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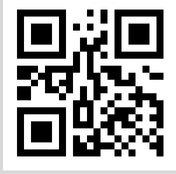

IN THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

PRINCIPAL SEAT

W.P(C) No. 5347/2022

X'SS BEVERAGE CO.,

Dag No.127, Mouza – Panbari, Patta No. 12, Chandrapur Road, Khankar Gaon, District – Kamrup (Metro), Assam, PIN – 781026 and represented by its Managing Partner Shri Nitesh Bharech.

........Petitioner

-***Versus***-

1. **The State of Assam,**
   Represented by the Secretary to the Government of Assam, Finance & Taxation Department, Assam Secretariat, Dispur, Guwahati-781006.

2. **The Commissioner of State Taxes, Assam,**
   Kar Bhawan, Dispur, Guwahati – 781006.

3. **The Joint Commissioner of State Tax,**
Guwahati Zone – A, Assam, Kar Bhawan, Dispur, Guwahati – 781006.

........***RESPONDENTS***

W.P(C) No. 5340/2022

X'SS BEVERAGE CO.,

Dag No.127, Mouza – Panbari, Patta No. 12, Chandrapur Road, Khankar Gaon, District – Kamrup (Metro), Assam, PIN – 781026 and represented by its Managing Partner Shri Nitesh Bharech.

........Petitioner

-***Versus***-

1. **The State of Assam,**
Represented by the Secretary to the Government of Assam, Finance & Taxation Department, Assam Secretariat, Dispur, Guwahati-781006.

2. **The Commissioner of State Taxes, Assam,**
Kar Bhawan, Dispur, Guwahati – 781006.

3. **The Joint Commissioner of State Tax,**
Guwahati Zone – A, Assam, Kar Bhawan, Dispur, Guwahati – 781006.

........***RESPONDENTS***

W.P(C) No. 5341/2022

X'SS BEVERAGE CO.,

Dag No.127, Mouza – Panbari, Patta No. 12, Chandrapur Road, Khankar Gaon, District – Kamrup (Metro), Assam, PIN – 781026 and represented by its Managing Partner Shri Nitesh Bharech.

........Petitioner

-***Versus***-

1. The State of Assam,
Represented by the Secretary to the Government of Assam, Finance & Taxation Department, Assam Secretariat, Dispur, Guwahati-781006.

2. The Commissioner of State Taxes, Assam,
Kar Bhawan, Dispur, Guwahati – 781006.

3. The Joint Commissioner of State Tax,
Guwahati Zone – A, Assam, Kar Bhawan, Dispur, Guwahati – 781006.

........RESPONDENTS

W.P(C) No. 5342/2022

X'SS BEVERAGE CO.,

Dag No.127, Mouza – Panbari, Patta No. 12,

Chandrapur Road, Khankar Gaon, District – Kamrup (Metro), Assam, PIN – 781026 and represented by its Managing Partner Shri Nitesh Bharech.

........Petitioner

-***Versus***-

1. The State of Assam,
Represented by the Secretary to the Government of Assam, Finance & Taxation Department, Assam Secretariat, Dispur, Guwahati-781006.

2. The Commissioner of State Taxes, Assam,
Kar Bhawan, Dispur, Guwahati – 781006.

3. The Joint Commissioner of State Tax,
Guwahati Zone – A, Assam, Kar Bhawan, Dispur, Guwahati – 781006.

........Respondents

W.P(C) No. 5346/2022

X'SS BEVERAGE CO.,

Dag No.127, Mouza – Panbari, Patta No. 12, Chandrapur Road, Khankar Gaon, District – Kamrup (Metro), Assam, PIN – 781026 and represented by its Managing Partner Shri Nitesh Bharech.

........Petitioner

-***Versus***-

1. The State of Assam,
Represented by the Secretary to the Government of Assam, Finance & Taxation Department, Assam Secretariat, Dispur, Guwahati-781006.

2. The Commissioner of State Taxes, Assam,
Kar Bhawan, Dispur, Guwahati – 781006.

3. The Joint Commissioner of State Tax,
Guwahati Zone – A, Assam, Kar Bhawan, Dispur, Guwahati – 781006.

........RESPONDENTS

– B E F O R E –
HON'BLE MR. JUSTICE SOUMITRA SAIKIA

Advocate for the petitioners : Mr. A. Saraf, Sr. Counsel assisted by Mr. P.K. Bora.

Advocate for the respondents : Mr. B. Gogoi, SC, Finance & Taxation.

Date of hearing : **30.08.2024**, **12.09.2024**, **30.09.2024**, **19.11.2024**, **28.11.2024**

Date of Judgment & Order : **04.03.2025**

JUDGMENT AND ORDER(CAV)

These writ petitions are filed by the petitioners unit assailing the Show Cause Notice dated

17.02.2022 and impugned order dated 14.07.2022 passed by the Joint Commissioner of State Tax, classifying the products manufactured by the writ petitioners under Customs Tariff Head 2202 10 90 rejecting the claims of the petitioners that the products are to be classified under Customs Tariff Head 2202 99 20. Since separate proceedings were initiated and orders passed for different financial years, the same are being assailed by separate writ petitions. Since the issues raised in all these writ petitions are same, these writ petitions are taken up together for hearing and disposal.

2. The petitioner is in the business of manufacture and sale of carbonated fruit drinks and ready to serve fruit drinks. The petitioner is a partnership firm and is represented in the present proceedings by the Managing partner. It manufactures and sells as many as 10 different products which are described as under:

Product 1 – XSS Orange	Product 6 – Thirst Cola

Product 2 – Thirst clear lemon	Product 7 – Thirst Orange
Product 3 – XSS Cola	Product 8 – XSS Clear Lemon
Product 4 – XSS Nimboo Paani	Product 9 – Thirst Nimboo Paani
Product 5 – Thirst Mango	Produce 10- XSS Mango Drink

3. According to the contentions of the writ petitioner, these products are classifiable under Tariff Item 2202 99 20 of the Customs Tariff Act, 1975 and are specified as serial No.48 under Schedule-II as "fruit pulp or fruit juice based drinks" in notification No.1 of 2017 – Integrated Tax (Rate) dated 28.06.2017 and are taxable at the rate of 12%.

4. According to the petitioner, carbonated beverages with fruit drinks should not have less than 10% fruit juice (5% in case of lime or lemon) and total soluble solids not less than 10% as per Regulation 2.3.30 of Food Safety and Standards (Food Products Standards and Food Additives) Regulation, 2011. According to the petitioner, these carbonated fruit drinks qualify as fruit beverages or fruit drinks. It is the case of the petitioner that the products manufactured by the petitioner are regularly tested at the State Public Health Laboratory, Government of Assam where sample products are sent for testing. From the report of analysis of food sample, it is clear that goods supplied by the petitioner comprises of fruit juice content more than 10% solids, sugar (sucrose) acidity regulators and synthetic food colors and it confirms to the

specifications stipulated in Regulation 2.3.30 of FSSAI for carbonated beverage with fruit juice. That apart, all particulars including the details of the fruit concentrate are described on the label of the respective products.

5. On the basis of the classification adopted by the petitioner, it filed the GST returns regularly upon payment of appropriate taxes at the rate of 12%. The classifications of the products were duly described in the invoices raised and the returns filed by the petitioner.

6. In the month of September, 2021, the department initiated an investigation in respect of the classification adopted by the petitioner in respect of the goods manufactured and sold by the petitioner. On the 03.09.2021 inspection was undertaken by a team of Officers of the State Tax, Zone-A, Guwahati at the place of business of the petitioner. Such inspection was undertaken by invoking powers under Section 67 of the Assam Goods and Service Act, 2017. During such investigations, several documents including sales registers, purchase registers, purchase files, loose slips files, long registers, sales bills files, loose slips folders, miscellaneous files were all seized. That part, the CPU-cum-monitor, pen drives, mobile phone and CCTV DVR were seized. The department served on the petitioner the seizure list in form of GST INS-02. During the search and seizure operation, sample products from the petitioner's units were also taken away by the department purportedly for analysis in the laboratory. However, no such test reports were ever furnished to the petitioner. Pursuant to the search and seizure conducted by the

respondent authorities, impugned order dated 14.07.2022 was issued to the petitioner alleging that the department was of the view that the goods manufactured and supplied by the petitioner contains carbonated water as an ingredient and as such these items were classifiable under Tariff Sub-Heading 2202 10 90 and it attracts GST at the rate of 28% and compensation cess at the rate of 12%. In the said impugned order it was stated that from the label available on the goods manufactured and sold by the petitioner and that it transpires that carbonated water "was an essential ingredient in the manufacture of these goods" and from the report of the analysis of food samples conducted by the State Public Health Laboratory, it appears that carbonated water was used in *thirst clear lemon, thirst Orange and thirst Cola*. The impugned order also contained the minimum and maximum consumption of apple concentrate, lemon concentrate, orange juice concentrate, mango pulp (neelam) and mango concentrate as per the data extracted from the Tally Accounting System maintained by the petitioner.

7. By the said order, the petitioner was asked to explain the reasons for the mismatch between the declaration made in the label as compared to the actual products as significant difference in consumption of concentrates in manufacturing the products was noticed by the Department. It was further stated in the said order that since the products manufactured and sold by the petitioner contains carbonated water along with added sugar or sweetening matter or flavor, the goods are to be covered

under HSN 2202 10 90 and are liable to be taxed at 28% GST along with cess at the rate of 12%. The department concluded that the petitioner had misclassified the product with the intent to minimize tax and which consequently led to short payment of tax and thereby had committed offense under section 122 of the Assam GST Act, 2017. The department therefore, had proceeded to adjudicate the issue under Section 74 of the Assam GST Act and a further interest under Section 50(1) of the Assam GST Act is levied.

8. Based on the conclusions arrived at by the department, the show cause notice dated 17.02.2022 under section 74 was issued, whereby the petitioner was directed to show cause along with supporting documents as evidence in support of its claim. The petitioner was asked to show cause as to why the petitioner should not be liable to pay interest and penalty in accordance with the provisions of the Act. It was also mentioned in the show notice that if the petitioner makes payment of tax stated in the notice along with interest and penalty at the rate of 25% of tax within 30 days of communication of notice, then proceedings shall be deemed to have been concluded. The show cause notice was accompanied by a summary of the demand in form GST DRC-01 which was issued by the respondent No.3.

9. In response to the show notice dated 17.02.2022 issued to the petitioner, the petitioner submitted its show cause reply dated 18.03.2022. In its reply the petitioner stated that the products in question were fruit juice based

drink and are therefore classifiable under Tariff 2202 99 20 of Schedule II of the IGST Notification. The petitioner stated that fruit pulp or fruit based drinks falling under the said tariff heading essentially means a drink based on fruit pulp or fruit juice (with or without additional flavors and sweeteners), where fruit pulp/fruit juice gives overall essential character to the drink. In support of its contention, the petitioner relied upon the judgment of the Tribunal's decision rendered in the case of CCE Bhopal vs. Parley Agro Pvt. Ltd. as well as the decision of the Apex Court rendered in Parley Agro (P.) Ltd. Vs. Commissioner of Commercial Taxes, Trivandrum. It was submitted that the judgments rendered in these cases squarely cover the case projected by the petitioner and are applicable to the factual matrix and therefore the subject drinks are liable to be classified as fruit juice based drinks as had been done by the petitioner. Pursuant to the reply submitted a personal hearing was granted to the petitioner where the petitioner reiterated its submissions made in the reply. It was also brought to the notice of the respondent authorities that by notification issued by the Government of India, Ministry of Finance, Department of Revenue being Notification No.8 of 2021 – Central Tax (Rate) dated 30.09.2021 whereby a new entry was inserted as serial 12A in Schedule-IV making carbonated beverages of fruit drinks or carbonated drinks with fruit juice to be taxable at the rate of 14%. The said notification was brought in force from 01.10.2021. It was also submitted that by Notification No.1 of 2021 – Compensation Cess (Rate) dated

30.09.2021 issued by the Government of India, Ministry of Finance, Department of Revenue, in the schedule to the Goods and Services Tax (Compensation to States) Act, 2017, a new entry namely Entry 4B was inserted levying 12% cess on carbonated beverages of fruit drinks or carbonated beverages with fruit juice and the same was made effective from 01.10.2021. It was submitted that in view of these notifications the show cause issued proposing to levy GST and cess on the said items at the rate of 14% GST and 10% cess prior to 01.10.2021 is illegal and the proceedings are liable to be dropped. The Joint Commissioner of Taxes by order dated 14.07.2022, however rejected the submissions of the petitioner and imposed tax interest and penalty classifying the item to be under HNS 2202 10 90 under the Custom Tariff Act. As it was held that water with added carbon-dioxide (carbonated water) containing added sugar or rather sweetening matter or flavored are separately classified under the HNS Code 2202 10. Being aggrieved the present writ petition has been filed.

10. It is submitted that the learned Senior Counsel submits that the products in question manufactured by the petitioner are "fruit juice based drink" classifiable under tariff item 2202 99 90 of Schedule II of the CGST, IGST rate notification.

11. The Tariff Item 2202 contains two parts, one is 2202 10 which is meant for *waters including mineral waters and aerated waters containing added sugar or other sweetening matter or flavors*. Whereas 2202 99 is for items

other than those classifiable under 2202 10. Therefore, the products manufactured by the petitioner are correctly classifiable under Item 2202 99 20 which is for *fruit pulp or fruit juice based drinks*. It is therefore, submitted that Tariff Sub-Heading No.2202 10 covers drinks which are predominantly made up of water, including mineral water and aerated water, and are either sweetened or flavored or both. Likewise, 2202 99 is for items other than those falling under 2202 10 and under Sub-Heading 2202 99 20 covers fruit pulp or fruit based drinks. It is submitted that a mere perusal of the nomenclature of Tariff Item No.2202 99 10 up to 2202 99 30 will reveal that is covers drinks which are identified by the dominant ingredient present therein like soya milk, fruit pulp, fruit juice, milk etc. These drinks would be characterized by the strong presence of such ingredients, rather than only as flavoring agent. It is submitted that the expression "fruit pulp or fruit juice based drinks" falling under 2202 99 20 essentially means a drink based on fruit pulp or fruit juice (with or without additional flavors or sweeteners). It is further submitted that the products in question in present factual matrix of Petitioner, are prepared with base such as apple concentrate, lemon concentrate, orange concentrate, as its base, which will be added to the syrupy liquid consisting of water, sugar and other constituents. For instance, in the product XSS Cola, percentage of apple juice constitutes 5% of the total beverage. Similarly, in case of Thirst Cola, percentage of apple juice constitutes 10% of total beverage. This is also evident from the sample labels. Thus, apple juice is the active

ingredient of the products in question, and imparts the basic attribute to the drink, including its taste and characteristics. However, carbonated water is added as a filler as well as preservative and the other substances are either flavours or regulators or preservatives etc. These products do not impart essential characteristic to the product. Similar is the situation in the other variants of the fruit drinks being sold by the Petitioner as well, wherein the fruit juice content is at least 5% in case of lemon and varies from 5% to 12% in case of other fruits. Therefore, the products in question are 'fruit juice-based drink', classifiable under the Tariff Item No. 2202 99 20.

12. The learned Senior Counsel refers to meanings ascribed in dictionaries and other authorities in support of the contentions raised. In support of the above interpretation, reliance is also placed upon ***D. Hicks (ed.), Production and Packaging of Non-carbonated Fruit Juices and Fruit Beverages, 1990, Van Nostrand Reinhold, New York,*** wherein it is stated that the most significant feature of a fruit beverage is not its fruit content but the function for which it is designed and marketed. The fruit is often a dominant ingredient providing its overall character to the drink which cannot be achieved in any other way.

