Global IDT Chronicles: When ‘bread’ is not ‘bread’!!!

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No one can compare the hullabaloo which tax litigation creates as regards the classification of goods and services. While we have frequent Rulings regarding the classification of foods in India, there certainly are some amusing and witty decisions which play with your mind and make you think twice. A quick googling of tax litigation on classification would provide immediate results saying ‘pringles are not potato chips’; Jaffa Cakes are cakes not biscuits’ , ‘softserve’ is ice cream’ , ‘fryums are not cooked foods’ etc.

In this vivid article our Global IDT Chronicles contributor **Sindhu Mangat (Advocate, Swamy Associates),** emphasizes on the Irish Supreme Court’s recent judgment in case of Subway’s franchisee **Bookfinders vs. The Revenue Commissioners** which garnered many eyeballs for its decision that the NIL rate otherwise applicable for ‘bread’ is not available for the ‘bread’ used in sandwiches made and sold by subway outlets. Elucidating that the judgment gives both, an enjoyable and enriching read as it discusses broadly the rules of interpretation to be followed while addressing disputes involving ‘classification’, the author mentions how the Court ruled that the ‘bread’ used by ‘Subway’ is not bread since the amount of sugar content in ‘Subway bread’ makes it more of a pastry than a bread.

Article

Disputes regarding classification of goods and services occupies a considerable place in tax litigation. The judicial pronouncements carried more news value especially when the subject was classification of food products. A quick googling of tax litigation on classification would provide immediate results saying ‘pringles are not potato chips’ **[Revenue and Customs Commissioners v Procter & Gamble UK. [2009] BVC 461]**; ‘Jaffa Cakes are cakes not biscuits’ **[United Biscuits (UK) Ltd (No. 2). [1991] BVC 818]** , ‘softserve’ is ice cream’ **[CCE Vs. Connaught Plaza Restaurants Private Ltd 2012 (286) E.L.T. 321 (S.C.)]** , ‘fryums are not cooked foods **[CCE Vs. TTK Healthcare Limited 2007 (211) E.L.T. 197 (S.C.)]** etc.

The recent ruling of the Supreme Court of Ireland **[Bookfinders Limited vs. Revenue Commissioners]** has invited much attention when it was held that the NIL RATE otherwise applicable for ‘bread’ is not available for the ‘bread’ used in sandwiches made and sold by subway outlets. The Judgment give both an enjoyable and enriching read as it discusses broadly the rules of interpretation to be followed while addressing disputes involving ‘classification’.

The appellant, Bookfinder is a Franchisee of subway. They had claimed exemption on bread, hot tea and coffee supplied by them on the ground that these items are covered with in Schedule 2 of the respective VAT Act, 1972, which lists out commodities which are NIL rated.

The Supreme Court, rejecting the arguments of appellant has held that, the ‘bread’ used by ‘Subway’ is not bread since the amount of sugar content in ‘Subway bread’ makes it more of a pastry than a bread. The Supreme Court, observed that the second schedule, providing for NIL rate, distinguishes bread as a staple food and other baked foods made from dough, which are confectionery or fancy baked foods. Bread is defined as **‘**food for human consumption manufactured by baking dough composed exclusively of a mixture of cereal flour and any one or more of the ingredients mentioned in the subclauses listed in the definition in quantities not exceeding the, limitation if any, specified for each ingredient. The relevant subclauses relied on by the Supreme Court provided that fat, sugar and bread improver, subject to the limitation that the weight of any ingredients specified in the sub clause shall not exceed 2 per cent of the weight of flour included in the dough. **The court found that the bread supplied by Subway in its heated sandwiches has a sugar content of 10% of the weight of the flour included in the dough, and thus exceeds the 2% specified.**

The court while holding so, had examined core issues such as consequence of inclusion of each item in respective schedule in VAT law and scope and objective of each schedule. The Court had observed that the NIL rated Schedule in so far as it applies to food products deals with such items which are consumed as staples. It is neither the policy nor the intention to include such food items or preparations which are discretionary indulgences within the scope of exemption.

The Judgment also favored classification of hot tea and coffee served by the appellant as falling under standard rate, rejecting the arguments for classification under NIL rated category. The court while addressing the main issues also held that the expression ‘and’ used in ‘food and beverages’ is to be read disjunctively. The interpretation was applied against contention of appellant that only when food and drinks are supplied together, the higher rate would apply. The court held that when read disjunctively, the

expression has the effect of standard rate being applied when food or beverage are supplied separately.

The court had opined that while addressing classification disputes, the first rule is to follow the literal meaning. If the literal meaning leads to a doubt regarding the imposition of levy, the purposive interpretation can be adopted to prevent a fresh or unfair imposition of tax.

To quote, the words used in Judgment, "t*he function of a court interpreting legislation is not the same as that of a pedantic school teacher correcting a student's English and perhaps inculcating an appreciation of the precise use of language: rather, the Court's function is to understand the provisions enacted by the legislature and give effect to them consistent with the principles of statutory interpretation and, in this case, the principle against doubtful penalization".*

Classification of Food Products: Indian Scenario

The classification of food articles for the purpose of taxation has seen many long legal battles. Various judicial forums have given significant rulings also in this context. Though, there are many rulings available on classification of food and food items, the following are worth quoting:

Whether biscuits are cooked food [Commissioner of Sales Tax vs Shri Ballabhdas Ishwardas (1968 21 STC 309 MP)]: Some interesting observations are made while holding that biscuits are not cooked food. Court observed that, in common parlance "cooked food" means those things which one eats at regular times of the day at breakfast, dinner or supper. Biscuit is no doubt a kind of food if the term is understood in a very wide sense. Though biscuit involve activity of cooking, same is not cooked food which one takes at meal hours. The term "cooked food" used in entry No. 41 cannot be read in a wide sense so as to include everything made fit for eating by application of heat, as by boiling, baking, roasting, broiling etc.

