic medicine, the dealers and the licensing officials treated the products in question as Ayurvedic medicines and not as Allopathic medicines, which gave an indication that they were exclusively Ayurvedic medicines or that they were used in the Ayurvedic system of medicine, though they were patented medicines. Consequently, it was held that the said products had to be classified under the Chapter dealing with medicaments.

30. B.P.L. Pharmaceuticals Ltd. Vs. Collector of Central Excise, Vadodara[14] was a case in which product "Selsun Shampoo" was under

> consideration for the purpose of classification under the Tariff Act. According to the manufacturers this shampoo was a medicated shampoo meant to treat dandruff which is a disease of the hair. This Court held that having regard to the preparation, label, literature, character, common and commercial parlance, the product was liable to be classified as a medicament. It was not an ordinary shampoo which could be of common use by common people. The shampoo was meant to cure a particular disease of hair and after the cure it was not meant to be used in the ordinary course.

31. Therefore, what flows from a reading of the afore-mentioned decisions is that in the absence of a statutory definition in precise terms; words, entries and items in taxing statutes must be construed in terms of their commercial or trade understanding, or according to their popular meaning. In other words they have to be constructed in the sense that the people conversant with the subject-matter of the statute, would attribute to it. Resort to rigid interpretation in terms of scientific and technical meanings should be avoided in such circumstances. This, however, is by no means an absolute rule. When the legislature has expressed a contrary intention, such as by providing a statutory definition of the particular entry, word or item in specific, scientific or technical terms, then, interpretation ought to be in accordance with the scientific and technical meaning and not according to common parlance understanding.

Classification of 'Soft-Serve'

32. In light of these principles, we may now advert to the question at hand, viz. classification of 'soft serve' under the appropriate heading. As aforesaid, the Tribunal has held that in view of the technical literature and stringent provisions of the PFA, 'soft serve' cannot be classified as

"ice-cream" under Entry 21.05 of the Tariff Act. We are of the opinion, that in the absence of a technical or scientific meaning or definition of the term "ice-cream" or 'soft serve', the Tribunal should have examined the issue at hand on the touchstone of the common parlance test.

33. As noted before, headings 04.04 and 21.05 have been couched in non- technical terms. Heading 04.04 reads "other dairy produce; edible products of animal origin, not elsewhere specified or included" whereas heading 21.05 reads "ice-cream and other edible ice". Neither the headings nor the chapter notes/section notes explicitly define the entries in a scientific or technical sense. Further, there is no mention of any specifications in respect of either of the entries. Hence, we are unable to accept the argument that since 'soft serve' is distinct from "ice-cream" due to a difference in its milk fat content, the same must be construed in the scientific sense for the purpose of classification. The statutory context of these entries is clear and does not demand a scientific interpretation of any of the headings. Therefore, in the absence of any statutory definition or technical description, we see no reason to deviate from the application of the common parlance principle in construing whether the term "ice-cream" under heading 21.05 is broad enough to include 'soft serve' within its import.

34. The assessee has averred that 'soft serve' cannot be regarded as "ice- cream" since the former is marketed and sold around the world as 'soft serve'. We do not see any merit in this averment. The manner in which a product may be marketed by a manufacturer, does not necessarily play a decisive role in affecting the commercial understanding of such a product. What matters is the way in which the consumer perceives the product at the end of the day notwithstanding marketing strategies. Needless to say the common parlance test operates on the standard of an average reasonable person who is not expected to be aware of technical details relating to the goods. It is highly unlikely that such a person who walks into a "McDonalds" outlet with the intention of enjoying an "ice-cream", 'softy' or 'soft serve', if at all these are to be construed as distinct products, in the first place, will be aware of intricate details such as the percentage of milk fat content, milk non-solid fats, stabilisers, emulsifiers or the manufacturing process, much less its technical distinction from "ice-cream". On the contrary, such a person would enter the outlet with the intention of simply having an "ice-cream" or a 'softy ice-cream', oblivious of its technical composition. The true character of a product cannot be veiled behind a charade of terminology which is used to market a product. In other words, mere semantics cannot change the nature of a product in terms of how it is perceived by persons in the market, when the issue at hand is one of excise classification.

35. Besides, as noted above, learned senior counsel, appearing for the assessee quoted some culinary authorities for the submission that ice cream must necessarily contain more than 10% milk fat content and be served only in a frozen to hard stage for it to qualify as "ice cream". It was argued that classifying 'soft serve', containing 5% milk fat content, as "ice cream", would make their product stand foul of requirements of the PFA which demands that an "ice-cream" must have at least 10% milk fat content.