13. In support of the above contention, the Petitioner also relies upon the US Customs Ruling No. N122815 in the matter of **Ms. Michele Peplinski Parker's Organic Fruit Juice,** which deals with the issue regarding the classification

of certain beverages containing concentrates of fruit juices as well as other ingredients. The ruling entailed classification of four such products, which could be summarised in the following table:

Sl.	Product Name	Ingredients	Classification
1.	Parkers Organic Sparkling Apple with a Twist of Lime	50 percent organic apple, 5 percent organic grape and organic lime juices from concentrate. Carbonated water has been added to bring the final Brix value of this product to a Brix of 13.	2202.90.9090 (Others)
2.	Parkers Organic Sparkling Pink Lemonade	9 percent grape juice concentrate, 7 percent apple juice concentrate, 1 percent lemon juice concentrate, 0.5 percent strawberry juice concentrate and 83 percent water.	2202.90.0040
3.	Parkers Organic Ginger Beer	Carbonated water, organic cane sugar, and Australian organic ginger.	2202.10.0040 (Carbonated Soft drink-others)
4.	Parkers Organic Lemonade	Carbonated water, organic cane sugar organic lemon juice and natural flavour	2202.10.0040 (Carbonated Soft drink-others)

14. It is contended that the aforesaid clearly points to the fact that a beverage could be a fruit juice – based drink (e.g. SI. 1 & 2 above) or it could be flavoured water (e.g. Sl No. 3 & 4 above). The classification, however, is determined by the nature of the beverage, particularly the presence of the fruit juice to an extent that it attributes the essential character to the beverage, not merely as a flavouring agent. It is the dominant nature of the product which determines the classification under the Sub-heading No. 2202 10 or 2202 99.

15. It is submitted that the distinction drawn above between fruit pulp or fruit juice based drinks' and mere 'flavoured beverages' is evident from the scheme of Chapter Heading 2202. If this distinction is ignored, it would render the specific Tariff Item No. 2202 99 20 redundant and otiose. Although Sub-heading 2202 99 is provided as a residuary entry, it has to be examined in the broader scheme of heading 2202. If Tariff Item 2202 10 90 is treated to include an apple juice-based drink, orange juice-based drink or lemon juice based drink, it would mean that any fruit juice-based drink would be susceptible to classification under Tariff Item No. 2202 10 90, as being flavoured water, irrespective of the composition, nature and common understanding of the market regarding the nature of the product. This is so because in a broader sense, juice or essence is a flavouring agent, and any beverage based on fruit juice would be classifiable as flavoured water. However, this is evidently not the intention of the scheme of classification under Chapter Heading No. 2202 of the Customs Tariff Act, 1975, which

provides a separate entry for classification of fruit juice-based drinks.

16. Further, it is submitted that upon a closer examination of the Chapter Heading No. 2202, it can be seen that Tariff Item 2202 99 20 covers 'Fruit pulp or fruit juice based drinks' within its ambit whereas, Tariff Item 2202 99 30 covers 'Beverages containing milk'. Therefore, it is evident that the intention of the Legislature is to include those beverages under Tariff Item 2202 99 20, wherein the fruit imparts the essential character of the beverage. Unlike, Tariff Item 2202 99 30 which used the word 'containing' instead of 'based, which would mean that beverages with any quantity of milk would be covered under Tariff Item No. 2202 99 30.

17. The learned Senior Counsel for the petitioner further submits that the Tariff Item 2202 90 20 under the Erstwhile Central Excise Tariff Act, 1985 is pari materia to the tariff scheme under the Customs Tariff Act, 1975. In support of his contentions he has placed reliance on the following decisions

1. Commissioner of C.Ex., Bhopal v. Parle Agro Pvt. Ltd., (2008) ELT 194.
2. Parle Agro (P) Ltd. v. Commissioner of Commercial Taxes, Trivandrum (2017) 7 SCC 540.
3. Commissioner of Customs (Prev.) Vs. Anutham Exim Pvt. Ltd., 2021 SCC Online CESTAT 5727.
4. Godrej Foods Ltd. v. CCE, Indore (2000) 121 ELT 231.

5. Hamdard (Wakf) Laboratories Vs. Collector of Central Excise, Meerut (1999) 6 SCC 617.
6. Katrala Products Ltd. v. CCE, Meerut, (1999) 113 ELT 981 SCC.
7. Brindavan Beverages Pvt. Ltd. v. Commr. Of Cus., CX & ST 2019 SCC Online CESTAT 9229.
8. Union of India v. Kamlakshi Finance Corporation Limited 1992 Supp (1) SCC 443.
9. Viacom 18 Media Pvt. Ltd. v. State of Maharashtra (2018) SCC Online Bom 18633.
10. Industrial Mineral Company (IMC) v. Commissioner of Customs, Tuticorin 2018 SCC Online Mad 13636.
11. Hindustan Poles Corporation v. CCE, Calcutta, (2006) 4 SCC 85.
12. Commissioner of Cus., Chennai v. Associated Cement Companies Ltd., (2001) 133 ELT 400.
13. CCE, Bhubaneswar-I v. Champdany Industries Ltd. (2009) 9 SCC 466.
14. CCE V Connaught Plaza Restaurant (P) Ltd. (2013) 18 GSTR 1 SC.
15. Delhi Cloth & General Mills Co. Ltd. V. State of Rajasthan (1980) 4 SCC 71.
16. HPL Chemicals Ltd. v. Commissioner of Central Excise, Chandigarh (2006) 5 SCC 208.
17. Hindustan Ferodo Ltd. v. CCE, Bombay (1997) 2 SCC 677.

18. Colgate Palmolive (India) Ltd. v. UOI 1980 SCC Online Bom 384.

19. CCE V. Chemphar Drugs & Liniments, Hyderabad (1989) 2 SCC 127.

20. Anand Nishikawa Co. Ltd. v. Commissioner of Central Excise, Meerut (2005) 7 SCC 749.

21. Hindustan Steel Ltd. v. State of Orissa (1962) 2 SCC 627.

22. CCE Vs. H.M.M. LIMITED 1995 Supp (3) SCC 322.

23. CCE, Aurangabad v. Balakrishna Industries, Civil Appeal No. 3389-3390 of 2001, SC.

24. Goyal Tobacco Co Pvt. Ltd. v. CCE & ST, Jaipur-1, 2015 SCC Online CESTAT 979.

25. Commissioner of Central Excise, Bangalore Vs. Mysore Electricals Industries Ltd. (2006) 12 SCC 448.

18. It is submitted by the learned Senior Counsel for the petitioner that the impugned decision of the respondent authority is violative of judicial discipline. It is submitted that where the Tribunal had already decided the similar issue in favor of the SSE and the said decision was relied upon by the petitioner before the respondent authority, the said authority could not have ignored the said decision and proceeded to render the impugned order ignoring the findings rendered by Tribunal. There is no dispute that the

adjudicatory authority in the present proceedings is subordinate to the Tribunal and therefore an order of the Tribunal is binding on the subordinate adjudicatory authority like the present respondents and therefore the respondent adjudicatory authority was duty bound to accept the findings of the Tribunal and could not have rendered the impugned order contrary to the findings arrived at by the Tribunal. He places reliance on the judgment of the Tribunal rendered in *CCE, Bhopal vs Parle Agro Pvt. Ltd. reported in 2008 (226) ELT 194 (TRI)*. Referring to the said matter, it is submitted that the issue involved therein was regarding classification of the product APPY FIZZ, in that matter the Revenue wanted to classify it under Tariff Item 2202 10 10 because it was aerated. The Revenue had classified the item under Tariff Head 2202 90 20 as it is a juice based drink because the product contained 23% apple juice. The assessee relied upon the Prevention of Food Adulteration Rules, 1955 to submit that fruit beverage or fruit drink must contain soluble solids not less than 10% whereas their product contains 13.7% soluble solids. Rejecting the contention of the Revenue, the Tribunal held that the product was classifiable under Tariff Head 2202 90 20. The said decision of the Tribunal was subsequently affirmed by the Apex Court by dismissing the appeal filed by the Revenue which is reported in 2010 (254) ELT A13 (SC). He has also referred to the judgments rendered in *Parle Agro (P) Ltd. vs Commissioner of Commercial Taxes, Trivandrum, reported in 2017 7 SCC 740* to submit that this judgment is squarely applicable to

the present proceedings for the reason that the Apex Court held in that matter that APPY FIZZ containing more than 10% fruit juice (mainly 12.7%) was a fruit juice based drink in terms of the provisions of Kerala VAT Act, 2003. Similarly, he has referred to the judgment of *Parle Agro (P.) Ltd. Vs. Commissioner of Commercial Taxes Trivandrum, reported in 2017 7 SCC 540*, where the Apex Court held on the facts of the case that the food based drinks were always covered under section 6(1)(a) of the Kerala Value Added Tax Act, 2003 and therefore the claim of the State Government that they were included in a subsequent notification issued under section 6(1)(d) was rejected. The Apex Court held that fruit based drinks were always covered under section 6(1)(a) and were never treated as "aerated branded soft drinks" as was sought to be done by the State while issuing notifications under section 6(1)(d). In support of his contentions he has further referred to the following judgments *Godrej Foods Ltd. vs. CCE Indore reported in 2000 (121) ELT 231 (TRI)* and *Hamdard (Wakf) Laboratories vs. Collector of Central Excise, Meerut reported in 1999 6 SCC 617*, *Katrala Products Ltd. V. CCE, Meerut reported in (1999) SCC Online SC 701*. It is submitted that any orders passed by higher authorities are required to be rigorously followed until and unless such order is stayed or set aside. It is submitted that the Tribunal in Parle Foods Pvt. Ltd. had rendered a finding rejecting the similar stand of the Revenue in favor of the SSE. This judgment ultimately came to be upheld by the Apex Court by dismissing the

appeal filed by the Revenue Department. This aspect was urged before the adjudicating authority at the time of hearing. However, the respondent No.3, who was the adjudicating authority in the present proceedings refused to accept the findings which was patently binding on the same authority. He submits that the Revenue Authorities are bound by the orders and decisions of the appellate authorities, including that of the Tribunal. In support of his contentions, he has relied on the following judgments: *Kamalakshi Finance Corporation Limited reported in 1991 (55) ELT 433 (SC)*, *Viacom18 Media Pvt. Ltd. V. State of Maharashtra reported in 2019 (22) GSTL 338 (Bom)*, *Industrial Mineral Company vs. Commissioner of Customs Tuticorin reported in 2018 (18) GSTL 396 (Mad)*.

19. Relying on these judgments, the learned Senior Counsel submits that the impugned show cause notice and the order passed by the respondent No.3 is completely contrary to the judicial pronouncements of the learned Tribunal as well as of the Apex Court and the other High Courts of the country. He therefore, submits that the impugned order passed by the respondent No.3 is ex-facie, illegal, arbitrary and against the mandate of law and on this count alone these proceedings initiated by the respondent No.3 should be dropped and the impugned order dated 14.07.2022 being absolutely illegal and without jurisdiction and not tenable in law is liable to be set aside and quashed.

21. The third limb of the argument of the learned Senior Counsel is that the Tariff Heading 2202 10 would cover

only those beverages which are prepared with flavors. The learned Senior Counsel submits that the classification submitted by the petitioner is the appropriate classification of the subject products under Tariff Item 2202 99 20 as they are fruit based drinks. That merely because the products are aerated and/or carbonated the same will not entail its classification under Tariff Sub-Heading 2202 10 as sought to be made by the Revenue Authorities. The contention sought to be raised by the Revenue Authorities that in respect of the present subject drinks of fruit juice is not the primary defining and unique ingredient of the subject products and the juice comprises of only a miniscule percentage of the product combination and that the main contents of the goods are alleged to be carbonated water, sugar, along with the preservative present is only contrary to the scheme of the Tariff Act and the classifications made under the said Tariff Act read with the judicial pronouncements discussed. It is submitted by the learned Senior Counsel that carbon-dioxide is added merely for preservation of the beverage and not for any other purpose. Rather, it is the fruit juice which gives the subject product its essential character and forms the base of the beverage. He submits that the carbon-dioxide in combination of other additives are added only for ensuring the safety of the beverage for consumption over its declared "best before date". The learned Senior Counsel places reliance on materials extracted from the "Carbonated Soft Drinks Formulation and Manufacture" edited by David P. Steen and Philip R. Ashurst, 2006 by

Blackwell Publishing Ltd. He also places reliance on "Chemistry and Technology of Soft Drinks and Fruit Juices, Second Edition, edited by Philip R. Ashurst & Associates, Consulting Chemists for Food Industry, Hereford, UK, 2005 by Blackwell Publishing Ltd. Referring to these authorities by specialists in the fruit drinks and beverages industry across the world, the learned Senior Counsel submits that carbon-dioxide is a very effective preservative as it inhibits growth of microorganisms in the beverage. It is submitted that in respect of the subject goods, the presence of carbon-dioxide is only as a preservative agent. He further submits that Sub-Heading 2202 10 covers waters, including aerated waters which are either sweetened or flavored or both. It is therefore, submitted that flavored water based beverage is covered by Sub-Heading 2202 10. It is submitted that flavor means odour and taste of a food item. In support of his contentions he makes a reference to the various authorities which define flavor. In Douglas M. Considine (ED), Foods and Food Production Encyclopedia, Van Nostrand Rainhold Company where it is explained that the "flavor of a food substance is the combined serisation of taste and odour as perceived by the eater/drinker of that substance".

22. Reference is also made to the Random House Compact Unabridged Dictionary, 1996, Random House, New York defines flavor as under:

"1. Taste, esp. the distinctive taste of something as it is experienced in the mounth."

According to The Shorter Oxford English Dictionary, 1973, Clarendon Press, Oxford 'flavour' is

"1. A smell or odour. In mod, use: A trace of a particular odour."

23. Relying on these authorities, the learned Senior Counsel for the petitioner submits that flavor is a trace (extremely small amount of a component) of a particular odour or taste in a food substance. Thus, flavoured waters contemplated under sub-heading 2202 10 are berverages or preparations which contain flavouring agents. Which impart the sensation of a particular taste or odour. It does nothing more. It does not impart or or attribute any sense of texture or mouth-feel identical with the substance from which the particular flavour was extracted or prepared. On the contrary, however, as already submitted, in a fruit juice-based drink the fruit juice content attributes the essential character of the beverage, and also functions more than as a mere agent imparting the sense of taste.

24. It is, therefore, submitted that since in the instant case, apple juice concentrate / orange juice concentrate / lemon concentrate is not added to the subject products merely as a flavouring agent, but as the base component of the product (being more than 5%/ 10%/ 12% content of the total product), the correct classification of the subject products will be under tariff item 2202 99 20 and not/ under tariff item 2202 10 20 or 2202 10 90. Thus, primary ingredient in the subject products are fruit juice and not carbonated water,

sugar and other preservatives as alleged by the Ld. Joint Commissioner in the impugned SCN.

25. Hence, the proposed classification of the subject products by Ld. Joint Commissioner, as carbonated water falling under CTH 2202 10 90 is factually incorrect and legally erroneous.

26. Thus, it is submitted that the goods manufactured by the petitioner are classifiable as fruit juice based drink since the essential component of the drink comprises of apple fruit juice and therefore the goods are classifiable under the tariff item 2202 99 20 as against the tariff sub-heading 2202 10 as proposed in the impugned SCN. Hence, the impugned SCN is liable to be dropped on this ground alone.