Whether Fryums is 'cooked food' [CCE Vs. TTK Health Care Limited (2007 (211) E.L.T. 197 (S.C.))]: The assesee claimed reduced rate of 4 % tax on the ground that 'fryums' fall under item No. 2 of Part I of Schedule II which refers to 'cooked food' .On the other hand, according to the Department the Item 'fryums' falls under Part VII of Schedule II to the M.P. Commercial Tax Act, 1994, under which the rate of tax is 8%. The issue revolved around determination of meaning of 'cooked food'. The court held that Fryums is not a cooked food. The court observed that the item 'cooked food' is inclusive definition which indicates by illustration what the legislatures intended to mean when it has used the term 'cooked food'. Reading of the above inclusive part of the definition shows that only consumables are sought to be included in the term 'cooked food'. In the case of 'fryums' there is no dispute that the dough/base is a semi-food and that they need further cooking to be consumed. There was certain process required to be applied before 'fryums' become consumable. Therefore fryums would fall under the residuary item "all other goods not included in any part of Schedule I.

Whether samosa is cooked food [Sarva Shri Neeraj Misthan Bhandar vs The Commissioner Commercial Tax (TS-982-HC-2018(UTT)-VAT)]: Samosa was liable to be taxed at 5%, if classiable as namkeen or at 8%, if same was cooked food. Court held 'samosas are cooked foods'. In this case though court expressed its opinion that they are not fully convinced on classification of samosas as 'cooked foods' still, same was upheld because they did not agree with classification of same as namkeens .

Whether ice cream and ice candy are cooked food [Commissioner of Sales tax Vs Gyanmal Kesharichand]: Assessee contended that ice cream is cooked food since heating or boiling of milk is involved in preparation of ice cream. The contention for revenue was that the common parlance meaning of cooked wood would not include ice creams. The court has held that ice creams and ice candy are not cooked food relying on common parlance or meaning as per popular sense. The court observed that ice cream or ice candy can be consumed alone or along with other would, but nobody would have it at meal hours.

Whether 'soft serve ' served at MacDonald's is ice cream [CCE Vs. Connaught Plaza Restaurant Private Limited 2012 (286) E.L.T. 321 (S.C.)]: The assesee, disputed the classification of 'soft serve' as ice cream on the ground that the product is nor marketed as ice cream and also that in ice creams the milk content would usually be ten percent whereas in 'softserve' it is five percent. The supreme court upheld the classification of soft serve as 'ice cream' on application of common parlance test (how product is conceived by consumer). Court held that the way in which product is marketed is not the decisive criteria. The court held, mere semantics cannot change the nature of a product in terms of how it is perceived by persons in the market, when the issue at hand is one of excise classification.

Whether double roti, parata and chapathi can be called bread [Kayani and Co vs. Commissioner of Sales tax AIR 1953 Hyd. 252]: The meaning of term 'bread' cannot be restricted to the way in which same is conceived in European countries. It is to be understood in the manner in which it is used in this country. Intention is to cover all kinds of breads consumed by citizens of India and hence, bread includes and

should include all forms and kinds of bread which are prepared by moistening, kneading, baking, frying or roasting meal of flour with or without addition of yeast, leaven or any other substance for puffing or lightening the article.

Whether Pizzas are classifiable as preparation of meat [Dodsal Corporation Private Limited Vs. CCE 2011 (263) E.L.T. 719 (Tri. - Bang.)]. It has been held that Pizza cannot be classified as preparations of meat (u/CETH 1601 10) for the reason that same has topping of chicken along with other ingredients. For any product to be considered as preparation of meat, the starting point should be meat.

SOME IMPORTANT RULINGS OF ADVANCE RULING AUTHORITY

Whether Classic Malabar Parota' & 'Whole Wheat Malabar Parota' are classifiable as bread under under Heading 1905 **[In Re Modern Food Enterprise Private Limited [TS-625-AAR-2018-NT]]**: The Advance Ruling Authority, negativing the contention of applicant that the items are classifiable as 'breads' held that applying the common parlance test, parottas are not classifiable as 'breads'. The goods were held as liable for 18% under HSN 2106 as 'Food preparations not elsewhere specified or included'.

Whether chicken patties, chicken sausage roll, chicken cutlet, chicken finger, chicken roll, chicken burger etc are classifiable as meat preparations under HSN 1601 [In Re: Switz Foods Private Limited [TS-1160-AAR-2019-NT]]: HSN 1601 covers 'Sausages and similar products, of meat, offal or blood; food preparations based on these products'. The applicant contends the products as meat preparation since it contains more than 20% by weight of chicken meat. It has been held that Chicken meat is used as a filling in most of the above products where bread or baked flour is used as the base. The baked product (sandwich, puff, patty, burger etc.) can be treated as a distinct food preparation which will survive even if the chicken meat is excluded from the filling. They are, therefore, not food preparations based on chicken meat. Such bakers' wares cannot, therefore, be classified under HSN 1601.

The litigation history of classification would show that the courts in India, have been applying the 'common parlance' test more frequently in case of ambiguity. Taking a cue from the elaborate principles of interpretation in the Judgment of Irish Supreme court, the purposive test is also equally important in determining the appropriate classification. This is more so, when the categorization of products under exempted or minimum tax rate is based on intelligent criteria of not burdening the ultimate beneficiary, who is the consumer, with burden of tax on commodities which are commonly consumed.