आयुक्त का कार्यालय केंद्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,अहमदाबाद उत्तर, कस्टम हॉउस(तल प्रथम) नवरंगपुरा- अहमदाबाद ,380009		Office of the Commissioner of Central Goods & Services Tax & Central Excise, Ahmedabad North, Custom House(1st Floor) Navrangpura, Ahmedabad-380009
फ़ोन नंबर./ PHONE No.: 079-2754 4599 फैक्स/ FAX : 079-2754 4463 E-mail:- *oaahmedabad2@gmail.com*		

निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. V.21/15-16/OA/2017

आदेश की तारीख़ / Date of Order : 10.01.2020

जारी करने की तारीख़ / Date of Issue : 13.01.2020

द्वारा पारित/Passed by -

डॉ. बलबीर सिंह / Dr. BALBIR SINGH

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR–15-16/2019-20

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति -इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार ,सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,O-20, मेघाणीनगर ,न्यु मेन्टल हॉस्पीटल कम्पाउन्ड , अहमदाबाद -380016 को संबोधित होनी चाहिए।

Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, O-20, Meghani Nagar, Mental Hospital Compound, Ahmedabad-380 016.

2.1 इस आदेश के विरुद्ध अपील न्यायाधिकरण में अपील करने से पहले मांगे गये शुल्क के 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है ।

An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

(as per amendment in Section 35F of Central Excise Act,1944 dated 06.08.2014)

3. उक्त अपील प्रारूप सं .इ.ए 3.में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 ,के नियम 3 के उप नियम (2)में विनिर्दिष्ट व्यक्तियों द्वारा हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियाँ में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई हो ,उसकी भी उतनी ही प्रतियाँ संलग्न की जाएँ)उनमें से कम से कम

एक प्रति प्रमाणित होनी चाहिए(। अपील से संबन्धित सभी दस्तावेज भी चार प्रतियाँ में अग्रेषित किए जाने चाहिए।

The Appeal should be filed in Form No. E.A.3. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

4. अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैंचार प्रतियों में दाखिल , उसकी भी उतनी ही ,की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उनमें से कम से क) प्रतियाँ संलगन की जाएंगीम एक प्रमाणित प्रति होगी।(

The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

5. अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के बिना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।

The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

6. अधिनियम की धारा 35बी के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है, वहां के किसी भी राष्ट्रीयकृत बैंक की शाखा से न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर रेखांकित माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।

The prescribed fee under the provisions of Section 35 B of the Act shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. न्यायालय शुल्क अधिनियम 1970 ,की अनुसूची ,1-मद 6 के अंतर्गत निर्धारित किए अनुसार संलग्न किए गए आदेश की प्रति पर 1.00रूपया का न्यायालय शुल्क टिकट लगा होना चाहिए।

The copy of this order attached therein should bear a court fee stamp of Re. 1.00 as prescribed under Schedule 1, Item 6 of the Court Fees Act, 1970.

8. अपील पर भी रु 4.00 .का न्यायालय शुल्क टिकट लगा होना चाहिए।

Appeal should also bear a court fee stamp of Rs. 4.00.

विषयः -कारण बताओ सूचनाः

Subject- Proceedings initiated vide Show Cause Notices bearing No. **V.21/15-16/OA/2017** dated **18.07.2017** & **V.21/15-03/OA/2018** dated **20.09.2018** issued to M/s Inbisco India Pvt. Ltd., Plot No. SM-9/5, GIDC Phase – II, Village – Bol, Sanand, Ahmedabad – 382 170.

BRIEF FACTS OF THE CASE :-

M/s. Inbisco India Pvt. Ltd., Plot No. SM-9/5, GIDC-Bol, Sanand-II Industrial Estate, Sanand, Dist-Ahmedabad (hereinafter referred to as 'M/s. Inbisco'' or 'the noticee' for the sake of brevity) are engaged in the manufacture of excisable goods such as different types of candy viz. Kopiko Cappuccino Coffee Candy (hereinafter referred to as KOPIKO), Juicy Milk Mango/Strawberry Flavour Candy and Noodle viz. Joy Me Noodles, all edible items. The said goods are classified by them under Tariff Item 17049090 and 19022010 respectively of the First schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as the 'CETA, 1985' for the sake of brevity), for payment of Central Excise duty. They have obtained Central Excise Registration No. AABCI8732PEM004.