27. The learned Joint Commissioner of Taxes has applied the HSN Explanatory Notes of heading 2202 to propose that the subject products are classifiable under the tariff sub-heading 2202 10. In this regard, it is submitted that tariff heading 2202 of the Customs Tariff Act, 1975 is not fully aligned with the Harmonized System of Nomenclature ("HSN") issued by the World Customs Organization ("WCO") since the entry 2202 99 20, viz. 'fruit pulp or fruit juice based drink' is not there in the said HSN but is specifically inserted in the Customs Tariff Act, 1975. Thus, the explanatory notes to HSN should not be the basis for interpretation of the said entry of the Customs Tariff Act. The said entry specifically inserted by the Indian legislature in Customs Tariff Act, 1975 has to be given a meaning and therefore, if all the products containing lime/lemon/ apple juice etc., whether as flavour or

not, are classified as 'Lemonade'/ 'Carbonated water', then the 'fruit juice-based drinks' entry would become redundant. Therefore, only the water with flavour or essence of lemon/apple/ other fruits would be classified under the Tariff Sub - Heading 2202 10, whereas the beverages/ drinks where the essential character is given by the lemon juice/ apple juice/ other fruit juices (in terms of the fruit juice content as per the FSSAI Regulations) would be classifiable under the tariff Item 2202 99 20.

28. In the light of the above it is submitted that the impugned order dated 14.07.2022 passed by the learned Joint Commissioner of Taxes, suffers from misinterpretation of relevant tariff entries in place. Accordingly, the proposal to demand GST by classifying them under Tariff sub- heading 2202 10 90 is misplaced and liable to be dropped completely.

29. The next argument of the learned Senior Counsel for the petitioner is that the Food Safety and Standards (Food Products and Food Addictives) Regulations, 2011 can be relied upon for the purpose of determining the correct classifications of the subject products.

30. He also submits that the standards of quality for various food including all types of beverages has been laid down in the Food Safety and Standards Act, Rules and Regulations **(Food Products Standards and Food Additives), 2011.** Therefore, a trader of a beverage has to necessarily abide by the standards provided under the Food Safety and Standards (Food Products Standards and Food

Additives) Regulations, 2011. The Regulations further help in establishing whether a beverage qualifies as a:

- Carbonated Sweetened Water, or
- a Carbonated Fruit Drink, fruit juice or flavoured water/ aerated water.

31. Once a product meets all the essential characteristics of a category of product, the trader is granted a licence under FSSAI Act to manufacture and sell the product. A copy of the license (FORM C) granted to the Noticee under FSS Act, 2006.

32. It is submitted that the standards for 'thermally processed fruit beverages/ fruit drink/ ready to serve fruit beverages' have been laid down under Para 2.3.10 of the said Regulations. As per the said Para, *thermally processed fruit beverages/ fruit drink/ ready to serve fruit beverages'* means an unfermented but fermentable product which is prepared from juice or pulp/puree or concentrated juice or pulp of sound mature fruit. Further, the drink may also contain water, peel oil, fruit essences and flavours, salt, sugar, invert sugar, liquid glucose, milk and other ingredients. Similarly, the standards for 'carbonated fruit beverages or fruit drinks' have been laid down under Para 2.3.30 of the said Regulations. As per the aforesaid para, Carbonated Fruit Beverages or Fruit Drink means any beverage or drink which is purported to be prepared from fruit juice and water or carbonated water and containing sugar, dextrose, invert sugar or liquid glucose either singly or in combination. Further, he fruit drink made plod contain peel

oil, fruit essences and any other ingredient appropriate to the product.

33. He refers to the Regulation 2.3.30 of the Regulation of 2011 to submit that the criteria mentioned in the said regulation prescribes the following requirements to make the said product fall under carbonated fruit beverages or fruit drinks:

> *i. Total soluble solids (m/m): not less than 10.0 percent*
>
> *ii. Fruit content (m/m)*
>
> > *a. Lime or Lemon juice : not less than 5.0 percent*
> >
> > *b. Other Fruits: Not less than 10.0 percent*
>
> *In case the quantity of fruit juice is below 10.0 per cent. But not less than 5.0 per Cent. (2.5 per cent. In case of lime or lemon), the product shall be called 'carbonated Beverages with fruit juice' and in such cases the requirement of TSS (Total Soluble Solids) shall, not apply and the quantity of fruit juice shall be declared on the label.*

34. It is submitted that as per the laboratory reports It is an undisputed fact that the products in question, meet the criteria as stipulated in FSSAI i.e., regarding the percentage of fruit juice content. The apple juice/ orange juice concentrate content is actually more than the prescribed limit

of 10% in all cases except in case of XSS Cola wherein the same is 5%. Further, the beverages based on lime/ lemon also have the juice content in excess of 5% in all cases. It is pertinent to note that this fact has already been declared on the labels of the product.

35. The learned Senior Counsel for the petitioner humbly submits that the clause 3-A of Regulation 2.3.30 of FSSAI is a mere extension/ sub-set of Regulation 2.3.30 of the FSSAI, wherein the beverages with less than 10% of fruit juice but more than 5% of fruit juice content have been classified. It is submitted that clause 3-A of Regulation 2.3.30 of the FSSAI was introduced on 25th October 2016 in line with Government's policy to increase the usage of fruits in the carbonated drinks to help farmers, since almost 35% of the fruits get wasted for lack of storage and processing facilities. Thus, clause 3-A is merely a sub part of 2.3.30 Regulation, wherein the beverage with fruit content ranging from 10% to 5% is also classified as a carbonated fruit beverage.

36. It is, therefore, submitted that once the carbonated fruit beverages falling under the Regulation 2.3.30 have been held by the CESTAT/ Hon'ble Supreme Court to be classified under the tariff item 2202 99 20, the sub-set of the same also needs to be classified thereunder. Thus, the subject products would merit classification under Sl. No. 48 of Schedule II to the IGST Rate Notification (for inter-state supply of goods made by Noticee). Even the learned CESTAT. Kolkata in Anutham Exim case (supra) held the same in its recent Final Order No. 75031/2021 dated 25.01.2021.

37. Hence, it is submitted that the products in question are fruit juice-based drinks, wherein fruit juice (having percentage content in excess of 5%, as provided under the regulation) is used to provide the essential characteristic of the drink and the related features of appearance and mouth-feel. Thus, the subject products, in present SCN, are correctly classifiable under tariff item 2202 90 20 as "fruit pulp or fruit juice-based drink"

38. It is thus, submitted that the products manufactured and supplied by the petitioner are classifiable as fruit juice-based drink since the essential component of the drink comprises of apple/ orange/ lemon fruit juice and therefore the goods are classifiable under the tariff item 2202 99 20 and not under the tariff sub-heading 2202 10, as proposed in the impugned SCN.

39. It is also submitted that Rule 3(a) of the General Rules for Interpretation of the Customs Tariff Act, 1975 provides that the heading which provides the most specific description shall be preferred to headings providing a more general description. The CGST/IGST Rate Notification, as amended, also specify that for interpretation of correct classification of a commodity under the said Notification the rules of Interpretation of Customs Tariff Act, 1975 will be applicable.

40. It is submitted that Rule 3(a) categorically provides that a heading that is most specific is preferred over a heading that provides more general description. The Rules provide that any mixture is to be classified based on the material that gives it their essential character. Therefore,

when there is specific Tariff Entry No. 2202 99 20 for **'fruit pulp and fruit juice-based drinks'**, there is no need to place reliance on the residuary entry for classification of a product if such entry is self-sufficient to classify a particular product.

41. Reliance is placed on the case of **Hindustan Poles Corporation v. CCE, Calcutta, 2006 (196) E.L.T. 400 (SC)** wherein it was held that the residuary entry is meant only for those categories of goods, which falls outside the ambit of specified entries. Further, the learned Tribunal of Chennai, in the case of **CC**, **Chennai v. Associated Cement Companies Ltd., 2001 (133) E.L.T. 400 (Tri.-Chennai)** held that a residuary heading cannot be resorted to for classification when specific entry is available.

42. The next limb of arguments by the learned Senior Counsel is that the special entry as prescribed under the tariff item will always prevail over the general entry. The HSN explanatory note are not applicable to the present case. It is also submitted that Rule 3(a) of the General Rules for Interpretation of the Customs Tariff Act, 1975 provides that the heading which provides the most specific description shall be preferred to headings providing a more general description. The CGST/IGST Rate Notification, as amended, also specify that for interpretation of correct classification of a commodity under the said Notification the rules of Interpretation of Customs Tariff Act, 1975 will be applicable.

43. It is submitted that Rule 3(a) categorically provides that a heading that is most specific is preferred over a heading that provides more general description. The Rules provide that any mixture is to be classified based on the material that gives it their essential character. Therefore, when there is specific Tariff Entry No. 2202 99 20 for **'fruit pulp and fruit juice-based drinks'**, there is no need to place reliance on the residuary entry for classification of a product if such entry is self-sufficient to classify a particular product.

44. Reliance is placed on the case of **Hindustan Poles Corporation v. CCE, Calcutta, 2006 (196) E.L.T. 400 (SC)** wherein it was held that the residuary entry is meant only for those categories of goods, which falls outside the ambit of specified entries. Further, the Hon'ble Tribunal of Chennai, in the case of **CC**, **Chennai v. Associated Cement Companies Ltd., 2001 (133) E.L.T. 400 (Tri.-Chennai)** held that a residuary heading cannot be resorted to for classification when specific entry is available.

45. Reliance is also placed on the Judgments of the Apex Court rendered in CCE, Bhubaneswar-I Vs. Champdany Industries Ltd., reported in 2009 (241) ELT 481 (SC). Referring to the Judgment, the learned Senior counsel submits that the products in question clearly satisfy the description of this entry and accordingly, should be classifiable under the Tariff Item No. 2022 99 20, by application of rules 3(a) of the GIR.

46. The next limb of argument of the petitioner is that as per the common parlance test, the subject products are classifiable under tariff item 2202 99 20. Referring to the 4th Paragraph in the Show Cause notice, the learned Senior counsel submits that the respondent No. 3 has admitted the fact that under common parlance test, the subject products are being marketed and sold as Carbonated fruit Beverage, Fruit Based Carbonated Beverage. However, merely because the ingredients provided in product's labels also provides for Carbonated water as an ingredient, it has been alleged that the products have been mis-classified as fruit juice based drink instead of as carbonated flavoured. It is submitted that this view of the respondent authority stems for non-appreciation of factual and transactional matrix are purchased consumers treating the same as a fruit juice based drink, unlike the other aerated beverages marketed under the various brand names, which are commonly understood by the consumers as 'soft drinks' or flavoured aerated water. It is a settled principle of law that the words used in the statute, imposing taxes or granting exemption should be understood in the same way as they are understood in 'ordinary parlance' in the area in which the law is in force or by the people who ordinarily deal with them. It is submitted that the understanding of the product in common parlance could be gauged from the way the subject products are marketed and the understanding of the customers purchasing the same. Marketing shapes the view of the vendors selling it and the customers buying the product. In this regard, reference is drawn to the wrapper/

label on the pack/ bottle of the subject products, wherein clearly the description of the product, prominent mention of fruit juice content, photograph of fruits etc. clearly substantiate the intent of the petitioner to market the product as fruit juice based drink. In support of his contention, petitioner relies on the Judgment of the Apex Court rendered in CCE Vs. Cannaught Plaza Restaurant (P) Ltd., reported in 2012 (286(ELT 321 (SC) as well as Delhi Cloth & General Mills Co. Ltd. Vs. State of Rajasthan, reported in 1980 (6) ELT 383 (SC).

47. It is submitted that the Apex Court has held that if there is one principle fairly well settled it is that the words or expressions must be construed in the sense in which they are understood in the trade, by the dealer and the consumer.

48. Referring to the said Judgment, the learned Senior counsel submits that from ratio laid down by the Apex Court it is abundantly clear that the ordinary meaning of a product must be considered over the technical meaning for classification purpose.

49. It is submitted that the subject products in the present case, clearly indicates that such beverage is a fruit juice and not as merely flavoured water. The label of each of the product labels (e.g. XSS Apple Fruit Drink, XSS clear lemon, XSS cola, Thirst Cola, XSS Orange etc.) clearly depict in the centre that it 'CONTAINS FRUIT', photograph of fruits, phrase 'fruit drink' etc. This clearly indicates the

intent of the petitioner in labelling the product in this manner in order to depict the fact that the product will be marketed to the customers as fruit juice-based beverage and not as flavoured water. Copy of the labels of the said products are already enclosed as Annexure-2.

50. Thus, the subject products are not understood in common parlance at par with the aerated carbonated soft drinks, which are classifiable under the tariff sub- heading 2202 10. The customers of the subject products buy it for the fruit juice content, which is adequately referred to, on the product label.

51. Therefore, though the Ld. Joint Commissioner has himself admitted that applying common parlance test, the goods are marketed and sold as Carbonated Fruit Beverages, Fruit Based Carbonated Beverage, which are treated as fruit drinks under Regulation 2.3.30 of the FSSAI regulations and have been held as 'fruit juice based drinks as per the judgments of Parle Agro (SC) and Brindavan Beverages (Tri-LB), as referred above. However, merely due to the presence of carbonated water in the ingredients, the Ld. Joint Commissioner has assumed that the product is the consumers buy the subject products for carbonated water and thus, the products have been mis- classified by the petitioner. It is submitted that the allegations of the Ld. Joint Commissioner are factually erroneous and entirely based on vague presumptions. As mentioned earlier, the subject products are instead marketed and sold by petitioner and purchased by customers as "fruit juice-

based drinks". Even applying the common parlance test, the subject products merit classification as "Fruit pulp or fruit juice based drinks" under Tariff Item No. 2202 99 20.

52. The further argument of the learned Senior counsel for the petitioner is that the burden is on the department to prove the classification of subject items are under such tariff heads as it is claims by the Revenue. The learned Senior counsel for the petitioner submits that it is settled law that once the assessee determines a classification and declares the same to the authorities along with all relevant facts, then, the burden is on the Department to prove that the same is incorrect and lead evidence to show that the goods are not classifiable in the manner as claimed by the assessee.

53. In support of his contention, he has relied upon the Judgment of the Apex Court rendered in Union of India Vs. Garware Nylons Ltd., reported in 1996 (87) ELT 12 (SC). Referring to the said Judgment, he submits that the decision of the Bombay High Court in favour of the assessee was upheld by the Apex Court. It was held by the Apex Court that the burden of proof is on the taxing authorities to show that the particular case of the item in question is taxable in the manner claimed by them, Mere assertion in that regard is of no avail. There should be material to enter appropriate finding in that regard and the material may either be oral or documentary. The taxing authority therefore must lay evidence in that regard even before the first adjudicating authority.

54. Reliance is also placed on the Judgment of the Apex Court rendered in HPL Chemicals Ltd. Vs. CCE, Chandigarh, reported in (2006) SCC 208; Hidustan Ferodo Ltd. Vs. CCE, Bombay, reported in (1997) 2 SCC 677; Colgate Palmolive (India) Ltd. Vs. Union of India & Ors, reported in 1980 SCC OnLine Bom 384.

55. In view of the elaborate submissions made above by the learned Senior counsel representing the petitioner it is vehemently urged that the subject products were correctly classified by the petitioner and the taxes due have been appropriately paid and the classifications in turn made by the Revenue Authorities in respect of the subject products rejecting the claims of the petitioner being contrary to the law as discussed above, the invocation of provisions under Section 74 of the CGST Act are not at all applicable. It is submitted that these provisions can only be invoked when there is any fraud or wilful suppression. In the facts of the present proceedings, no such fraud or wilful suppression can be alleged against the petitioner. The impugned Show Cause notice has proposed differential GST, Cess, interest on both GST and Cess, penalty under Section 74 of the Assam GST Act by merely alleging that the offence falls under Section 122 of the Assam GST Act.

56. It is submitted that the provisions of Section 74 of the CGST Act can be invoked only for recovery of tax not paid by reasons of fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of the Act or Rules with intent to evade

payment of tax. Further, as per Explanation 2 of Section 74 of AGST Act/CGST Act, the term 'suppression has been explained as non-declaration of facts or information in returns. Thus, the provisions of Section 74 are applicable only if any of the ingredients specified above exist.