36. Such a hard and fast definition of a culinary product like "ice- cream" that has seen constant evolution and transformation, in our view, is untenable. Food experts suggest that the earliest form of ice cream may have been frozen syrup. According to Maguelonne Toussaint-Samat in her History

of Food, "They poured a mixture of snow and saltpeter over the exteriors of containers filled with syrup, for, in the same way as salt raises the boiling-point of water, it lowers the freezing-point to below zero." The author charters the evolution of "ice cream" in the landmark work from its primitive syrupy form to its contemporary status with more than hundred different forms, and categorizes 'soft serve' as one such form.

37. Noted author C. Clarke states the following in "The Science of Ice Cream":

> "The legal definition of ice cream varies from country to country. In the UK 'ice cream' is defined as a frozen food product containing a minimum of 5% fat and 7.5% milk solids other than fat (i.e. protein, sugars and minerals), which is obtained by heat- treating and subsequently freezing an emulsion of fat, milk solids and sugar (or sweetener), with or without other substances. 'Dairy ice cream' must in addition contain no fat other than milk fat, with the exception of fat that is present in another ingredient, for example egg, flavouring, or emulsifier.' In the USA, ice cream must contain at least 10% milk fat and 20% total milk solids, and must weigh a minimum of 0.54 kg I-'.Until 1997, it was not permitted to call a product 'ice cream' in the USA if it contained vegetable fat.
>
> Ice cream is often categorized as premium, standard or economy. Premium ice cream is generally made from best quality ingredients and has a relatively high amount of dairy fat and a low amount of air (hence it is relatively expensive), whereas economy ice cream is made from cheaper ingredients (e.g. vegetable fat) and contains more air. However, these terms have no legal standing within the UK market, and one manufacturer's economy ice cream may be similar to a standard ice cream from another." Therefore, while some authorities are strict in their classification of products as "ice cream" and base it on milk fat content, others are more liberal and identify it by other characteristics. There is, thus, no clear or unanimous view regarding the true technical meaning of "ice cream". In fact, there are different forms of "ice cream" in different parts of the world that have varying characteristics.

38. On the basis of the authorities cited on behalf of the assessee, it cannot be said that "ice cream" ought to contain more than 10% milk fat content and must be served only frozen and hard. Besides, even if we were to assume for the sake of argument that there is one standard scientific definition of "ice cream" that distinguishes it from other products like 'soft serve', we do not see why such a definition must be resorted to in construing excise statutes. Fiscal statutes are framed at a point of time and meant to apply for significant periods of time thereafter; they cannot be expected to keep up with nuances and niceties of the gastronomical world. The terms of the statutes must be adapted to developments of contemporary times rather than being held entirely inapplicable. It is for precisely this reason that this Court has repeatedly applied the "common parlance test" every time parties have attempted to differentiate their products on the basis of subtle and finer characteristics; it has tried understanding a good in the way in which it is understood in common parlance.

39. Learned counsel for the assessee had strongly relied on Akbar Badrudin Giwani (supra) to buttress his claim, that in matters pertaining to classification of commodity taxation, technical and scientific meaning of the product will prevail rather than the commercial parlance, and hence on this basis, headings 04.04 and 21.05 were to be harmoniously construed so that 'soft serve' would be classified under heading 04.04. We are afraid, reliance on this judgment is misplaced and out of context. It would be useful to draw a distinction between the contexts of Akbar Badrudin Giwani (supra) and the present factual matrix.

40. In Akbar Badrudin Giwani (supra) the issue was whether the slabs of calcareous stones (which were in commercial parlance known as marble) being imported by the Appellant were to be regarded as "marble" under Item No. 62 of the List of Restricted Items, Appendix 2, Part 8 of Import and Export Policy given that Item No. 25.15 (Appendix 1-B, Schedule I to the Import (Control) Order, 1955 referred to "marble, travertine, ecaussine and other calcareous monumental or building stone of an apparent specific gravity of 2.5 or more and Alabaster...". Hence, the controversy revolved around whether "marble" should be construed in its scientific and technical meaning, or according to its commercial understanding, in order to determine whether the appellant's goods would come within the ambit of Entry No. 62 of List of Restricted Items. The Court examined both the entries and opined that Item No. 25.15 referred specifically not only to marble but also to other calcareous stones having specific gravity of 2.5, whereas, Entry No. 62 referred to the restricted item "marble" only. The content of Item No. 25.15 had been couched in scientific and technical terms and therefore, "marble" had to be construed according to its scientific meaning and not in the sense as commercially understood or meant in trade parlance. Hence, in this context this Court held that the general principle of interpretation of tariff entries is of a commercial nomenclature but the said doctrine of commercial nomenclature or trade understanding should be departed from in a case where the statutory content in which the tariff entry appears, requires such a departure. In other words, a trade understanding or commercial nomenclature can be given only in cases where the word in the tariff entry has not been used in a scientific or technical sense and where there is no conflict between the words used in the tariff entry and any other entry in the Tariff Schedule. Thus, these observations of the Court were made in a context where one of the tariff entries was couched in a scientific and technical sense and had to be harmonized with the other entry. It would have run counter to the statutory content of the legislation, to construe the term "marble" in its commercial sense.