2. Intelligence was gathered by the officers of the Directorate General of Central Excise Intelligence (DGCEI) that M/s. Inbisco were manufacturing KOPIKO and were short-paying Central Excise duty by mis-classifying the same under Tariff Item 17049090 as "*sugar confectionary not containing cocoa*" instead of Tariff Item 2101 12 00 of the CETA, 1985 as "*preparations with basis of extracts, essences, concentrates or with a basis of coffee*", a specific description; and thereby were irregularly availing benefit of Notification No. 12/2012-CE dated 17.03.2012, as amended.

3.1 Acting on the above intelligence, investigation was initiated against M/s. Inbisco under summons dated 13.08.2015 calling for details, such as list of ingredients used and process of manufacture of the product KOPIKO, copies of import documents for procurement of Coffee extract, lab reports showing ingredients and certifying the content of coffee and details of production/clearance and duty payment of 'KOPIKO'. It is seen from the Central Excise invoices for clearance of 'KOPIKO' issued by M/s. Inbisco, that they classified the product KOPIKO of varying units under Tariff Item 17049090, availing benefit of Notification No. 12/2012-CE (Sl. No. 19) and paying Central Excise duty @ 6% Ad-valorem (plus Education Cess and Secondary and Higher Education Cess, where applicable).

3.2. M/s. Inbisco vide letter dated 13.08.2015, submitted the list of ingredients used for manufacture of KOPIKO include Refined Sugar, Liquid Glucose, Lecithin, Salt, Unsalted Butter, RBD Palm Kernel Oil, Skim Milk Powder, Flavour Coffee, Caramel etc. They also submitted labels of the imported product Flavour KPK-ID 001 and Kopiko Cappuccino.

4.1 A statement of Shri Rajesh Kushwaha, Department Head (Production) of M/s. Inbisco at the material period was recorded on 13.08.2015 by the DGCEI officials under Section 14 of the Central Excise Act, 1944 (hereinafter referred to as the 'CEA, 1944'), wherein, he *inter-alia*, deposed that he was working as Department Head Production and in-charge of Production in M/s Inbisco, looking after day to day production of the unit; that they were manufacturing different types of candy viz. Juicy Milk Mango Flavour, Juicy Milk Strawberry Flavour Candy, Kopiko Cappuccino Coffee Candy and Noodles viz. Joy Me Noodles; that they used Sugar, Liquid Glucose, Edible Vegetable Oil, Milk Solids, Coffee flavour 4%, Butter, Salt, Soya Lecithin E322, Vanillin etc. as raw material for manufacturing of Kopiko Cappuccino Coffee Candy; that they used Coffee flavour which was imported in the name of 'Flavour KPK' and other raw material purchased indigenously; they were maintaining production work order for recording shift-wise production in which they showed ingredients used and finished product manufactured; submitted specimen copies of the production order No. 210000415/21.01.2015, 210000686/27.02.2015, 210000904/27.03.2015, 210001961/25.05.2015, 210002254/ 11.06.2015, 210002577/13.07.2015 210002841/08.08.2015 maintained by them for manufacturing of Kopiko Cappuccino Coffee Candy; that Coffee flavour imported by their unit as 'Flavour KPK', that Ingredients Flavour KPK were Coffee Extract and artificial Coffee flavouring substances, that role of Flavour KPK was to give coffee flavour to the product Kopiko Cappuccino Coffee Candy; that 'Flavour KPK' imported from Indonesia for the manufacture of Kopiko Cappuccino Coffee Candy; that produced copies of sample labels of Kopiko Cappuccino Coffee Candy Jars/Pouches, manufactured by their company at Ahmedabad; that he was not

aware about the label 'Coffee Extract 2.5%' on Jars/pouches of Kopiko Cappuccino Coffee Candy, Shri Mukesh Sharma, Manager (R&D) would be the right person to explain the same.