57. Referring to the Judgment of the Apex Court in CCE Vs. Chemphar Drugs & Liniments, reported in 1989 (40) ELT 276 (SC) and Anand Nishikawa Co. Ltd. Vs. Commissioner of Central Excise, Meerut, reported in 2005 (188) ELT 149 (SC) , it is submitted that the term “wilful” and “suppression” signifies conscious withholding of information with malafide intention and not an unintentional failure due to inadvertence. Thus, in order to invoke the extended period of limitation, it is necessary to prove an act or omission on the part of the petitioner equivalent to collusion or wilful misrepresentation or suppression of facts.

58. It is submitted that the petitioner is a bona fide assessee and is regular in filing statutory returns within due date of filing by classifying the subject products under tariff item 2202 99 20 and thus, discharging tax @12%. Further, during the investigation/ search and seizure proceedings, the petitioner has always co- operated with the department and submitted all the relevant documents. indicating that goods manufactured by the petitioner are classified under tariff item 2202 99 20.

59. Since the impugned Show Cause Notices are is based on the information suo moto declared by the petitioner in statutory returns and during investigation process, therefore, there can be no ground to allege any suppression or concealment of information where everything was disclosed. This goes on to establish that all relevant facts were well within the knowledge of the Department and no suppression can now be alleged against the petitioner. The question, thus, of evading the liability to pay tax cannot arise.

60. Further, the petitioner humbly submits that the impugned SCN has not brought on record any evidence to show that suppression of any fact from the Department.

61. It also submitted that the present issue involves interpretation of complex and technical question of determining classification of goods manufactured and supplied by the petitioner. The position adopted by the petitioner is in line with the settled principles of law and various judicial precedents as referred to above. Thus, there cannot be said to be any malafide intent on the part of the petitioner. Therefore, the provisions of Section 74 are not invokable.

62. The petitioner was and is still under the bonafide belief that subject products are classifiable under tariff item 2202 99 20. The bonafide belief is based on the submissions made above. Thus, in cases of bonafide belief, the Joint Commissioner has erred in invoking the provisions

of Section 74 of the AGST/ CGST Act in the present case of the petitioner.

63. The learned Senior counsel therefore submits that the penalty sought to be imposed under Section 122 is not imposable on the petitioner. Referring to the provisions of Section 122, it is submitted that the said provision provides for the imposition of penalty equivalent to tax due from the assessee or ten thousand rupees, whichever is higher. Thus, for the purpose of imposing penalty under Section 122(2)(b), there should be an intention to evade payment of tax, or there should be suppression or concealment or wilful mis-statement of facts.

64. It is therefore submitted that the ingredients for imposition of penalty under Section 122(2)(b) are identical to the ingredients for invocation of the provisions of Section 74 of the CGST Act.

65. The petitioner has conclusively demonstrated in the foregoing paragraphs that there has been no suppression of facts or willful mis-statement as alleged by the Department and thus, the provisions of Section 74 are not invokable in the instant case and in the absence of the said ingredients, no penalty can be imposed upon it under Section 122(2)(b) of the CGST Act.

66. It is further submitted that the penal provisions are only a tool to safeguard against contravention of the rules. It is submitted that the petitioner has always been and are still under the bona fide belief that fruit juice based drinks

is classifiable under tariff item 2202 99 20 only. Such bona fide belief is based on the submissions made above. Thus, petitioner had no intention to evade payment of duty as mentioned in the grounds above. Therefore, no penalty is imposable on the petitioner.

67. In support of the above contentions, reliance is placed on the decision of the Hon'ble Supreme Court in the case of ***Hindustan Steel Ltd. V. The State of Orissa AIR 1970 (SC) 253.***

68. It is submitted that once the demand is found to be non-sustainable, question on levy of penalty does not arise. Reference is made to the Judgment of the Apex Court rendered in Collector of Central Excise Vs. H.M.M. Limited 1995 (76) ELT 497 (SC) as well as CEE, Aurangabad Vs. Balakrishna Industries, reported in 2006 (201) ELT 325 (SC).

69. Relying on the aforesaid Judgments, it is submitted that penalty is not imposable when differential duty is not payable.

70. It is submitted that the issue in the present case is highly technical and interpretational since it pertains to the classification of goods vis-à-vis fruit juice based drinks. Therefore, in such cases, where the issue is complex and requires technical understanding of the product, no penalty can be imposed on the petitioner. It is settled law that the imposition of penalty on the petitioner cannot be sustained when the issue is one of pure interpretation. Therefore,

proposal to impose penalty under Section 122(2)(b) of the CGST Act is invalid and unsustainable in law. It is therefore submitted that the proposal for imposition of penalty on the petitioner is not sustainable in law.

71. The further contention of the petitioner is that the interest under Section 50 of the CGST is also not recoverable in the instant case. It is submitted that the charging of interest under the provisions of Section 50 of the AGST Act is not sustainable since the demand is itself not payable. The purpose of levying interest is to ensure that the Department is not at a loss due to any late payment of duty or tax. Therefore, what emerges is that interest is payable when there exists a liability to pay tax and the same has not been paid within the prescribed time limit.

72 In the present case, since the proposed demand of duty has been established to be legally unsustainable in preceding paragraphs, hence there is no question of demand of interest under Section 122 of the CGST Act.

73. In support of the contention, reliance is placed on Goyal tobacco Co. Pvt. Ltd. Vs. CCE & ST, Jaipur-1 reported in 2015 (329) ELT 619 (Tri-Del). The pressing the Judgment into service, the learned Senior counsel submits that no interest is charged when demand is not sustainable and the interest is not payable by the petitioner.

74. The next limb of the argument is that the Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 and

Notification No. 1/2021-Compenation Cess (Rate) dated 3009.2021 operates prospectively.

75. It is submitted that the Notification No. 8/2021-Central Tax (Rate) dated 30.09.2021 whereby a new entry was inserted as Serial No. 12A in Schedule – IV making Carbonated Beverages of Fruit Drink or Carbonated Beverages with Fruit Juice to be taxable @ 14% and Notification 1/2021-Compensation Cess (Rate) dated 30.09.2021 whereby in the Schedule of the Goods and Services Tax (Compensation to States) Act, 2017 a new entry namely 4B was inserted levying 12% Cess on Carbonated Beverages of Fruit Drink or Carbonated Beverages with Fruit Juice and the same was made effective from 01.10.2021. The tax @ 14% and Cess @ 12% cannot be imposed on the said items for the periods prior to 01.10.2021. It is therefore submitted that the aforesaid Notifications by which the higher rate of tax imposed and cess has been imposed being oppressive and cannot be retrospectively. To buttress his submissions, the learned Senior counsel has placed reliance on Commissioner of Central Excise, Bangalore Vs. Mysore Electricals Industries Ltd., reported in (2006) 12 SCC 448.

76. It is submitted that in the present case since the periods involved in the writ petition are prior to the issuance of the aforesaid Notification re-classifying the items, the said Notification shall have effect only from the date, the same have been made effective. It is also respectfully submitted that if the aforesaid items dealt with

by the Petitioner would have fallen within the Entry 2202 10 10 i.e. “Aerated Waters”, there was no necessity of inserting a separate item in the Schedule and also by inserting a new entry into the Cess into the Assam Goods & Service Tax Act, 2017. He refers to the Judgment of the *Parle Agro (P) Ltd. (Supra)* to submit that the Apex Court in that case held that the items concerned were always included under Section 6(1)(a) and therefore, there was no occasion of the subordinate authority to include the products in the Notification under Section 6(1)(d).

77. Similarly, in the present case if the aforesaid product would have been covered by 2202 10 10, there would have been no occasion to issue the aforesaid Notifications by inserting new items making it effected from 01.10.2021. In view of the aforesaid, it is very clear that earlier the items in question were covered by Tariff Item 2022 90 20 and only after issue of the aforesaid Notification, the same are made taxable at a higher rate.

78. It is therefore submitted that in the absence of any concrete evidence, the allegation of the Department fails entirely. Further, it is important to note that the minimum consumption percentage has been arrived at by comparing concentrate in kgs with finished goods (viz. Apple Drink, Mango Drink in milli – litre (ml), which is grossly erroneous. Comparison if any must be made in same units to ensure accurate results.

79. With regard to the allegations that there were 2 negative stock during certain periods, the Petitioner submits that manufacture of final products without having input/raw material is practically impossible. The Petitioner yet again submits that discrepancies in maintenance of books of accounts should not be used as a basis to make vague allegations such as negative stock.

80 In view of the above, the learned Senior counsel submits that the impugned show cause notices dated 17.02.2022 and orders dated 14.07.2022 for each of the financial years are illegal and without jurisdiction and thereby the same are liable to be set aside and quashed.

81. In W.P (C) No. 5342/2022, the respondents have filed their counter-affidavit. During the course of the hearing, the respondents submitted that the affidavit filed in W.P(C) No. 5342/2022 will cover the stand of the respondents in all the other writ petitions. Accordingly, this affidavit is considered to be the affidavit of the respondents in all the writ petitions including W.P(C) No. 5342/2022.

Submission of the respondents

81. The respondents deny and dispute the submissions made by the counsel for the petitioner. It is submitted that the contentions raised by the petitioner in regard to the classification of the said product under Tariff Item 2022 99 20 of the Customs Tariff Act, 1975 is wholly misplaced and misconceived. The Tariff Heading 2202 in the Customs Tariff Act, 1975 has been divided into two sub-headings,

viz sub-heading 2202 10 which covers "waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured", and sub-heading 2202 90 which covers "other".

83. Referring to the Notifications under the Customs Tariff Act, 1975, it is submitted that the products are broadly classified under Tariff Item 2202 in the Customs Tariff Act, 1975, which have been divided into two sub-headings viz. 2202 10 which covers "waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured" and sub-heading 2202 90 which covers "other".

84. It is submitted that the petitioner manufactures various types of beverages using different ingredients/inputs such as sugar, sucrose, flavours, artificial sweetener, fruit pulp, fruit concentrate, preservatives etc. Different ingredients/inputs are used for manufacture of different finished products which give different identity to each product.

85. Referring to the labels of the various products showing the ingredients, the respondent counsel submits that from the label available on the products manufactured by the petitioner, which has been listed as above, it transpires that Carbonated Water, is used as an essential ingredient in some of the products manufactured by him.

86. It is further submitted that from the "Report of Analysis of Food Samples" conducted by the State Public

Health Laboratory, Govt. of Assam, it is clear that Carbonated Water (i.e. aerated water) has been used in case of thrist Clear Lemon, Thrist Orange and Thrist Cola. However, in case of Thrist Mango Drink and Thrist Namboo Pani Drink, carbonated water has not been used.

87. Based on the ingredients of the products, as seen from the label of the products, and which has been duly described above and the list of ingredients as found in the factory premises, it is seen that the products are manufactured by adding fruit concentrate to large quantities of water along with other flavours, sweetener, preservatives etc. which then goes through a carbonation process. The fruit juice concentrate is just one of the many ingredients of the drink.

88. It is submitted that the petitioner has used fruit concentrate for manufacturing of Apple Drink, CFD (i.e. Carbonated Fruit Drink) Clear Lemon, CFD Cola, CFD Lemon, CFD Orange. CFD Clear Lemon, Fontys CFD Clear Lomon, CFD Orange, CFD Thrist Orange, Fontys CFD Orange, etc., along with carbonated water and the petitioner did not use any fruit pulp or fruit juice for manufacturing of such finished product.

89. It is submitted that as per the contents of the products, the said products are sweetened (with sugar and/or sweetener) and flavoured (with Juice concentrate and added flavours natural and nature-identical flavouring

substances). The same is also carbonated (aerated) as well as presented in PET bottles.

90. Based on the manufacturing flowchart, the method of preparation of various products are shown as follows:

Processing RO Water- Preparation of Sugar Syrup Solution- Add mixure (Recipe containing the concentrate, flavours, additives and preservatives)- Thermal Process- Blending- Carbonisation/Carbonator- Hilden RFC- Filling- Capping- Inspection- Sleeve application- Shrinik Sleeve- Batch Coding- Dispatch.

91. The Revenue submitted that HSN for Sub-heading 2202 10, includes beverages which consists of ordinary drinking water, sweetened or not, flavoured with fruit juices or essences, or compound extracts; that they are often aerated with carbon dioxide gas, and are generally presented in bottles or other airtight containers. On examining the contents of the products, based on laboratory reports and as appearing on the label of the products, it contains Carbonated Water, Sugar, Sweetener, Juice (from concentrate), added flavours (natural and nature-identical flavouring substances). These products also contain Acidity Regulator, Preservatives, Stabilizers and permitted synthetic food colour. The product is presented in the PET bottle.

92. Since the products manufactured and sold by the petitioner, under various brand names such as X'SS, Thrist, Fontys, etc., contains carbonated water along with added

sugar or other sweetening matter or flavoured depending on the type of product manufactured, are to be covered under HSN 2202 10.

93. The Chapter 22 has different tax rate for different items ranging from 12% to 28% and Cess @ 12% is also leviable on some items. For the HSN Code 2202 10 90: the tax rate is 28% (14% SGST + 14% CGST) and 12% Cess, whereas the petitioner has categorised such products under the HSN code 2202 only with tax rate of 12% (6% SGST + 6% CGST) without any cess.

94. It is therefore submitted that the petitioner has deliberately misclassified his products in lower tax rate category with the sole intention of minimizing his tax liability.

95. With regard to the submissions of the petitioner placing reliance on the Food Safety and Standard (Food Products and Food additives) Regulation, 2011 for the purpose of determining the classification of the subject matter, it is submitted that the classification of the product is well placed in accordance with the Customs Tariff Act, 1975 and GST Law, and as such by adhering to the well settled principle the Statutes having common object may provide aid to each other. But different statutes seeking to achieve different objects rule out interpretation of expressions used in one statute with reference to their use in another statute and decisions rendered with reference to construction of one Act cannot be applied with reference to

the provisions of another Act, when the two Acts are not in parimateria.

96 Relying on the Judgment of the Apex Court rendered in Ram Narayan Vs. State of Uttar Pradesh, reported in 1956 (9) TMI 54-Supreme Court, it is submitted that it cannot be presumed that the Legislature while enacting a statute intended to import meaning from other statute for interpretation of provisions of the former statute, unless otherwise stated in the former statute. When there is no ambiguity in interpreting object of a statute it is not permissible to refer for the purpose of its construction, provisions of any other legislation. An effort to construe legislation on one subject with the help of other legislation on different subject is to defeat the purport of the former statute, unless both the statutes serve the common object. Only by incorporation or adoption of provisions of a statute for the construction of other, no aid is permissible. Rule of construction suggests that when two statutes remain different and distinct and each is to be judged with reference to their object, there is no scope for adoption of provisions of one statute by the other. The object of each enactment plays a dominant role in rule of construction.

97. Referring to Hotel & Restaurant Association Vs. Star India (P) ltd., reported in 2006 (11) TMI 540- Supreme Court of India, it is submitted that the Apex Court has held that the definition of a term in one statute cannot be used as a guide for construction of a same term in another

statute, particularly in a case where statutes have been enacted for different purposes.

98. It is further submitted by placing reliance upon Eagles Chicory (Firm) Vs. Collector of Central Excise & Customs, reported in 1986 (7) TMI 358-CEGAT, New Delhi, that it is no sound principle of construction to interpret an expression used in one Act with reference to its use in another Act, since the meaning of words and expressions used in an Act must take their colour from the context in which they appear.

99. Reference is also made to Bharat Hansraj Gandhi Vs. Addl. Collector of Central Excise, reported in 1990 (12) TMI 89-High Court of Judicature at Bangalore (Karnataka), wherein it has been held that it is not a sound principle to interpret the expressions with reference to their use in another Act, when the two statutes are not in parimateria.