41. It is significant to note that the question of classification of 'soft serve' is based on a different set of facts in a different context. Heading 21.05 which refers to "ice cream and other edible ice" is not defined in a technical or scientific manner, and hence, this does not occasion the need to construe the term "ice-cream" other than in its commercial or trade understanding. Since, the first condition itself has not been fulfilled; the question of harmonizing heading 21.05 with 04.04 by resort to the scientific and technical meaning of the entries does not arise at all. Hence, we are of the opinion that the ratio of Akbar Badrudin Giwani (supra) does not apply to the facts of the present case.

42. Learned counsel for the assessee had vociferously submitted that the common parlance understanding of "ice-cream" can be inferred by its definition as appearing under the PFA. According to Rule A 11.20.08 the milk fat content of "ice-cream" and "softy ice-cream" shall not be

less than 8% by weight. Hence, according, to the learned counsel, the term "ice-cream" under heading 21.05 had to be understood in light of the standards provided in the PFA, more so when selling "Ice-cream" with fat content of less than 10% would attract criminal action, as held in Baburao Ravaji Mharulkar (supra).

43. We are unable to persuade ourselves to agree with the submission. It is a settled principle in excise classification that the definition of one statute having a different object, purpose and scheme cannot be applied mechanically to another statute. As aforesaid, the object of the Excise Act is to raise revenue for which various goods are differently classified in the Act. The conditions or restrictions contemplated by one statute having a different object and purpose should not be lightly and mechanically imported and applied to a fiscal statute for non-levy of excise duty, thereby causing a loss of revenue. [See: Medley Pharmaceuticals Limited Vs. Commissioner of Central Excise and Customs, Daman[15] and Commissioner of Central Excise, Nagpur Vs. Shree Baidyanath Ayurved Bhavan Limited[16]]. The provisions of PFA, dedicated to food adulteration, would require a technical and scientific understanding of "Ice-cream" and thus, may require different standards for a good to be marketed as "ice-cream". These provisions are for ensuring quality control and have nothing to do with the class of goods which are subject to excise duty under a particular tariff entry under the Tariff Act. These provisions are not a standard for interpreting goods mentioned in the Tariff Act, the purpose and object of which is completely different.

44. Learned counsel for the assessee also contended that based on Rule 3(a) of the General Rules of Interpretation which states that a specific entry shall prevail over a general entry, 'soft serve' will fall under heading 04.04 since it is a specific entry. We do not see any merit in this contention. The learned counsel for the assessee had himself contended that "ice-cream" was a dairy product and would have been classified under heading 04.04 if heading 21.05 had not been inserted into the Tariff Act. However, in the presence of heading 21.05, "ice- cream" cannot be classified as a dairy product under heading 04.04. Hence, it is obvious that in relation to heading 04.04, heading 21.05 is clearly a specific entry. Therefore, we cannot subscribe to the claim that heading 04.04 is to be regarded as a specific entry under Rule 3(a) of the General Rules of Interpretation, since such an interpretation would be contrary to the statutory context of heading 21.05. In conclusion, we reject the view taken by the Tribunal and hold that 'soft serve' is to be classified as "ice-cream" under heading 21.05 of the Act.

45. At this stage it may be relevant to refer to Trade Notice No. 45/2001 dated 11th June, 2001 of Mumbai Commissionerate IV which came to our notice. According to the said notification, "softy ice-cream/soft serve" dispensed by vending machines, sold and consumed as "ice-cream", is classifiable under Entry 21.05 of the Act. The same is reproduced below:

> "Classification of Softy Ice Cream being sold in restaurant etc. dispensed by vending machine — [Mumbai Commissionerate IV Trade Notice No.45/2001, dt. 11.6.2001] Ice Cream dispensed by vending machine falling under chapter 21 has been made liable to nil rate of duty vide Sl. No.8 of Notification No.3/2001-CE dated 1.3.2001.