4.2 Further, the statement dated 27.08.2015 of Shri Mukesh Sharma, Senior Manager (R & D) of M/s. Inbisco was also recorded by DGCEI officials under Section 14 of the CEA, 1944, wherein he *inter-alia* stated that he was in-charge of Research & Development in M/s. Inbisco and that he had gone through the statement dated 13.08.015 of Shri Rajesh Kushwaha, Department Head Production and agreed with the contents of the same; that the ingredients of product Kopiko Cappuccino Coffee Candy were Sugar/Glucose 85%, Flavours 5%, Salt/Butter/Vegetable Oil/Milk Powder/Lecithin 10% Approx; that they used Coffee Flavour, Vanilla Flavour and Milk Flavour for manufacturing of Kopiko Cappuccino Coffee Candy; that 'Coffee Extract 2.5% or 0.5%' as mentioned as one of the ingredients on the labels of the product Kopiko Cappuccino Coffee Candy means the product Kopiko Cappuccino Coffee Candy contain 2.5% or 0.5% coffee extract; on being asked to explain about the labels of the product Kopiko Cappuccino mentioning that "KOPIKO offers the enjoyment of like having rich roasted coffee at anytime and anywhere", he stated that Kopiko Cappuccino Coffee Candy gives a taste and aroma of rich roasted coffee; that they used a flavour "FLAVOUR KPK-ID 001(Coffee Flavour)" for manufacturing of Kopiko Cappuccino Coffee Candy which gives taste and aroma of rich roasted coffee; that "FLAVOUR KPK-ID 001(Coffee Flavour), a food flavor which consist of artificial and natural components, it gave characteristic Coffee taste and aroma to any food item in which it is added, generally it is added less than 5%.

4.3. A statement of Shri Nimesh Vyas, Manager (Finance & Accounts) of M/s. Inbisco was recorded by DGCEI officials on 23.11.2015 under Section 14 of the CEA, 1944 wherein he *inter-alia* stated that he being Finance & Account Manager and authorized signatory of the company, looking after accounts, finance & taxation, including indirect taxation matters for the past one year and eight months; that he had gone through the statements of Shri Rajesh Kushwaha, Department Head Production of M/s. Inbisco dated 13.08.2015 and Shri Mukesh Sharma, Sr. Manager (R & D) of M/s. Inbisco dated 27.08.2015 and agreed with the contents of the same; that M/s Inbisco registered for manufacture of excisable goods. They submitted the details of the products manufactured by their unit, classification and rate of duty which are as under-

Sr.No.	Product	CETH	Rate of duty	Notification availed
1	Kopiko-Cappuccino Candy	17049090	6%	No.12/2012-CE, dt. 17.03.2012, Sl.No.19
2	Juizy (Milk Strawberry/Mango) Candy	17049090	6%	
3	JoyMee Noodles	19022010	6%	

Further, he stated that Product 'Kopiko-Cappuccino' contains ingredients as under:

Sr.No	Ingredients	Percentage
1	Sugar and Glucose	85% (approx)
2	Salt, Butter, vegetable oil, milk powder and lecithin	10% (approx)
3	Coffee Flavour	5% (approx)

Further, he stated that they use 'Flavour KPK' Coffee Flavour for 'Kopiko-Cappuccino'; that it contains Natural Coffee Extract 30% and Artificial Coffee Flavour 70%; that 'Flavour KPK' gives Coffee taste and Aroma to the product Kopiko-Cappuccino candy; that "Flavour KPK' was main ingredient in product 'Kopiko-Cappuccino' to give coffee taste; that rationale behind classification of above product 'Kopiko-Cappuccino' candy under Central Excise Tariff Heading 17049090 of CETA,1985 for the purpose of payment of Central Excise duty in spite of its characteristic component were coffee flavour and coffee extract, he stated that the product 'Kopiko-Cappuccino' being hard boiled sugar and glucose confectionary and hence they classified the product under CETH No. 17049090 of Central Excise Tariff; that Flavour KPK

containing two basic components (i) Coffee Flavour & (ii) Coffee Extract, which gives coffee taste to Kopiko Cappuccino.

Further, he perused the CETH 2101 of the Central Excise Tariff Act, 1985

Tariff Item	Description of goods	Unit	Rate of duty
(1)	(2)	(3)	(4)
2101	EXTRACTS, ESSENCES AND CONCENTRATES, OF COFFEE, TEA OR MATE AND PREPARATIONS WITH A BASIS OF THESE PRODUCTS OR WITH A BASIS OF COFFEE, TEA OR MATE; ROASTED CHICORY AND OTHER ROASTED COFFEE SUBSTITUTES, AND EXTRACTS, ESSENCES AND CONCENTRATES THEREOF		
	- *Extracts, essences and concentrates of coffee, and preparations with a basis of these extracts, essences or concentrates or with a basis of coffee:*		
2101 11	-- *Extracts, essences and concentrates:*		
2101 11 10	--- Instant coffee, flavoured	kg.	12.5%
2101 11 20	--- Instant coffee, not flavoured	kg.	12.5%
2101 11 30	--- Coffee aroma	kg.	12.5%
2101 11 90	--- Other	kg.	12.5%
2101 12 00	-- Preparations with basis of extracts, essences, concentrates or with a basis of coffee	kg.	12.5%