100. Reference has also been made to the Judgment of the Apex Court in CCE Vs. Shree Baidyanath Ayurved Bhawan Ltd., reported in 2009 (4) TMI 6- Supreme Court, to submit that the definition of one statute having different object, purpose and scheme cannot be applied mechanically to another statute.

101. It is also submitted that based on findings about the nature of products, ingredients used, manufacturing process it can be clearly seen that the product was misclassified by the petitioner to wrongly avail

the benefit of incorrect classification into goods which are taxed at lower rate.

102. The further submission of the Revenue is that the GST being a progressive tax regime it encourages self-policing by the taxpayers and generally undertakes enforcement activities in cases where there is a strong suspicion of tax evasion. Hence, the contention of the tax payer that the GST department didn't raise any dispute or objection does not signify anything.

103. The Revenue contends that the classification of the finished products under Assam GST Act must be done as per the HSN Code and not by borrowing any other standard like from FSSAI which is codified for a different purpose.

104. The Revenue submits that the product is manufactured by adding fruit concentrate to large quantities of water along with other flavours, sweetener, preservatives etc. which then goes through a carbonation process. The fruit juice concentrate is just one of the many ingredients of the drink. The petitioner has used fruit concentrate for manufacturing of Apple Drink, CFD (i.e. Carbonated Fruit Drink), Clear Lemon, CFD Cola, CFD Lemon, CFD Orange. CFD Clear Lemon, Fontys CFD Clear Lemon, CFD Orange, CFD Thrist Orange, Fontys CFD Orange, etc., along with carbonated water and the petitioner did not use any fruit pulp for manufacturing of such finished product.

105. The Revenue reiterates that the petitioner's finished products are manufactured from "fruit concentrates" and not from fruit pulp or fruit juice alongwith Carbonated Water, Sugar, Sweetener, added flavours (natural and nature-identical flavouring substances). Hence it cannot be classified under the entry 2202 99 20 i.e. "Fruit pulp or fruit juice-based drinks" and therefore disputes the contentions made by the petitioner.

106. The Judgments referred by the petitioner rendered by the CESTAT are disputed by the respondents on the ground that the CESTAT has jurisdiction to hear and decide appeals arising only from the Customs Act, 1962, the Central Excise and Salt Act, 1944 and the Gold (Control) Act, 1968 and therefore the Judgments of CESTAT relied upon by the writ petitioner are not applicable in the facts of the case.

107. The Revenue submits that during the entire investigation, the petitioner was afforded multiple hearing opportunities and one such personal hearing was even granted after submission of the Show Cause Reply by the petitioner, wherein the authorized representative of the petitioner on 05.05.2022 has attended the hearing.

108. The Revenue denies the contention of the petitioner that it ignored the judicial pronouncements relied upon by the petitioner.

109. It is submitted on behalf of the Revenue that the contention of the petitioner of classification of the said

products under HSN 2202 99 20 instead of HSN 2202 10 90 does not find merit to the fact that the correct classification rightly falls under HSN 2202 10 90 instead of HSN 2202 99 20. It is submitted again that the said product are manufactured using juice concentrate along with it being sweetened and aerated, which is sold in PET Bottles. The Revenue also disputes the submissions made by the petitioner in providing that the tariff heading 2202 10 would cover only those beverages which are prepared with flavours.

110. It is contended by the Revenue that the petitioner has indulged itself into misclassification of the said product under HSN 2202 99 20 instead of HSN 2202 10 90. It is submitted that the petitioner has been using concentrate for manufacturing of the said product along with Carbonated Water and other ingredients. It is submitted that the HSN Classification Heading 2202 10 specifically provides for "*Water including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured"*

111. The contention of the petitioner that applying common parlance tests, the subject products are known in the markets as "fruit pulp" or "fruit juice based drink" is disputed by the Revenue. It is submitted that the Label of the said products provides for "Fruit Based Carbonated Beverage" and/or "Carbonated Fruit Beverage" and/or "Ready to Serve Fruit Drink". The Revenue therefore submits that while taking reliance on the label of the

products along with taking the contention of the petitioner into account, it becomes imperative to note. The Revenue further disputes the contention of the petitioner that the two Notifications have been ignored while issuing the Show Case notice and the consequential demand. It is submitted that the reports of the State Laboratories clearly provide that the products are "Fruit Based Carbonated Beverages" It is further submitted that the results of the State Laboratories giving "no negative results" cannot be the basis to question the classification made by the Revenue.

112. Revenue further disputes the contention of the petitioner that Section 74 of the CGST Act, 2017 has been wrongly invoked taking into light that there lies no case of non-payment of tax due to reasons of fraud or collusion or misstatement or suppression of facts or contravention of any of the provisions of the Act. It is submitted that the petitioners have been deliberately misclassifying the said product under HSN 2202 99 20.

113. It is contended by the Revenue that there lies a Tax Rate Difference in between the two HSN Codes and if the former was supposedly charged, the same came to be 40% (14% CGST + 14% SGST + 12% Cess). But the same products were classified under HSN 2202 99 20, the same product was charged under 12% (6% CGST +6% SGST). It is submitted on behalf of the Revenue that the petitioner knowingly without any iota of doubt had been involved in short paying of taxes and even involved in misclassifying the product resulting in short payment of taxes and

thereby the petitioner deliberately misclassified the product to evade payment of due taxes. Such actions of the petitioner, clearly establishes the fact that petitioner is liable for proceedings under Section 74 of the CGST Act, 2017, as the petitioner has by reasons of fraud/wilful misstatements/suppression of facts have evaded the legitimate payment of statutory dues to the Government. Such acts of the petitioner are required to be strictly dealt with as per law and as such the same should be considered as an economic offence for which the petitioner should be made liable.

114. The contention of the petitioner that no default should be charged and that the same is without jurisdiction, is also denied by the Revenue. The Revenue reiterates that the petitioner has been rightly charged under Section 74 of the CGST Act, 2017 and penalty has been appropriately imposed under Section 122 of the CGST Act, 2017 as also the interest under Section 50 of the Assam GST Act, 2017 as the petitioner is required to pay the demand raised by the Revenue.

115. The learned counsel for the parties have been heard. Pleadings available on record carefully perused. The Judgments and authorities placed before the Court have been carefully perused.

116. In order to understand the issues raised in the present proceedings, it is necessary to refer to the Show Cause Notice which was issued on 17.02.2022. The Show

cause Notice was issued by the Revenue on the following grounds:

> *"1. The products manufactured by the Taxpayer have been misclassified. Based on the ingredients of the products as seen from the label of the products, and which has been duly described in the SCN and the list of ingredients as found in the factory premises it is seen that the product is manufactured by adding fruit concentrate to large quantities of water along with other flavours, sweetener, preservatives etc. which then goes through a carbonation process, The fruit juice concentrate is one of the ingredients of the drink and are not meant for direct consumption.*
>
> *2. As per the contents of the products, the said products are sweetened (with Sugar and/or Sweetener) and flavoured (with Juice Concentrate and added flavours natural and nature-identical flavouring substances). The same is also aerated. The product are sold in PET bottles.*
>
> *3) The Tariff Heading 2202 in the Customs Tariff Act, 1975 has been divided into two sub-headings, viz, sub-heading 2202 10 which covers "waters, including mineral waters 'and aerated waters, containing added sugar or other sweetening matter or flavoured", and sub-heading 2202 99 which covers "Other".*
>
> *4) In the backdrop of the aforesaid factual and legal position the products manufactured 'and supplied by the taxpayer have been examined to ascertain whether, that it has been appropriately classified under Sub-heading 2202 10 or under Tariff Item 2202 99 20 or 2202 99 90.*
>
> *5) It was observed that there is nothing in the Explanatory Notes of HSN pertaining to Heading 2202 to suggest that the product containing Carbon Dioxide as preservative only*

would not fall under Tariff Sub Heading 2202 10. On the contrary, Explanatory Notes of HSN for Sub Heading 2202 10 specifically mentions that the products of this Sub heading are often aerated with carbon dioxide gas. Therefore, the products are not excludible from Sub Heading 2202 10 on the ground that the product contains Carbon Dioxide as preservative only.

6) From the reasons above, is clear that water with added carbon dioxide (carbonated water) containing added sugar or other sweetening matter or flavoured are separately classified under the HSN code 2202 10.

7) Since the products manufactured and sold by the taxpayer, under various brand names such as X'SS, Thirst, Fontys, etc., contains carbonated water along with added sugar or other sweetening matter or flavoured depending on the type of product manufactured by the taxpayer, are to be covered under HSN 2202 10,

8) Even under the Common Parlance Test, i.e determining as to how a product in question is being marketed and sold to the consumer at large. In taxpayer's case, the products in question are being marketed and sold as Carbonated Fruit Beverage, Fruit Band Carbonated Beverage, based on the product. Further, the ingredients provided/specified in the label of the products sold provides for Carbonated Water as one of the ingredient.

9) The chapter 22 has different tax rate for different items ranging from 12% to 28% and Cess @12% is also leviable on some items. For the HSN Code 2202 10 90: the tax rate is 28% (14% SGST+14%CGST) and 12% Cess, whereas the taxpayer had categorised such products of his under the HSN Code 2202 only with tax rate of 12% (6% SGST + 6% CGST) without any cess. It appears that the taxpayer have

misclassified to minimize his tax liability. This implies that tax has been short paid on such products.

10) There appears to be significant difference in the consumption of concentrates in manufacturing the finished products."

117. In the said Show case notice, the raw materials in the subject products are extracted in a tabular form indicating the minimum percentage consumption and the maximum percentage of the concentrate. The Revenue found significant difference in the consumption of concentrates in the manufacturing products and therefore called upon the assessee to explain the reason for such mismatch between the declaration made and thereby affecting the quality of the products actually supplied versus the actual product.

118. Further on the basis of the date extracted from the assessee's computerised accounting software "Tally", the Revenue noticed "Negative Stock" during certain period that is raw materials/stock consumed even without having stock/raw materials present along with the assessee on various occasions as per their books of accounts. The assessee was therefore asked to explain the said anomalies. The assessee was given 30 days time to submit its reply in the prescribed form.

119. Pursuant to the Show cause notice issued, reply was duly submitted and the reply was submitted on the following points:

"1. The subject products are "Fruit Juice Based Drink" classifiable under Tariff Item 22029920 of Schedule-Il of CGST/IGST rate notification.

2. That Tariff heading 2202 10 would cover only those beverages which are prepared with flavours.

3. Food Safety and Standard (Food products and Food Additives) regulations, 2011 can be relied upon for the purpose of determining the correct classification of the subject products.

4. As per the general rules for interpretation, specific entry to prevail over general entry, Thus, the products in question are classifiable under tariff item 2202 99 20. HSN explanatory notes are not applicable to the present case.

5. As per the common parlance test, the subject products are classifiable under Tariff item 2202 99 20.

6. The burden is on the department to prove the classification of the subject items.

7. The allegations made by the Ld. Joint Commissioner are entirely based on presumption as the department has not adduced any cogent reasoning/evidence in support of such allegations. Specific rebuttals to such allegations by the notice,

8. Extended period under Section 74 of the CGST Act is not invokable in the present case in the absences of any fraud or wilful suppression.

9. Penalty under Section 112 is not imposable on the notice.

10. Interest under section 50 of the CGST is not recoverable in the instant case."

120. The reply also discribed the manufacturing flow chart showing the method of preparation of the various products. The assessee submitted in the reply that the appropriate sub-heading in the Customs Tariff Act of 1975 for application of the products is 2202 99 20 as the products manufactured by the petitioners are "Fruit Juice Based Drink"

121. The respondent No. 3 upon considering the submissions rejected the contentions of the assessee/writ petitioner. The Revenue rejected the case of the petitioner on the following grounds:

- *"The prayer for dropping the proceeding initiated vide issue of SCN dated 17/02/2022 is being rejected to the fact that taxpayer has not paid the demand raised in the SCN and further the demand raised is tenable taking into consideration the facts and circumstances involved in the present case. Hence, it would not be appropriate to drop the proceeding as has been prayed by the taxpayer.*

- *The prayer for classifying the subject products under tariff item 2202 99 20 and accordingly praying for no-conforming the demand raised is rejected to the fact: that the actual classification of the subject product is under HSN 2202 10 90, the reasons for which has been rightly provided under the SCN issued on 17/02/2022 and even provided in the aforesaid paragraphs. Further, considering the fact that the subject products has to be rightly classified under HSN 2202 10 50 and not under 2202 99 20 (as provided by the taxpayer), the necessity of allowing the prayer for not-confirming the demand gets nullified.*

- *The prayer for holding that the interest on the proposed differential GST and Cess is not recoverable u/s. 50(1) of AGST Act is not tenable considering the fact that the taxpayer has not paid any amount against the demand raised and further the fact that there exists a liability to pay tax and the same has not been paid by the taxpayer till date.*

- *The prayer for dropping the imposition of penalty u/s. 122 of the AGST Act deserved no consideration, taking into account the fact that in the foregoing paragraphs, it has rightly provided for charging the taxpayer under Section 74 of the CGST Act and further by establishing the fact that there lies an intention to evade payment of tax, Section 122 has been rightly invoked and hence the same cannot be dropped off as has been prayed by the taxpayer.*

- *The prayer for granting a personal hearing was granted. Shri Rohit Agarwal, CA appeared and submitted the response of the taxpayer. However, no new submission was made in the hearing and the contention which were made in the written submission was reiterated."*

122. As is revealed from the pleadings, the Petitioner is a Partnership Firm registered under the Indian Partnership Act, 1932 and is engaged in the business of manufacture and sale of carbonated fruit drinks and ready to Serve Fruit Drink. The Petitioner is engaged in the manufacture and sale of the following carbonated fruit drinks and ready to Serve Fruit Drink:

Product 1 – XSS Orange	Product 6 – Thirst Cola
Product 2 – Thirst clear lemon	Product 7 – Thirst Orange
Product 3 – XSS Cola	Product 8 – XSS Clear Lemon

Product 4 – XSS Nimboo Paani	Product 9 – Thirst Nimboo Paani
Product 5 – Thirst Mango	Produce 10- XSS Mango Drink

123. According to the petitioner, the said products are classifiable under Tariff Item 2202 99 20 of the Customs Tariff Act, 1975, and specified at Serial No. 48 under Schedule – II as "fruit pulp or fruit juice-based drinks" of Notification No. 1/2017 – Integrated Tax (Rate) dated 28.06.2017 taxable @ 12%. It is to be mentioned here that for the purpose of classifying the items for fixation of the rate of tax to be imposed, the Customs Tariff Act, 1975 is adopted for the said purpose.