> Doubts have been raised as regards to the classification of softy ice cream/soft serve dispensed by vending machine and soft serve mix used for its manufacture prior to 1.3.2001. A manufacturer was obtaining soft serve mix and processing it in his restaurant for manufacture of softy ice cream. The process involved lowering of temperature so that it changes its form from liquid to semi-solid state and incorporation of air, which results in production of overrun, in Tylor Vending Machine.
>
> The product that emerges after this process is a completely different product and is ready to be consumed immediately. It has all the ingredients of an ice cream. The product is sold and consumed as ice cream.
>
> In the circumstances, it is clarified by the Board that softy ice cream is correctly classifiable under heading 21.05 of Central Excise Tariff. As per HSN Explanatory Notes, heading 19.01 also cover mix bases (e.g. powders) for making ice cream. It has been further clarified that soft serve mix will be correctly classifiable under heading 19.01.
>
> All the trade associations are requested to bring the contents of this trade notice to the attention of their member manufacturers in particular, and trade in general.
>
> Sd/-
>
> (Neelam Rattan Negi) Commissioner Central Excise, Mumbai-IV" While it is true that the trade notice is not binding upon this Court, it does indicate the commercial understanding of 'soft-serve' as 'softy ice- cream'. Further, as this trade notice is in no way contrary to the statutory provisions of the Act, we see no reason to diverge from what is mentioned therein.

46. In view of the aforegoing discussion, we are of the opinion that the Tribunal erred in law in classifying 'soft-serve' under tariff sub- heading 2108.91, as "Edible preparations not elsewhere specified or included", "not bearing a brand name". We hold that 'soft serve' marketed by the assessee, during the relevant period, is to be classified under tariff sub-heading 2105.00 as "ice-cream".

47. Lastly, learned counsel for the assessee had also contended that in the event 'soft serve' was classifiable under heading 21.05, the assessee was entitled to the benefit under Notification No. 16/2003-CE (NT) dated 12th March 2003. The notification reads:

> "Notification: 16/2003-C.E. (N.T.) dated 12-Mar-2003 Softy ice cream and non-alcoholic beverage dispensed through vending machine exempted during period 1-3- 1997 to 28-2-2001 Whereas the Central Government is satisfied that a practice that was generally prevalent regarding levy of duty of excise (including non-levy thereof) under section 3 of the Central Excise Act, 1944 (1 of 1944) (hereinafter

referred to as the said Act), on softy ice cream and non-alcoholic beverages dispensed through vending machines, falling under Chapters 20, 21 or 22 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), and that such softy ice cream and non-alcoholic beverages dispensed through vending machines were liable to duty of excise which was not being levied according to the said practice during the period commencing on and from the 1st day of March, 1997 and ending with 28th February, 2001.

Now, therefore, in exercise of the powers conferred by section 11C of the said Act, the Central Government hereby directs that the whole of the duty of excise payable on such softy ice cream and non alcoholic beverage dispensed through vending machines, but for the said practice, shall not be required to be paid in respect of such softy ice cream and non alcoholic beverages on which the said duty of excise was not being levied during the aforesaid period in accordance with the said practice."

48. We are afraid we are unable to take this argument into account since such a plea was not urged before the Tribunal in the first place. Given that this is a statutory appeal under Section 35L of the Act, it is not open to either party, at this stage of the appeal, to raise a new ground which was never argued before the Tribunal. Our scrutiny of the arguments advanced has to be limited only to those grounds which were argued by the parties and addressed by the Tribunal in its impugned order. Since, the impugned orders at hand do not reflect the argument raised by the learned counsel for the assessee; we do not find any justification to entertain this submission. Nonetheless, for the sake of argument, even if we assume that this ground had been urged before the Tribunal, in our view, learned counsel's reliance on this notification is misplaced. Upon a reading of the notification it is clear that the exemption in the notification is granted for the whole of excise duty which was payable on such softy ice cream and non alcoholic beverages dispensed through vending machines, but was not being levied during the relevant period, which is not the case here. In the present case, as aforenoted, three show cause notices had been issued to the assessee alleging that 'soft serve' was classifiable under heading 21.05 and attracted duty @ 16%. The show cause notices issued by the revenue also indicated that the assessee was liable to pay additional duty under Section 11A of the Act. This clearly shows that the excise duty was payable by the assessee and was being levied by the revenue. Therefore, the assessee's case does not fall within the ambit of the said notification and is not eligible for the exemption granted to "softy ice- cream", dispensed through a vending machine for the relevant period.

49. For the view we have taken, it is unnecessary to examine the issue whether the product in question bears a brand name.

50. Resultantly, the appeals are allowed and the impugned orders of the Tribunal are set aside, leaving the parties to bear their own costs.