On being asked to explain that for manufacture of product "Kopiko Cappuccino", main ingredients used was extract of coffee, so that the product gives the taste, aroma and effect of coffee when consumed, also on the packing pouch of individual candy, it was printed that the product was "POCKET COFFEE", on the Jar/ Pouch in which candies were packed, it was printed that *"Kopiko Cappuccino made from the highest quality coffee extract that enriched with milk to complete your KOPIKO experience,. KOPIKO offers the enjoyment of like having a rich roasted coffee anytime and anywhere*", accordingly the product "Kopiko Cappuccino" was classifiable under CETH-21011200 as " *Preparation with basis of extracts, essences, concentrates or with the basis of coffee*, whereas their company have wrongly classified the under CETH- 17049090 as *"Other- Sugar confectionery (including white chocolate), not containing cocoa*", he explained before the DGCEI officials that the coffee flavour containing Coffee extract was used for production "Kopiko Cappuccino" candy, still it was a sugar boiled confectionery and classifiable under CETH-17049090; that they had not informed the jurisdictional Central Excise Authorities regarding manufacturing process of the product 'Kopiko Cappucino' and its ingredients at any point of time; that they had not sought any clarification in writing from the jurisdictional Central Excise authorities about the Central Excise classification to be adopted for 'Kopiko Cappucino'.

5.1 It appeared that the product KOPIKO was being manufactured by M/s Inbisco by using imported input 'Flavour KPK-ID 001(Coffee Flavour). They have imported 'Flavour KPK-ID 001 (Coffee Flavour) classifying the same under Custom Tariff Heading 21011190 as *"extract essence and concentrate of coffee*". Label of imported 'Flavour KPK-ID 001 (Coffee Flavour) shows the ingredients as Coffee Flavour and Coffee Extract.

5.2 Central Excise Tariff Heading No. 1704 of the CETA, 1985 covers *Sugar Confectionery (including white chocolate) not containing cocoa and includes candies* whereas Tariff Item 21011200 covers *preparations with a basis of extracts, essences or with a basis of coffee.* On scrutiny of the data such as list of ingredients used, manufacturing process, label of imported Flavour Coffee, labels of the finished product etc., furnished by M/s. Inbisco and as per the depositions of Shri Rajesh Kushwaha, Department Head Production, Shri Mukesh Sharma, Senior Manager (R&D) and Shri Nimesh Vyas, Manager (Finance & Accounts), it appeared that one of the principal ingredients used in the manufacture of Kopiko-Cappuccino was "Flavour Coffee" containing "Coffee Extract" which gives the characteristic coffee flavor to the product. The said Flavour Coffee / Coffee Extract was imported by M/s. Inbisco under the description

"Flavour KPK-ID 001" by classifying the same under Customs Tariff Heading No. 2101 11 which reads as "*extracts, essences and concentrates of coffee....and preparations with basis of coffee*". Thus, it appeared that the product-Kopiko-Cappuccino manufactured by M/s. Inbisco using the said coffee extract / coffee flavour would be *preparations with a basis of extracts, essences of coffee* and classifiable under CETH No. 21011200 of the CETA, 1985.

5.3 As clarified by M/s. Inbisco, the imported Flavour KPK-ID 001 contains approximately 30% coffee extract and the product "Kopiko Cappuccino" manufactured by them contain coffee extract to the extent of approximately 2.5% or 0.5%. Thus it appeared that the "Kopiko Cappuccino" is essentially preparations with a basis of Coffee extract. It further appeared that the imported Flavour KPK imparts the characteristic coffee flavour to the "Kopiko Cappuccino" and thus the essential characteristic of the said product marketed as "pocket coffee" is derived from the coffee extract. As seen from the website of Inbisco, they are advertising the product "Kopico Cappuccino" as Candy which is perfect blend of high quality coffee extracts enriched with milk and as seen from the label of "Kopico Cappuccino" the product is marketed as 'POCKET COFFEE' containing coffee extract of 2.5% or 0.5%. Further, as clarified by M/s. Inbisco themselves, the coffee extract ingredient is derived from the Flavour KPK imported and is classified by them as "extract/ essence/ concentrate of coffee under Chapter 21 of the Customs Tariff. Thus, it appeared that the coffee extract/flavour which gives essential characteristic flavour/ distinct identity to product- Kopiko-Cappuccino is imported as extract/flavour of coffee and the product Kopiko-Cappuccino is manufactured using coffee extract/flavour can be only preparations with basis of extracts/essences of coffee.