124. To ensure adherence to quality, the goods manufactured and supplied by the petitioner are regularly tested by sending sample products to the State Public Health Laboratory, Government of Assam. These test results indicate Fruit Juice Content of more than 10%, Soluble Solieds, Sugar, Acidity Regulators and Synthetic Food Colour. As such the petitioner relying on the Food Safety and Standards (Food Products Standards and Food addictives) Regulations, 2011, considered these products to be as per the specifications stipulated under Regulation 2.3.30 of FSSAI for Carbonated Beverages with Fruit Juice. Based on the classification adopted by the Petitioner, the GST returns were being filed regularly on payment of appropriate taxes i.e. 12%. The classification of the products were also disclosed in the invoices raised and the returns filed by the Petitioner. There is no dispute that

there was no objection raised by the GST Department with regard to the classification of fruit juice-based drinks under Tariff Item 2202 99 20 until August, 2021. In the month of September, 2021, the Department initiated an investigation with respect to classification of the aforesaid goods manufactured and sold by the Petitioner. On 03.09.2021, Inspection was undertaken by a team of officers of State Tax, Zone – A, Guwahati at the principal place of business of the Petitioner under Section 67 of the Assam Goods and Service Tax Act. During such investigation, certain documents such as sales registers, purchase registers, purchase files, loose slips file, long registers, sales bills file, loose slips folder, miscellaneous file were seized. Further, CPU cum monitor, pen drive, mobile phone and CCTV DVR were seized. Accordingly an order of Seizure in Form GST INS – 02 was issued to the Petitioner. The sample of the Petitioner's products were also drawn by the Department, however, no test report in relation to the same was provided to the Petitioner. In pursuance to the aforesaid search and seizure conducted by the Tax Department officials, an order dated 17.02.2022 was issued to the Petitioner making allegation that the Department was of a view that the goods manufactured and supplied by the Petitioner contains carbonated water as an ingredient. It was identified that these products namely, CFD Orange/Thirst Orange, Apple Drink, CFD Clear Lemon, CFD Cola, CFD lemon and CFD Orange (hereinafter referred to as 'the subject products') were appropriately classifiable

under tariff sub-heading 2202 10 90 and attracted GST @ 28% and compensation Cess @ 12%.

125. According to the Department from a perusal of label available on products/goods manufactured by the Petitioner, it transpired that Carbonated water was an essential ingredient in such manufactured goods and that from the Report of Analysis of Food Samples conducted by the State Public health Laboratory, Government of Assam, it appeared that carbonated water was used in Thirst Clear Lemon, Thirst Orange and Thirst Cola.

126. From the data extracted from the accounting system maintained by the petitioner, the department found significant differences in consumption of concentrates in manufacturing the products and accordingly, it found that there was a mismatch between declarations made in label versus the actual product. As such, the show cause was issued calling upon the petitioner to explain why the subject products should not be reclassified under the Tariff sub-head considered to be appropriate by the department instead of its classification under the Tariff subhead as maintained by the petitioner.

127. The petitioner has assailed this impugned show cause notice as well as impugned order and consequential demand raised on several grounds and the same are dealt with accordingly.

128. The subject products are "Fruit Juice Based Drink" classifiable under the Tariff Item 2202 99 20 of

Schedule-II of CGST/IGST Rate Notification and that Tariff heading 2202 10 would cover only those beverages which are prepared with flavours.

129. In order to deal with the contentions raised, it is necessary to refer to the tariff heading 2202 of the Customs Tariff Act, 1975 which has been adopted for the purposes of CGST/IGST Rate Notification. The same is extracted below:

Tariff Item	**Description of goods**
(1)	(2)
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
2202 10	*Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured:*
2202 10 10	Aerated Waters
2202 10 20	Lemonade
2202 10 90	Other
2202 99	Other
2202 99 10	Soya milk drinks, whether or not sweetened

	or flavoured
2202 99 20	Fruit pulp or fruit juice based drinks
2202 99 30	Beverages containing milk
2202 99 90	other

130. From a perusal of the above. It is evident that Chapter Heading No. 2202 has been divided into two sub-headings, viz.

- Sub-heading 2202 10 which covers "waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured", and

- Sub-heading 2202 99 which covers "other" non-alcoholic beverages. Fruit pulp or fruit juice-based drinks are specifically covered under Tariff Item No. 2202 99 20 under the Sub-heading No. 2202 99 as 'other non-alcoholic beverages.

131. The structure and scheme of the Tariff Heading No. 2202 demonstrates that tariff Sub-heading No. 2202 10 covers drinks which are predominantly made up of water, including mineral water and aerated water and are either sweetened or flavoured or both. Tariff Item No. 2202 99 covers other non-alcoholic beverages.

132. A perusal of the nomenclature of the Tariff Item No. 2202 99 10 to 2202 99 30 clearly shows that products classified thereunder would be known by the

dominant ingredient present therein, like soya milk, fruit pulp, fruit juice, milk, etc. These products are seen to be classified by the presence of such ingredients, as in the case of the drinks falling under Tariff Item No. 2202 10.

133. The leads to the next question as to whether the expression "Fruit Pulp or Fruit Juice Based Drinks" falling under 2202 99 20 would essentially mean a drink based on fruit pulp or fruit juice with or without additional flavours and sweeteners and whether the fruit pulp/fruit juice gives the overall/essential character to the drink?

134. Since the answer to this question is not found in the Customs Tariff Act nor it is defined under the CGST or AGST Act, reference is therefore is necessary to be made to other authorities which have been pressed into service.

The Collins Cobuild English Dictionary for Advanced Learners, 2001. Harper Collins Publishers, defines 'base' thus:

> "Base-
>
> *(1) The base of something is its lowest edge or part.*
>
> *(11) The base of a substance such as paint or food is the main ingredient of it, to which other substances can be added"*

135. Similarly, The Compact Edition of the Oxford English Dictionary, 1987, Oxford University Press explains 'base' to mean "...II. *The main or the most important element or ingredient, looked upon as its fundamental part."* Thus, a substance or ingredient of a food item can be called its base when such substance/ ingredient forms the main or fundamental ingredient and imparts the essential attribute to the food item.

136. Similarly in ***D. Hicks (ed.), Production and Packaging of Non-carbonated Fruit Juices and Fruit Beverages, 1990, Van Nostrand Reinhold, New York,*** wherein it is stated that the most significant feature of a fruit beverage is not its fruit content but the function for which it is designed and marketed. The fruit is often a dominant ingredient providing its overall character to the drink which cannot be achieved in any other way.

137. The US Customs Ruling No. N122815 in the matter of **Ms. Michele Peplinski Parker's Organic Fruit Juice,** which deals with the issue regarding the classification of certain beverages containing concentrates of fruit juices as well as other ingredients. The ruling entailed classification of four such products, which could be summarised in the following table:

Sl.	Product Name	Ingredients	Classification
1.	Parkers Organic Sparkling Apple with a Twist of	50 percent organic apple, 5 percent organic grape and	2202.90.9090 (Others)

	Lime	organic lime juices from concentrate. Carbonated water has been added to bring the final Brix value of this product to a Brix of 13.	
2.	Parkers Organic Sparkling Pink Lemonade	9 percent grape juice concentrate, 7 percent apple juice concentrate, 1 percent lemon juice concentrate, 0.5 percent strawberry juice concentrate and 83 percent water.	2202.90.0040
3.	Parkers Organic Ginger Beer	Carbonated water, organic cane sugar, and Australian organic ginger.	2202.10.0040 (Carbonated Soft drink-others)
4.	Parkers Organic Lemonade	Carbonated water, organic cane sugar organic lemon juice and natural flavour	2202.10.0040 (Carbonated Soft drink-others)

138. From the discussions and the information in the tabular form extracted above, it is seen that a beverage could be a fruit juice – based drink (e.g. SI. 1 & 2 above) or it could be flavoured water (e.g. Sl No. 3 & 4 above). The classification is seen to be determined by the nature of the beverage, particularly by the presence of the fruit juice to an extent that it attributes the essential character to the beverage, not merely as a flavouring agent. It is the dominant nature of the product which determines the classification.

139. Reference is also made to **Carbonated Soft Drinks: Formulation and Manufacture**, edited by David P. Steen and Philip R. Ashurst, 2006 by Blackwell Publishing Ltd. wherein, it has been stated that:

> *"Carbon dioxide is a colourless, non-toxic, inert gas that is virtually tasteless and is readily available at a reasonable cost. It is soluble in liquids, the degree of solubility increasing as the liquid temperature decreases, and can exist as a gas, liquid or a solid. When dissolved in water it forms carbonic acid. It is carbonic acid that produces the acidic and biting taste found in carbonated waters and soft drinks. Above a certain level of carbonation carbon dioxide has a preserving property, having an effective antimicrobial effect against moulds and yeasts. It achieves this with moulds by depriving the moulds of oxygen required for growth."*

140. In **Chemistry and Technology of Soft Drinks and Fruit Juices, Second Edition,** edited by Philip R. Ashurst, Ashurst and Associates, Consulting Chemists for the Food Industry, Hereford, UK, 2005 by Blackwell Publishing Ltd., wherein it has been stated that:

> *"RTD (ready to drink) beverages are mostly carbonated (i.e. contain carbon dioxide). This, as well as giving sensory characteristics, provides a very effective antimicrobial effect, especially against yeasts and moulds. Carbon dioxide is effective against yeasts because it tends to suppress the production of more CO2 as a by product of the fermentation of sucrose to ethanol. It deprives moulds of the oxygen that most require for growth."*

The Random House Compact Unabridged Dictionary, 1996, Random House, New York defines 'flavour' thus:

> *"1. Taste, esp. the distinctive taste of something as it is experienced in the mouth."*

> *According to The Shorter Oxford English Dictionary, 1973, Clarendon Press, Oxford 'flavour' is*
>
> *"1. A smell or odour. In mod. Use: A trace of a particular odour."*

141. From these Technical Literatures referred to above, what is seen is that a substance or an ingredient of a food item can be called its base it's when such substance

or ingredient forms the main or fundamental ingredient and imparts the essential attribute to the food item. The most significant feature of a food beverage is not it's food content but the function for which it is designed and marketed. The fruit is often a dominant ingredient providing its overall character to the subject product which cannot be achieved in any other way. This view is also found in the US Customs Ruling No. N122815 in the matter of Ms. Michele Peplinski Parker's Organic Fruit Juice. The said authority had classified the beverages by the presence of the fruit juice to the extent it attributes the essential character to the beverage.

142. Having noticed, the authorities placed before the Court as discussed above, it will now be apposite to refer to the various Judgments and the Rulings referred to by the parties before this Court in this regard.

143. In CCE, Bhopal Vs. Parle Agro Pvt. Ltd. Reported in (226) ELT 194 (Tri), the classification sought to be made by the Revenue was rejected. This classification was sought to be made by the Revenue placing reliance on the HSN explanatory notes of chapter 22. The issue involved before the Tribunal in respect of classification of the product in question "Appy Fizz". The classification sought to be made by the Revenue under item head 2202 10 10 on the ground that it was aerated whereas the assessee had classified the item under Tariff Subheading 2202 90 20 as it is a juice based drink and also because the product contained 2203% apple juice. The assessee

therein relied upon the Prevention of Food Adulteration Rules, 1955 to submit that fruit beverage or fruit drink must contain soluble solids not less than 10%, whereas their product contains 13.7% soluble solids. Rejecting the contention of the Department, the Hon'ble Tribunal held that the product was classifiable under tariff item 2202 90 20, observing as under:

> *"6. The Revenue relied upon HSN Explanatory Notes of Chapter 22. We find that our tariff is not fully aligned with the HSN Explanatory Notes. In the HSN Explanatory Notices there are two sub-headings under Heading No. 2202 one is "water including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured and second is in respect of others. Whereas Central Excise Tariff under Sub-heading No. 2202 there are specific headings in respect of soya milk, drinks etc. As per the Central Excise Tariff, the waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured are classifiable under sub-heading No. 2202.10. The drinks based on fruit juice are specifically classifiable under Heading No. 22029020 of the Tariff. In the present case, there is no dispute regarding the contents of the product. Revenue is not disputing the certificate given by the Ministry of*

Food and Processing Industries, New Delhi rather they are relying it in the ground of appeal, and as per the certificate, the product in question contains 23% of apple juice, therefore, we find no infirmity in the impugned order. The appeal is dismissed."

144. The above decision of the Hon'ble Tribunal was affirmed by the Hon'ble Supreme Court by dismissing the civil appeal filed by the Department, as reported in ***2010 (254) ELT A13 (SC).***

145. The Hon'ble Supreme court in the case of ***Parle Agro (P) Ltd. v. Commissioner of Commercial Taxes, Trivandrum, (2017) 7 SCC 740*** also held that 'Appy Fizz' containing more than 10% fruit juice (viz. 12.7%) was a fruit juice-based drink in terms of the provisions of Kerala VAT Act, 2003.

146. In ***Parle Agro Private Limited Vs. Commissioner of Commercial Taxes Trivandrum,*** reported in ***(2017) 7 SCC 540*** the Apex Court at paragraph 20 of the said judgment observed that Section 6 of the Kerala Value Added Tax Act, 2003 provides for levy of tax on sale or purchase of goods. The said Section 6(1)(a) 6(1)(a) read as under:

"20. *Before we proceed to consider the submissions of the learned counsel for the parties, it is necessary to look into the statutory scheme and the relevant entries prior to amendment by SRO No. 119 of 2008. Section 6 of*

the Kerala Value Added Tax Act, 2003 provides for levy of tax on sale or purchase of goods. Section 6(1)(a) which is relevant for the present case as existed before 1-4-2007, was as follows:

> *"**6. (1)(a)** in the case of goods specified in the Second and Third Schedules at the rates specified therein and at all points of sale of such goods within the State, and in the case of goods specified below at the rate of twenty per cent, at all points of sale of such goods within the State, namely—*

Sl. No.	Description of goods	HSN Code
(1)	(2)	(3)
1.	Areated drink	2201.10.10
	(1) Mineral Water	***
	(2) Packaged drinking water	2202.10
	(3) Branded soft drinks, excluding soda	8415"
2.	Air Conditioners	
3.	Building materials"	

The State by various notifications under Section 6(1)(*d*) has notified list of goods taxable at the rate of 12.5%. Entry 71 which is relevant for the present case as notified by the State as existing prior to amendment by SRO No. 119 of 2008 is as follows:

> *"**71.** Non-alcoholic beverages and their powders, concentrates and tablets including (i) aerated water, soda water, mineral water, water sold in sealed containers or pouches, (ii) fruit juice, fruit concentrate, fruit squash, fruit syrup and fruit cordial [* * *] [The words "(iii) soft drinks of all varieties" omitted by SRO No. 543/2007 dated 20-6-2007*

published in Kerala Extraordinary No. 1167 dated 21-6-2007.] , (v) other non-alcoholic beverages; not falling under any other entry in this List or in any of the Schedule.

(1) Water not containing added sugar or other sweetening matter	
[* *] [Omitted by SRO No. 543/2007 dated 20-6-2007 published in Kerala Gazette Extraordinary No. 1167 dated 21-6-2007. Prior to the omission it read as under:"(a) Mineral water 2201.10.10"]*	
(b) Aerated water	
(2) Water containing added sugar or other sweetening matter	*2201.10.20*
(3) Fruit juices and vegetables juices, unfermented and not containing added spirit, whether or not containing added sugar of other sweetening matter	*2009*
(4) Fruit pulp or fruit juice based drinks	*2202.90.30*
(5) Soft drink concentrates	
(a) Sharbat	*2106.90.11*
(b) Others	*2106.90.19*
(6) Beverages containing milk	*2202.90.30"*

By SRO No. 119 of 2008 Entry 71 has been substituted by another Entry. Entry 71 after amendment by SRO No. 119 of 2008 w.e.f. 1-4-2007 is as follows:

"***71.****Non-alcoholic beverages and their powders, concentrates and tablets in any form including—*

(1) aerated water, soda water, mineral water, water sold in sealed containers or pouches;

(2) fruit juice, fruit concentrates, fruit squash, fruit syrup and pulp and fruit cordial;

(3) soft drinks other than aerated branded soft drinks;

(4) health drinks of all varieties;

(5) 'similar other products not specifically mentioned under any other entry in this List or any other Schedule'."

147. In this connection, the Apex Court observed as under:

> "***31.*** *The aerated branded soft drinks, excluding soda were always covered under Section 6(1)(a) and prior to 1-4-2007 it bears HSN Code 2201.10.10. Entry 71 Item 4 also reads as "fruit pulp or fruit juice based drinks with HSN Code 2202.90.20". When fruit juice based drinks were covered under Entry 71 the State Government knew that fruit juice based drinks were not covered by Section 6(1)(a). Applicability of the power of State to issue notification under Section 6(1)(d) arises only*

when goods were not covered by Section 6(1)(a). Fruit juice based drinks, thus, were never treated as "aerated branded soft drinks" which was the understanding of the State of Kerala while issuing notification under Section 6(1)(d). Had fruit juice based drinks were also to be covered by aerated branded soft drinks, there was no occasion for subordinate legislative authority i.e. the State Government, to include such products in notification under Section 6(1)(d)."