	(D.K. JAIN, J.)

	|.....
	|(JAGDISH SINGH KHEHAR, J.)
NEW DELHI,	
NOVEMBER 27, 2012	

RS

ITEM NO.1-A COURT NO.2 SECTION III

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NO. 5307-5308 OF 2003

COMMNR.OF CENTRAL EXCISE,NEW DELHI Appellant (s)

VERSUS

M/S.CONNAUGHT PLAZA REST.(P)LTD.N.D. Respondent(s)

Date: 27/11/2012 These Appeals were called on for pronouncement of Judgment today.

For Appellant(s) Mr. Arijit Prasad, Adv.
Mr. P. Parmeswaran,Adv.

For Respondent(s) Mr. Alok Yadav, Adv.
Mr.Rajesh Kumar,Adv.

Hon'ble Mr. Justice D.K. Jain pronounced the judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice Jagdish Singh Khehar.

The appeals are allowed and the impugned orders of the Tribunal are set aside, leaving the parties to bear their own costs.

[Charanjeet Kaur]		[Kusum Gulati]
Court Master		Court Master

[Signed reportable judgment is placed on the file] ITEM NO. IN Chambers SECTION III S U P R E M E C O U R T O F I N D I A RECORD OF PROCEEDINGS CIVIL APPEAL NO. 5307-5308 OF 2003 COMMNR.OF CENTRAL EXCISE,NEW DELHI Appellant (s) VERSUS M/S.CONNAUGHT PLAZA REST.(P)LTD.N.D. Respondent(s) Date: 27/11/2012 These Appeals were taken up in chambers.

CORAM : HON'BLE MR. JUSTICE D.K. JAIN
HON'BLE MR. JUSTICE JAGDISH SINGH KHEHAR

.....

In the first page of judgment dated 27th November, 2012 pronounced in C.A. Nos. 5307-5308 of 2003, cause title shall be read as follows :

"CIVIL APPEAL NOS. 5307-5308 0F 2003			
COMMISSIONER OF CENTRAL EXCISE, NEW DELHI		APPELLANT	
VERSUS			
M/S CONNAUGHT PLAZA RESTAURANT (P) LTD., NEW DELHI	–	RESPONDENT	

WITH
CIVIL APPEAL NO. 8097 of 2004

COMMISSIONER OF CENTRAL EXCISE, DELHI-II	–	APPELLANT	
VERSUS			
M/S CONNAUGHT PLAZA RESTAURANT (P) LTD.,THROUGH ITS MANAGING DIRECTOR"	–	RESPONDENT	

[Charanjeet Kaur]		[Kusum Gulati]
Court Master		Court Master

[Signed reportable order is placed on the file] REPORTABLE IN THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION |"CIVIL APPEAL NOS. 5307-5308 0F 2003 | |COMMISSIONER OF CENTRAL EXCISE, | | APPELLANT | |NEW DELHI | | | |VERSUS | |M/S CONNAUGHT PLAZA RESTAURANT | |RESPONDENT | |(P) LTD., NEW DELHI | | | O R D E R In the first page of judgment dated 27th November, 2012 pronounced in C.A. Nos. 5307-5308 of 2003, cause title shall be read as follows :

"CIVIL APPEAL NOS. 5307-5308 0F 2003		
COMMISSIONER OF CENTRAL EXCISE,		APPELLANT
NEW DELHI		
VERSUS		
M/S CONNAUGHT PLAZA RESTAURANT	–	RESPONDENT
(P) LTD., NEW DELHI		

WITH

CIVIL APPEAL NO. 8097 of 2004

COMMISSIONER OF CENTRAL EXCISE,	–		APPELLANT
DELHI-II			
VERSUS			
M/S CONNAUGHT PLAZA RESTAURANT	–	RESPONDENT	
(P) LTD.,THROUGH ITS MANAGING			
DIRECTOR"			

.....

[D.K. JAIN, J.]

.....

[JAGDISH SINGH KHEHAR,J.]

NEW DELHI,
NOVEMBER 27, 2012

---

[1] (1984) 4 SCC 540
[2] (1990) 2 SCC 203
[3] 1993 Supp (3) SCC 716 at page 720
[4] (1951) C.L.R. (Ex. Court) 122
[5] (1962) 1 SCR 279
[6] (1967) 2 SCR 720
[7] (1976) 2 SCC 241
[8] 1992 Suppl.(1) SCC 298
[9] (1985) 3 SCC 284
[10] (1989) 1 SCC 150
[11] (1997) 6 SCC 464
[12] (1996) 9 SCC 402

[13] (2004) 9 SCC 136
[14] (1995) Suppl. 3 SCC 1
[15] (2011) 2 SCC 601
[16] (2009) 12 SCC 419