5.4 It is contended by M/s. Inbisco that the product- Kopiko-Cappuccino is essentially sugar based candies having coffee flavour. However, as seen from the labels, M/s. Inbisco market the "Kopico Cappuccino" as "*Pocket Coffee*"/ "*A Rich Tasting Aromatic Coffee Made of Choice Coffee Beans*" /"*Coffee Candy*" and claim that the said products are "*made from the highest quality coffee extract.....*"/ "*Kopiko offers the enjoyment of like having a rich roasted coffee anytime.* Further, it is not in dispute that the imported Flavour KPK comprising of coffee extract to the extent of 30% imparts the characteristic coffee taste to the "Kopico Cappuccino" which also contains coffee extract as one of the essential ingredients. Kopiko products are sold as Coffee Candy / Pocket Coffee and known as such in common parlance. The coffee extract contained in the products, is the essential ingredient giving Kopiko- Cappuccino the distinct identity. Hence, it appeared that the products Kopiko Cappuccino is preparations based on coffee extract/essence and classifiable accordingly under Tariff Item 2101 12 00 of the CETA, 1985.

Principles of Classification:

As per Rule 3(a) of the General Rules for the interpretation of the CETA, 1985, the heading which provides the most specific description for the product shall be preferred to the headings providing a more general description and further in terms of Rule 3(c) of the Rules, goods which cannot be classified in accordance with the Rules 3(a) or 3(b) shall be classified under the heading which occurs last in numerical order among those which equally merit consideration. On both these counts, it appeared that since the heading "*preparations with basis of extracts, essences, concentrates or with a basis of coffee*" specifically describes the products "Kopiko Cappuccino" and since the Tariff Item 21011200 occurs later in numerical order via-a-vis Chapter 17 of the CETA, 1985, the said products appeared classifiable under Tariff Item 21011200 of the CETA, 1985 attracting appropriate rate of Central Excise duty thereon.

7. M/s. Inbisco classified the products Kopiko Cappuccino under Tariff Item 17049090 as Sugar Confectionery not containing Cocoa. The said Tariff Item is covered under MRP based assessment under Section 4A of the CEA, 1944 with an abatement of 30% of retail sale price (Sl. No. 4 of Notification No. 49/2008-CE (NT) dated 24.12.2008, as amended). The effective rate of duty for goods classifiable under Tariff Item 1704 90 is 6% Adv in terms of Sl. No. 19 of Notification No.12/2012-CE, as amended. However, as discussed in para supra, it appeared that the products Kopiko Cappucino are more appropriately classifiable under Tariff Item 21011200 as preparation with basis of extracts, essences, concentrates or with a basis of coffee. The said

CETH is also covered under MRP based assessment under Section 4A of the CEA, 1944 with an abatement of 30% of retail sale price (Sl No. 16 of Notification No. 49/2008-CE (NT) dated 24.12.2008, as amended) but attracting full rate of CE duty @ 12% and the Education Cesses thereon. It appeared that by mis-classifying the products Kopiko Cappuccino under CETH No. 17049090 and availing the benefit of exemption Notification No. 12/2012-CE dated 17.03.2012 (Sl. No. 19), instead of classifying under CETH No. 2101 12 00 attracting full rate of Central Excise duty, M/s. Inbisco short-paid Central Excise duty. The Central Excise duty so short-paid was worked out by the DGCEI officials amounting to Rs. 3,64,53,793/- during the period November,2014 to July, 2015.