148. Similarly, in the case of **Godrej Foods Ltd. v. CCE, Indore, 2000 (121) ELT 231 (Tri.),** the issue before the Hon'ble Tribunal was regarding classification of the fruit drink marketed under the brand name "Lipton Tree Top" as a ready to serve beverage. The fruit drink was prepared in different fruit flavours Mango, Apple, Guava and Orange. The assessee had claimed its classification under sub-heading No. 2001.10 as fruit juice, whereas Revenue was of the view that the product merits classification under sub-heading No. 2202.90 as non-alcoholic beverages. The product contained 15.18% to 19.32% fruit pulp/concentrate, 13.44% to 14.7% sugar, and 70% water. The Hon'ble Tribunal held the product was not classifiable under heading 2001 as a preparation of food but was classifiable under sub-heading 2202 90 as other non-alcoholic beverage.

149. It is submitted that Squash and other ready-to-serve beverages made from fruit/ fruit juice have been held

to be classifiable under tariff item 2202.90 of the old six-digit Tariff Schedule, which corresponds to present eight-digit tariff item 2202 99 20, in the following cases:

150. In the case of ***Hamdard (Wakf) Laboratories Vs. Collector of Central Excise, Meerut,*** reported in ***(1999) 6 XCC 617***, the Apex Court was examining with regard to the classification of a product made by the Appellate Court called "SharbatRoohAfza" which contained some orange juice and distillates of citrus medica, rose damascene and permissible food colours and was said to be a summer drink and useful also in treating disorders associated with heat. The Apex Court was examining the question of the said sharbat falls within Tariff Heading 2202.90. In this connection the Apex Court held as under:

> ***"6.*** *The Tribunal would appear to have gone wrong in concluding that the said sharbat did not fall under Entry 2202.90 because it read "not including fruit or vegetable juices of Heading 20.01" as meaning beverages which do not contain fruit or vegetable juices. This is patently erroneous. Where the Tariff wanted to convey this intention it used the words "not containing", as in Heading 22.01, and where it intended to convey that an article should contain something it used the word "contained", as in Entry 22.02 itself. The fact that a beverage includes fruit or vegetable juice does not ipso facto exclude it from Heading 22.02. Only beverages that contain fruit or*

vegetable juices that fall under Heading 20.01 are excluded from Heading 22.02."

151. In the case of ***Katrala Products Ltd. v. CCE, Meerut***, reported in ***(1999) SCC Online SC 701,*** the Apex Court was examining the question as to whether synthetic squash or concentrate which can be consumed as a table drink after dilution with water. Even so, it has not been classified as a beverage. The Apex Court following the judgment of ***Hamdard (Wakf) Laboratories,*** allowed the appeal of the appellant.

152. The final order No. 75031/2021 dated 25.01.2021 passed by the Tribunal, Kolkata in the case of Anutham Exim Pvt. Ltd. also returned similar findings that the items before the Tribunal are classifiable under item head 2202 99 20.

153. In the facts of that case for the period under consideration, the assessee therein had filed Bills of Entry, for the import of the goods, viz. Big Cola, Big Jeera etc., which were carbonated beverages with fruit juice, having the fruit juice content of atleast 5% (2.5% in case of lime/ lemon), classifying the same under the tariff item 2202 99 20 (as fruit juice-based drinks) and applying appropriate IGST at the rate of 12%. However, the adjudicating authority re-assessed the said illis of entry and classified imported goods under tariff sub-heading 2202 10 treating the same as carbonated flavoured waters.

154. Thereafter, on appeal before Commissioner (Appeals.), against aforesaid order, the Commissioner (Appeals), Kolkata vide Order-In-Appeal dated 08.06.2020, set aside the Order-in-Original dated 06.05.2020 and held that the said goods would be treated as fruit juice-based drinks' only and classifiable under tariff item 2202 99 20 and chargeable to GST @ 12%.

155. Being aggrieved with aforesaid order, the department challenged the same before the Hon'ble Tribunal vide Customs Appeal No. C/75195/2020. The Hon'ble Tribunal, Kolkata vide Final order No. 75031/2021 dated 25.01.2021. rejected the appeal filed by the department, relying on settled judicial pronouncements of the Hon'ble Apex Court in the case of **Parle Agro (P) Ltd. v. Commissioner of Commercial Taxes, Trivandrum, 2017 (352) ELT 113 (SC)** and the larger bench of Tribunal in the case of **Brindavan Beverages Pvt. Ltd. v. Commr. of Cus., CX & ST 2019 (29) GSTL 418 (Tri-LB)**. Accordingly, the said goods were held to be classifiable under Tariff Item 2202 99 20. Relevant portion of the order is reproduced herein below:

> *"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 theproducts 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).

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...

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 decisionof 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."

156. The catena of judicial pronouncements as discussed above unequivocally lead to the conclusion that while interpreting the classification under Tariff heads and the sub heads, the meaning ascribed or provided in the statute must be followed.

157. As have been discussed above, a plain reading of the schedule under Chapter 22 reveals that the Tariff item 2202 is to be applied in respect of *"Waters including mineral waters and aerated waters containing added sugar and other sweetening matter or flavoured, and other non-alcoholic beverages not including food or vegetable juices under heading 2009".* This Tariff head is divided into two parts namely;

2202 10- *Waters including mineral water, aerated water containing added sugar or other sweetening matter or flavoured.*

And the other sub-head

2202 99- *"Others"*

158. The chemical examination of the sample products undertaken by the petitioner company which are available as Annexure-2 series in the writ petition reveals amongst others the following:

> *The total soluble solids more than 10% and food juice content is found to be present. Sugar is also found to be more than 10% in most of the products is also found to be present. The results also reflects that as per the standard prescribed under the Food Safety and Standard Regulations, total soluble solids should not be less than 10%.*

The opinion of the Food Analyst show that the *sample confirms to the prescribed standards as per food safety and standards regulations with respect to the tests carried out.*

159. These tests were conducted to ensure the food safety and standards required to be maintained under the relevant statute. The Food Safety and Standards Act and Regulations are essentially statutes which are enacted by the State to regulate food standards, production, distribution, consumption and are based on international legislations. The objectives of the Food Safety and Standards Act are as follows:

(i) to consolidate the laws regulating the food;

(ii) to establish food safety and standards authority of India for laying down science based standards for articles of food

(iii) To regulate their manufacture, storage, distribution, sale and import;

(iv) To ensure availability of safe and wholesome food for human consumption.

160. The Act apart from making stringent provisions to curb food adulteration, also ushers in new concepts such as putting in place food safety management systems and food safety audit to realise its ultimate goal of ensuring availability of safe and wholesome food for human consumption. {for reference Swami Achyutananda Teerth Vs Union of India 2016 (9) SCC 669}.

161. Under Section 92 read with Section 16 of the Food Safety and Standard Act, 2006, the Food Safety and Standards (Food Products Standards and Food Additive) Regulations, 2011 have been framed. The assessee has referred to the standards mentioned in Regulation 2.3.30 which pertains to carbonated food beverages or fruit drinks.

162. It is further provided thereunder that in order to confirm to the Micro Biological Requirements given in Appendix-B, the product must meet the following requirements:

(i) Food content (m/m)

A lime or lemon not less than 5%

(ii) Other foods not less than 10%

163. It is further provided that the product shall have the colour, tastes and flavour characteristic of the product and shall be free from extraneous matter.

164. Under the Customs Tariff Act, which is adopted by the GST authorities for the purpose of rate of tax in respect of the items prescribed in the schedules, the Rules for interpretation of the schedule as prescribed would be relevant for the purposes of this case. Under the said general Rules, the classification of goods in the schedule are to be governed in the principles prescribed thereunder.

"Rules for the interpretation of this Schedule

> ***1.*** *The titles of sections and Chapters are provided for ease of reference only; for legal purpose, 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 provisions hereinafter contained.*
>
> ***2.*** *(a) Any reference in a heading to goods shall be taken to include a reference to that goods incomplete or unfinished, provided that, the incomplete or unfinished goods have the essential character of the complete or finished goods. It shall also be taken to include a reference to that goods complete or finished (or falling to be classified as complete or finished by virtue of this rule), removed 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 contained in Rule 3.*
>
> ***3.*** *When by application of sub-rule (b) of Rule 2 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, 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, 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, insofar 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 the numerical order among those which equally merit consideration.

4. *Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.*

5. *For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub-headings and any related Chapter Notes and, mutatis mutandis, to the above rules, on the understanding that only sub-headings at the same level are comparable. For the purposes of this rule, the relative section Notes also apply, unless the context otherwise requires.*

General Explanatory Notes

1. *Where in column (3) of this Schedule, the description of an article or group of articles under a heading is preceded by "-", the said article or group of articles shall be taken to be a sub-classification of the article or group of articles covered by the said heading. Where, however, the description of an article or group of article is preceded by "——", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of articles or group of articles which has "-".*

2. *The abbreviation "%" in column (4) of this Schedule in relation to the rate duty indicates that duty on the goods to which the entry relates shall be charged on the basis of the*

value of the goods as defined in Section 4 or the tariff value fixed under Section 3 of the Central Excises and Salt Act, 1944 (Act 1 of 1944), the duty being equal to such percentage of the value or tariff value as is indicted in that column."

165. From a perusal of these Rules, it is seen that while interpreting the Tariff heads/sub-heads that where the goods cannot be classified in accordance with the above Rules, they shall be classified under the heading appropriate to the goods to which they are most akin.

166. Coming to the facts of the present case, the chapter 22 does not specifically define the items manufactured and sold by the petitioner . Therefore, under the Rules of interpretation provided under the 1st schedule to the Customs Tariff Act, 1975, these items will have to be classified under the heading appropriate to the goods to which they are most akin. The tests conducted under the Food Safety Act quite clearly reveal that they are within the permissible limits prescribed under the Food Safety Act and except lime based products where the fruit concentrate is required to be 5% in all the other products it is seen to be more than 10%. This is not disputed by the Revenue.

167. It is also not disputed that the GST Statute does not have the Tariff heads and classification prescribed under the Act and the Rules. Therefore, the Customs Tariff Act has been adopted. Therefore, in order to arrive at a definitive conclusion as to whether the subject products manufactured by the petitioner and its constituents, in the absence of any specific description or heading provided under Chapter 22, the items will have to be classified under

the heading or sub-heading to which these goods appear to be most akin to. From the laboratory test reports and the manufacturing flow charts placed before the Court, it is clear that it cannot be classified under 2202 10 rather it is more akin to 2202 99 20 namely fruit pulp or fruit juice based drinks as has been classified by the petitioner. To contradict this conclusion, which is based on Laboratory Test reports, the Revenue is required to place alternative materials to suggest that the classification made by the assessee is incorrect and the one made by the Revenue is the appropriate one. No such contrary material has been placed before the Court by the Revenue. The only ground on which the Revenue has classified the subject product under sub-heading 2202 10 is that it contains carbonated water. However, a quick reference to the Tariff schedule makes it clear that Sub-heading 2202 10 is primarily 'WATER' and it also includes mineral waters/ aerated waters /water containing added sugar or sweetening matter or flavour whereas sub-heading 2202 99 includes 'OTHERS' which are further described under the said sub-heading. The Tariff heading 2202 99 20 is seen to be for fruit pulp or fruit juice based drinks.

168. There is also no dispute that the subject products manufactured by the petitioner had at any point in time earlier been classified as water in order that it is required to be classified under sub-head 2202 10 as per Revenue. The Revenue has never at any point in time raised the issue or question that the subject products are essentially

"Water" with or without flavour. Notwithstanding the seizures made by the Revenue the materials collected from the assessee and the various inputes received from the assessee during the course of the hearing and the elaborate order passed by the respondent No. 3, it is clear that the Revenue never proceeded to treat the subject products to be "Water" or products which are akin to water and have accordingly therefore proceeded to levy GST under Sub-head 2202 10.

169. The sole basis for rejecting the assessee's classification under Sub-head 2202 99 is that these subject products contained carbonated water. However, such conclusions by the Revenue that merely because it contains carbonated water, the subject products are to be treated under classification 'water' or 'aerated water' is completely fallacious. The Laboratory Reports as well as the Labels on the fruit products which were placed before the Revenue Authorities clearly reveal the contents of the subject product. These products being sold as drinks and not as powders to be solved in water or in any other solid or semi solid form, must necessarily contained an element of water or carbonated or aerated water. That by itself cannot classify the subject product under the sub-head as have been sought to be done by the Revenue.

170. Even if the classification of the subject items are to be based on the Doctrine of common perlance then also the classifications sought to be made by the Revenue cannot be sustained. These subject products have been

sold in the market as Fruit Based Drinks or Drinks containing Fruit Pulp or Fruit Concentrate. When a consumer seeks to purchase water, there is no possibility that these subject products can be sold and/or purchased by such a consumer who seeks to purchase water. These products cannot be identified as water by a consumer.

171. Under such circumstances, taking into consideration the Rules of interpretation as prescribed under the 1st schedule to the Central Excise Tariff, the subject products classification under Tariff Heading 2202 99 20 as have been done by the assessee will have to be accepted over the claim of the Revenue that it is classifiable under the heading 2202 10 90. The contention of the Revenue therefore cannot be upheld and the same is rejected.

172. In so far as the contention raised before this Court by the Revenue regarding the correctness of the placing reliance by the petitioner on the Food Safety and Standards (Food Products and Food Additive) Regulation, 2011. It is seen that the Central Excise Tariff Act does not specify any particular category of laboratory where such tests are to be conducted nor does it specifically debar tests results undertaken under the FSSAI for the purposes of determining the classification of the items under the appropriate tariff heads. The Revenue has also not suggested any alternative methods or means by which such tests results were undertaken leading to contradictory findings to that of the tests results conducted under the

FSSAI. During the search and seizure operations conducted in the petitioners unit, sample products were also taken by the Revenue which is not denied. These products could have been sent to appropriate laboratories for tests to find out the contents of each of them. However, no such laboratory results etc have been placed before this Court to substantiate the claim of the Revenue that these tests results under FSSAI are unreliable. As it has already been held in the above discussions that the tests conducted by the State Laboratory indicate the presence of the total soluble solids of more than 10% where the required standard is the presence of soluble solids of not less than 10% and fruit juice content being found to be present, it cannot be considered to be water or carbonated water alone

173. In Parle Agro Pvt. Ltd (Supra) before the Tribunal also the Food Standards laid down under the prevention of Food Adulteration Rules, 1955 were referred to and relied upon to classify the product in question. The order of Tribunal in favour of the assessee therein has also been upheld by the Apex Court. There is no finding that placing reliance on Food Adulteration Rules or FSSAI in order to determine the appropriate classification of the product in question is contrary to the provisions of Customs Tariff Act or the same would be unreliable for the purposes of classification of the items under the Customs Tariff Act. It is therefore held that the reliance placed by the assessee on the Food Standard Regulation and the tests results from

the State Laboratory cannot be set to be unreliable. Rather its supports the contention of the petitioner that the items in question cannot be classified under the Sub Head "Water or Carbonated Water". Therefore, this Court does not find any infirmity in the petitioner placing reliance on Food Safety and Standards (Food Products Standards and Food Additives) Regulation, 2011 as well as the test results by the State Laboratory for the purposes of classifying the products items in question under appropriate heads. Under such circumstances, this contentions of the Revenue fails and is therefore rejected.

174. There is also another reason why the submissions of the Revenue cannot be upheld.

175. Chapter 22 is for "beverages, spirits and vinegar". For the purposes of this proceedings, the tariff head 2202 is relevant. The said sub-head along with the items described is extracted below:

Tariff Item	**Description of goods**
(1)	(2)
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
2202 10	*Waters, including mineral waters and aerated waters, containing added sugar or other*

	sweetening matter or flavoured:
2202 10 10	Aerated Waters
2202 10 20	Lemonade
2202 10 90	Other
2202 99	Other
2202 99 10	Soya milk drinks, whether or not sweetened or flavoured
2202 99 20	Fruit pulp or fruit juice based drinks
2202 99 30	Beverages containing milk
2202 99 90	other

176. A perusal of the chart reveals that Tariff Head 2202 is for Water 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. This head is again further divided into sub-heads namely 2202 10 for Waters, *including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured* and Sub- Head 2202 99 for Others.

177. If the sub heading 2202 10 and the items specified under that sub heading are to be seen, it will be apparent that all the sub heads under 2202 10 are meant for different kinds of water. Whereas 2202 99 and the Tariff Items thereunder have been so classified as to distinguish them from products which are ordinarily identified with water or mineral water or aerated waters. Under such circumstances, it is a well established Rule to

be followed that Tariff Items are to be classified under Items to which it is most akin to. Therefore, where the subject product contains soluble solids and fruit content as per the report of the State Food Laboratory, it cannot be said to be akin to water, mineral water or aerated water. Mere presence of carbon dioxide or carbonated water cannot be treated to classify the subject items under water or carbonated water. Therefore, the classification sought to be made by the Revenue cannot be accepted. The classifications by the petitioner of the items under the subject head Fruit Pulp or Fruit Based Drink appear to be correct to this Court.

178. As have been discussed above, the burden is on the department to prove the classification of the subject items. Although, the results of the State Food Laboratory have been discarded by the Revenue, no alternative test reports or methods for appropriate classification of the subject products have been placed before the Court. Where an established laboratory for food testing under the FSSAI has in it's test reports indicated presence of food content and soluble solids in the report, and these reports not having been contradicted by the Revenue by referring or relying on other reliable test reports, the contention of the Revenue that these reports cannot be reliable, therefore cannot be accepted as the same are not supported by any sufficient reason.

179. In Union of India Vs Garware nylons Ltd, reported in 1996 (87) ELT 12 (SC), the dispute before the

Apex Court was regarding the classification of 'Nylon Twine' which the assessee classified under Tariff Item No. 18 as Nylon Yarn whereas the department entertained the view that it is classifiable under the residuary entry 68. The assessee produced certificates/ affidavits from experts in the field and also from the users of its products to the effect that Nylon Twine was treated as Nylon Yarn only in commercial parlance. The assessee also laid before the authorities the text of various technical literatures to substantiate the classification adopted by it. However, the department did not agree to the classification adopted by the assessee and confirmed the demand, which upon appeal by the assessee, was set aside by Hon'ble High Court of Bombay. The Hon'ble Apex Court upheld the order of the Hon'ble High Court observing as under:

> *"15. In our view, the conclusion reached by the High Court is fully in accord with the decisions of this Court and the same is justified in law. The burden of proof is on the taxing authorities to show that the particular case or item in question, is taxable in the manner claimed by them. Mare assertion in that regard is of no avail. It has been held by this Court that there should be material to enter appropriate finding in that regard and the material may be either oral or documentary. It is for the taxing authority to lay evidence in that behalf even before the first adjudicating authority.*

Especially in a case as this, where the claim of the assessee is borne out by the trade inquiries received by them and also the affidavits filed by persons dealing with the subject matter, a heavy burden lay upon the revenue to disprove the said materials by adducing proper evidence. Unfortunately, no such attempt was made. As stated, the evidence led in this case conclusively goes to show that Nylon Twine manufactured by the assessee has been treated as a kind of Nylon Yarn by the people conversant with the trade. It is commonly considered as Nylon Yarn. Hence, it is to be classified under Item 18 of the Act. The Revenue has failed to establish the contrary....

180. Again in ***H.P.L. Chemicals Ltd. v. CCE, Chandigarh***, reported in in ***(2006) 5 SCC 208,*** the Apex Court held that classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assesse, the Department has to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the revenue.

181. In ***Hindustan Ferodo Ltd. v. CCE, Bombay***, reported in ***(1997) 2 SCC 677,*** the Apex Court held that the onus of establishing that the said rings fell within Item

22-F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, that the CEGAT was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed.

182. The ratio in the above judgments can be squarely applied to the facts of the present proceedings. As such, it is held that the burden is on the Revenue to establish with cogent materials that the classification of the subject items have been wrongly classified under the sub Heads by the assessee rather it has to be classified under the sub Heads as projected by the Revenue.

183. In so far the arguments of the petitioner that Section 74 of the CGST Act is not applicable in the present case in the absence of any fraud or wilful suppression on the part of the petitioner. In order to deal with the said contention of the petitioner it will be necessary to refer to Section 74 of the CGST Act. The said section reads as under:

> ***"74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any willful-misstatement or suppression of facts.-****(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the*

notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under subsection (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded."

184. The penalty sought to be imposed by the Revenue on the petitioner under Section 74 of the CGST Act is by reason for recovery of tax not paid by the assessee by reasons of fraud or collusion or wilful mis-statement or suppression of facts and contravention of any of the provisions of the Act or the Rules with the intent to evade to payment of tax.

185. Under Section 74 Explanation 2, the term "suppression" has been explained as non declaration of facts or information in the returns. In this context, it is necessary to examine whether there was any suppression or non-declaration of materials by the assessee while payment of taxes by classifying the subject items under Tariff Head 2202 99 20.

In order to decide, whether there was any wilful suppression or mis-statement by the petitioner, it is necessary to examine the case laws pressed into service in this regard.

186. In the case of ***CCE V. Chemphar Drugs & Liniments, 1989 (40) E.LT. 276 (S.C.),*** it has been observed that the term 'willful' and 'suppression' signifies conscious withholding of information with mala fide Intention and not an unintentional failure due to inadvertence. Thus, in order to invoke the extended period of limitation, it is necessary to prove an act or omission on the part of the petitioner equivalent to collusion or wilful misrepresentation or suppression of facts.

187. Again in Anand Nishikawa Co. Ltd. Vs. Commissioner of Central Excise, Meerut, reported in 2005 (188) ELT 149 (SC), the Apex Court held that suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty. But when facts were known to both parties, the omission by one to do what he might have done, not that he must have done, would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act of the assessee to bring it within the ambit of wilful suppression.

188. From the Judgments above, it is seen that for arriving at the conclusion that there was a suppression of facts, it must be evident that the correct information was deliberately not disclosed by the petitioner or that there was a conscious withholding of information with malafide intention by the petitioner/assessee. Mere failure due to

inadvertence will not amount to suppression for invoking the powers under Section 74.

189. In the impugned show cause notice or in the impugned order, there is no finding by the Revenue that the petitioner evaded from furnishing his returns regularly. The returns which were furnished by the petitioner were on the basis of the classification made by the petitioner. These returns filed by the petitioner under the Tariff Head were known to the Revenue all along. There was no occasion earlier to raise objections to these returns filed under the concerned Tariff Head by the petitioner. Therefore, it cannot be said that there was wilful suppression or concealment with malafide intention on the part of the petitioner which will lead to the ultimate conclusion that there was suppression on the part of the petitioner/assessee and which gives rise to the invocation of powers by the Revenue under Section 74.

190. The dispute in the present proceedings is with regard to the appropriate Tariff Head for the subject products. The elaborate discussions above would reveal that there is no specific or definitive description of the items manufactured and sold by the petitioner. As have been discussed above, the Revenue did not lay before this Court any contrary evidence to contradict the views of the petitioner that in respect of the Tariff Head.

191. Under such circumstances, where substantial discussion is required to arrive at a conclusion to determine

the appropriate Tariff Head of the subject products, it cannot be said that filing of returns under the Tariff Head 2202 90 20 by the petitioner in respect of the subject products will amount to deliberate and wilful suppression or non-disclosure of facts and thereby attract the provisions of Section 74. Accordingly, it is held that invocation of powers by the Revenue under Section 74 was uncalled for and the same is therefore unwarranted.

192. In order to dwell upon the arguments made by the petitioner questioning the penalty imposed under Section 122 of the Assam GST Act and to decide on the correctness of such imposition, it is necessary to refer to the provisions of Section 122 of the Assam GST Act. For the purposes of the present proceedings, reference to the provisions of Section 122 (2)(b) would be sufficient. The said Section reads as under:

> *"Penalty for certain offences.*
>
> *(2) Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed of utilised,-*
>
> *(a) for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent. of the tax due from such person, whichever is higher;*

> *(b) <u>for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees of the tax due from such person, whichever is higher."</u>*

193. From perusal of the said provision, it is clear that for imposition of penalty under Section 122 (2) (b), there should be an intention to evade payment of tax or there should be suppression or concealment or wilful mis-statement of the facts.

194. It is apparent that the ingredients for imposition of penalty under Section 122(2)(b) are identical to the ingredients for invocation of the provisions of Section 74 of the CGST Act.

195. From the elaborate discussions above, this Court has concluded that there was no suppression of facts or wilful mis-statement on part of the petitioner assessee as alleged by the department and consequently provision of Section 74 of the CGST cannot be invoked in the instant case.

196. It should also be noted that penal provisions are only a tool to safeguard against contravention of the Rules. Reference to the Judgment of the Apex Court in Hidustan Steel Ltd. Vs. The State of Orissa, reported in AIR 1970 (SC) 253 is relevant for the purpose. The Apex Court held that liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order

imposing penalty for failure to carry out e statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so*.*

197. Further once the demand has been found to be non-sustainable, the question of levy of penalty does not arise. The Apex Court in HMM Ltd (Supra) held that the question of penalty would arise only if the Department is able to sustain the demand. Similarly, in the case of ***CCE, Aurangabad v. Balakrishna Industries, Civil Appeal No. 3389-3390 of 2001,*** Hon'ble Supreme Court held that penalty is not imposable when differential duty is not payable. Therefore, the proposal for imposition of penalty upon the petitioner is not sustainable in law.

198. For the reasons given in the foregoing paragraphs, if the proposed demand is unsustainable in law, no penalty is imposable on the petitioner. Under such circumstances, it is held that where the demand has been found to be unsustainable on the ground that there was no wilful and deliberate suppression or mis-statement or evasion or payment of tax, the question of imposition of penalty must also failed. Accordingly, the imposition of penalty by the Revenue is therefore interfered with and set aside.

199. Similarly, the imposition of interest under Section 50 is also not recoverable in the present proceedings. The reason being that where the primary demand has been held to be unsustainable there is no basis for levy of any interest. Therefore, the levy of interest under Section 50 of the CGST Act is also interfered with and set aside.

200. Coming to the Notification No. 8/2021-Central Tax (Rate) dated 30.09.2021 and Notification No. 1/2021-Compenation Cess (Rate) dated 30.09.2021, it is seen by the said Notification No. 8/2021-Central Tax (Rate) dated 30.09.2021 whereby a new entry was inserted as Serial No. 12A in Schedule – IV making Carbonated Beverages of Fruit Drink or Carbonated Beverages with Fruit Juice to be taxable @ 14% and Notification 1/2021-Compensation Cess (Rate) dated 30.09.2021 whereby in the Schedule of the Goods and Services Tax (Compensation to States) Act, 2017 a new entry namely 4B was inserted levying 12% Cess on Carbonated Beverages of Fruit Drink or Carbonated Beverages with Fruit Juice and the same was made effective from 01.10.2021. The tax @ 14% and Cess @ 12% cannot be imposed on the said items for the periods prior to 01.10.2021. These Notification have been made effective only from the date it is notified.

201. In ***Commissioner of Central Excise, Bangalore Vs. Mysore electricals industries Ltd.,*** reported in ***(2006) 12 SCC 448,*** the Apex Court held that the classifications of a item can take effect only

prospectively. The Apex Court held that the assessee therein had filed a classification list effective from 1-3-1993, classifying the single panel circuit-breakers under Heading 85.35 and claiming concessional rate of duty at 5% under Notification No. 52/93 dated 28-2-1993. The said classification list was approved by the jurisdictional Assistant Commissioner on 10-6-1993. Thereafter, the assessee cleared the said goods in accordance with the approved classification list. When this approved classification was proposed to be revised to reclassify the single panel circuit-breakers under Heading 85.37 of the Tariff Act, such reclassification can take effect only prospectively from the date of communication of the show-cause notice proposing reclassification. It was held by the Apex Court that the show-cause notice was communicated to the assessee only on 31-12-1993, therefore, as rightly urged by the learned counsel for the respondent, the reclassification can take effect only from 27-4-1994 and accordingly the differential duty can be demanded only from that date.

202. The periods involved in the present writ petitions are prior to the issuance of the said Notifications re-classifying the items. These Notifications therefore can only have effect from the date it is made effective and prospectively. There is no justification by the Revenue to make these notifications applicable retrospectively.

203. The publication of the Notifications and insertions of new entry rather supports the case of the writ

petitioners. If the subject items dealt with by the petitioners are classifiable under entry 2202 10 10 i.e. under the description "aerated waters" as sought to be classified by the Revenue, there would have been no necessity of inserting a separate item in the schedule and also by inserting by new entry of Cess under the Assam GST Act, 2017. In this context, the reference to the Judgment of Parle Agro (P) Ltd (Supra) is very relevant.

204. In this case before it, the Apex Court observed that fruit juice based drink were also to be covered by aerated branded soft drink, there was no occasion for the subordinate authorities to include the said products in Notification under Section 6(1)(d). Paragraph 31 of the said Judgment is extracted below:

"31. The aerated branded soft drinks, excluding soda were always covered under Section 6(1)(a) and prior to 1-4-2007 it bears HSN Code 2201.10.10. Entry 71 Item 4 also reads as "fruit pulp or fruit juice based drinks with HSN Code 2202.90.20". When fruit juice based drinks were covered under Entry 71 the State Government knew that fruit juice based drinks were not covered by Section 6(1)(a). Applicability of the power of State to issue notification under Section 6(1)(d) arises only when goods were not covered by Section 6(1)(a). Fruit juice based drinks, thus, were never treated as "aerated branded soft drinks" which was the understanding of the State of Kerala while issuing notification under Section 6(1)(d). Had fruit juice based drinks were also to be covered by aerated

branded soft drinks, there was no occasion for subordinate legislative authority i.e. the State Government, to include such products in notification under Section 6(1)(d)."

205. Similarly, in the present case if the aforesaid product would have been covered by 2202 10 10, there would have been no occasion to issue the aforesaid Notifications by inserting new items making it effected from 01.10.2021. In view of the aforesaid, it is very clear that earlier the items in question were covered by Tariff Item 2022 90 20 and only after issue of the aforesaid Notification, the same is made taxable at a higher rate.

206. In view of the elaborate discussions above, the contentions raised by the Revenue fails. The Judgments relied upon by the Revenue therefore do not support the contentions raised by the Revenue and are therefore not discussed. The writ petitions are therefore allowed. The impugned Show cause Notice dated 17.02.2022 and impugned order dated 14.07.2024 for the periods from July, 2017 to March, 2018 in W.P.(C) No. 5340/2022; April, 2018 to March, 2019 in W.P(C) No. 5342/2022; April, 2019 to March, 2020 in W.P.(C) No. 5341/2022; April, 2020 to March, 2021 in W.P(C) No. 5347/2022; April, 2021 to August, 2021 in W.P.(C) No. 5346/2022 are interfered with, set aside and quashed. No order as to cost. Interim orders, if any, stands merged.

JUDGE

Comparing Assistant

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