8. **Outcome of Investigation conducted by DGCEI:-**

From the foregoing discussions, documents referred and depositions recorded, it appeared that:

- M/s. Inbisco is *inter-alia* engaged in the manufacture of excisable goods viz. Kopiko Cappuccino
- The said goods are classified by them under Central Excise Tariff Item No. 17049090 of the first schedule to the Central Excise Tariff Act, 1985, and they are availing the benefit of exemption Notification No. 12/2012-CE dated 17.03.2012 (Sl. No.19), wherein Central Excise duty is being paid @ 6% Adv.
- Admittedly, one of the essential ingredients used in the manufacture of Kopiko-Cappuccino is Coffee Flavour or Coffee Extract which is imported under the description "Flavour KPK-ID 001" classifying the same under Customs Tariff litem No. 21011190 which reads as "*extracts, essences and concentrates of coffee*". The imported product is labeled to show that it as 'Flavour KPK-ID 001(Coffee Flavour)' and ingredients as "Coffee Flavour & Coffee Extract", therefore, it appeared that even the input is described by the supplier consisting Coffee Flavour and Coffee Extract.
- M/s. Inbisco, the imported Flavour KPK-ID 001contains approximately 30% coffee extract and the products Kopiko Cappuccino manufactured by them contain coffee extract to the extent of approximately 2.5% or 0.5% of the 30% coffee extract contained in the imported Flavour-KPK.
- The Flavour KPK imparts the characteristic coffee flavour to the Kopiko products and thus the essential characteristic of the said products marketed as "pocket coffee" is derived from the coffee extract.
- As seen from the website of M/s. Inbisco, they are advertising the product Kopiko Cappuccino as Candy which is perfect blend of high quality coffee extracts enriched with milk.
- As seen from the labels of Kopiko Cappuccino, the product is marketed as "pocket coffee" containing coffee extract of 2.5% or 0.5%.
- As seen from the labels, M/s. Inbisco market the Kopiko products as "*Pocket Coffee*"/ "*A Rich Tasting Aromatic Coffee Made of Choice Coffee Beans*" /"*Coffee Candy*" and claim that the said products are "*made from the highest quality coffee extract.....*"/ "*Kopiko offers the enjoyment of like having a rich roasted coffee anytime* and known in the market accordingly. In essence, the Kopiko products are claimed to be made from coffee extract.
- As per Principle 3(a) of the General Rules for the interpretation of the first schedule to Central Excise Tariff Act, 1985, the heading which provides the most specific description for the product shall be preferred to the headings providing a more general description and it appeared that "Kopiko-Cappuccino" fits into the specific description "*preparations with basis of extracts, essences, concentrates of*

coffee" under Tariff Item No. 21011200 attracting 12% adv. rate of Central Excise duty.

- Further, in terms of Rule 3(c) of the General Rules for the interpretation of the schedule to Central Excise Tariff Act, 1985, Coffee Candy, as referred to by M/s. Inbisco, would also fall under the Tariff Item no. 21011200 of the CETA, 1985.

- The mis-classification and resultant irregular availment of Notification No. 12/2012-CE dated 17.03.2012, as amended, resulted in short-payment of Central Excise duty to the tune of Rs. 3,64,53,793/- for the period from November 2014 to July, 2015.

9. **Legal Provisions and Quantification of Central Excise duty Liability**

9.1. In terms of sub-section (2) of Section 4A of the CEA, 1944, "*Where the goods specified under sub-section (1) are excisable goods and are chargeable to duty of excise with reference to value, then, notwithstanding anything contained in section 4, such value shall be deemed to be the retail sale price declared on such goods less such amount of abatement, if any, from such retail sale price as the Central Government may allow by notification in the Official Gazette*".

9.2 As per Sl. No. 16 of Notification No. 49/2008-CE (NT) dated 24.12.2008, as amended, "*Extracts, essences and concentrates, of coffee, and preparations with a basis of these extracts, essences or concentrates or with a basis of coffee*", falling under Tariff Item No. 2101 12 00 are notified for assessment under Section 4A of the Act, ibid, wherein abatement of 30% from retail sale price is provided. The said goods are leviable to Central Excise duty @12% Adv.

9.3. The duty thus short paid by M/s. Inbisco by mis-classification of the products and wrong availment of benefit of Notification No. 12/2012-CE dated 17.03.2012 for the period from November, 2014 to July, 2015 amounting to Rs. 3,64,53,793/- (Rupees Three Crore Sixty Four Lakh Fifty Three Thousand Seven Hundred and Ninety Three only) including Cenvat: Rs, 3,60,73,981/- plus Education Cess Rs. 2,53,210/- plus Secondary & Higher Education Cess Rs. 1,26,601/-. The abstract of Central Excise duty liability is worked out as hereunder:-

Period	Assessable Value (in Rs.)	Central Excise duty payable @12% Adv plus cesses (in Rs.)	Central Excise duty paid @6% Adv plus cesses (in Rs.)	Differential Duty payable inclusive of cesses (in Rs.)
November,2014 to July,2015	57,18,91,544/-	7,11,91,035/-	3,47,37,242/-	3,64,53,793/-

Central Excise Duty from March, 2015 @12.5% adv - paid by M/s. Inbisco @ 6%adv.

10.1 Therefore, it appeared that M/s. Inbisco contravened the following provisions of the CEA, 1944 and Rules framed there under-

- Section 3 of the CEA, 1944 inasmuch as they cleared the excisable goods without payment of appropriate Central Excise Duty
- Rule 4 of the Central Excise Rules, 2002 (herein after referred to as the 'CER, 2002') inasmuch as they short-paid the duty leviable on "Kopiko Cappuccino".
- Rule 6 of the CER, 2002 inasmuch as they failed to correctly assess the duty payable on "Kopiko Cappuccino".
- Rule 8 of the CER, 2002 inasmuch as they failed to pay the Central Excise duty by the stipulated due date.
- Section 5A of the CEA, 1944 inasmuch as they have irregularly availed the benefit of Notification No. 12/2012-CE dated 17.03.2012, as amended, resulting in short-payment of duty.

10.2. It appeared from the foregoing paras that M/s. Inbisco failed to correctly classify, assess and pay the Central Excise duty in time and also irregularly availed the benefit of Notification No. 12/2012-CE dated 17.03.2012 for which they were not eligible; it appeared that they contravened the provisions of the Central Excise Act/ Rules made there under with intention to evade/short-pay Central Excise duty on the product "Kopiko-Cappuccino" to the tune of Rs, 3,64,53,793/-, is recoverable from M/s. Inbisco under Section 11A(1) of the CEA, 1944 along with interest for delayed payment of evaded Central Excise duty under Section 11AA of the CEA, 1944. For the acts of contravention of above provisions, they also appeared to be liable for penalty under Rule 25 of the CER, 2002, read with Section 11AC of the CEA, 1944.

11. On the basis of above outcome of the investigation conducted by the DGCEI, M/s. Inbisco were issued show cause notice F.No. DGCEI/AZU/36-64/2015-16 dated 08.12.2015 by the Principal Additional Director General, DGCEI, Ahmedabad Zonal Unit, Ahmedabad, to show cause to the Commissioner of Central Excise, Ahmedabad-II Commissionerate, as to why:-

(i) Excisable Goods viz. "Kopiko Cappuccino" should not be classified as *preparations with basis of extracts, essences, concentrates or with a basis of coffee"* under Tariff Item no.21011200 of the first schedule to Central Excise Tariff Act, 1985.

(ii) An amount of Central Excise duty of Rs. 3,64,53,793/- (Rupees Three Crore Sixty Four Lakh Fifty Three Thousand Seven Hundred and Ninety Three only) (inclusive of education cesses) short paid by them during the period November, 2014 to July, 2015 should not be demanded from them under Section 11A(1) of Central Excise Act, 1944;

(iii) Interest at the applicable rate on the amount mentioned at Sl. No (ii) above should not be recovered from them under Section 11AA of Central Excise Act, 1944;

(iv) Penalty should not be imposed on them in terms of Rule 25 of Central Excise Rules, 2002 read with Section 11AC of Central Excise Act, 1944;

12. After due process of personal hearing, this case was adjudicated by the Commissioner, Central Excise, Ahmedabad-II, vide OIO No. AHM-EXCUS-002-COMMR–3/2016–17 dated 31.03.2017 wherein he ordered classification of Excisable goods viz. Kopiko Cappuccino under Tariff Item 2101 1200 of the first Schedule of the Central Excise Tariff Act, 1985 as 'preparations with basis of extracts, essences, concentrates or with a basis of coffee', confirmed the demand of Central Excise duty of Rs. 3,64,53,793/- being duty short paid during the period November, 2014 to July, 2015 under sub-section (1) and (10) of Section 11A of the Central Excise Act, 1944, ordered for charging interest under Section 11AA of the Central Excise Act, 1944 and imposed penalty in terms of Section11AC(1)(a) of the Central Excise Act, 1944, read with Rule 25(1) of Central Excise Rules, 2002.

13. Further, following two SCNs were issued by the Commissioner, CGST & Central Excise, Ahmedabad North against M/s.Inbisco India Pvt.Ltd, Plot No.SM-9/5, GIDC – Bol, Sanand-II Industrial Estate, Sanand, Dist: Ahmedabad, in terms of Section 11A(7A) of the Central Excise Act, 1944 demanding Central Excise duty of Rs.17,19,97,176/- for the short-paid amount on the clearances of Kopiko Cappuccino by wrongly availing benefit of exemption Notification No.12/2012-CE dated 17.03.2012 (Sl.No.19) by adopting similar modus operandi, under Section 11A(1)(a) of the Central Excise Act, 1944, demanding interest under Section 11AA of the Central Excise Act, 1944 and proposing penalty under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC(1)(a) of the Central Excise Act, 1944.

Sr.no.	SCN No. & Date	Period involved	Amount of duty demanded/Rs.
01	V.21/15-16/OA/2017 dated 18.07.2017	August 2015 to December 2016	14,96,00,117/-
02	V.21/15-03/OA/2018 dated 20.09.2018	January 2017 to June 2017	2,23,97,059/-
	Total		17,19,97,176/-

WRITTEN SUBMISSIONS:-

14. **In respect to Show Cause Notice No. V.21/15-16/OA/2017 dated 18.07.2017 and Show Cause Notice No.V.21/15-03/OA/2018 dated 20.09.2018, the noticee, vide their letter dated 30.08.2017 and 26.10.2018 have filed the reply to SCNs respectively, wherein *inter-alia* submitted as under;**

"We, Inbisco India Private Limited ('INBISCO', or the 'Company' for short) have our office at Plot No SM-9/5, GIDC Phase –II, Sanand, Ahmedabd (Gujarat). For the purpose of Central Excise, we are registered under the Central Excise law and held Central Excise registration bearing number AABCI8732PEM004 during the period covered by the captioned Show Cause Notice ('Notice').

2. We have received the above referred Notice on 28th September2018. The Notice calls upon us to reply to the allegations raised in the Notice with your good office, along with the relevant information/ documents within 30 days of receipt of the Notice. The periodical Notice relates to the differential duty demand of Rs. 2,23,97,059/- over alleged misclassification of the Kopiko Cappuccino. The Notice proposes to classify Kopiko Cappucino candy cleared for home consumption during the period from January 2017 up to June 2017 under sub-heading 21011200 attracting the higher rate of duty at 12.5 % as against the rate of 6 % under central excise tariff sub-heading 17049090 read with exemption against Sr. No 19 of the Table under Notification 12/2012, C. E. dated 17-Mar-2012.

3. Prior to setting out our submissions with regard to the allegations raised in the SCN, we request to place here-in-after for consideration by your kind authority the background of INBISCO and the facts of the case in brief. This shall facilitate understanding the case in the perspective towards justice.

4.0 Background of the Company and facts of the case in brief:

4.1 Incorporated in 2008, INBISCO is engaged in the distribution of food products like candy, biscuit and chocolate in India. The Company had forayed into manufacturing by setting up a manufacturing plant in Hyderabad in 2012 and Sanand,Gujarat in 2014.

4.2 During the period covered under the Notice, INBISCO continued to engage itself in the manufacture of edible excisable goods, namely Kopiko (Cappuccino),Juizy Milky (Mango and Strawberry) and noodles under the brand name of Joy Mee Noodles.The product in question in the SCN, namely Kopiko (Cappuccino), a hard boiled sugar and glucose confectionary was cleared under concessional rate of 6.00%, ad valorem, in terms of exemption Notification 12/2012 – C.E., dated 17-Mar-2012(Sr. No 19).

4.3 Although not mentioned in the Notice, the Directorate General of Central Excise Intelligence, Hyderabad Zonal unit ('DGCEI-HZU') set off the original litigation in respect of our Hyderabad unit which was dropped by the Commissioner of Central Excise, Hyderabad – IV vide his Order-in-Original No: HYD-EXCUS-004-COM-053-15-16, dated 08-Dec-2015. The Commissioner observed that the same product when imported into India is assessed under Chapter Heading 1704 as sugar boiled confectionery not only by Indian customs authorities but also by various other countries like USA, Phillippines, Thailand, Japan and Malaysia. The O-i-O dated 08-Dec-2015, was subjected to a review and an appeal was filed against the same with the Hyderabad Tribunal. The departmental appeal is pending.

4.4 In a parallel investigation the Directorate General of Central Excise Intelligence, Ahmedabad Zonal unit ('DGCEI-AZU') followed up with the case in respect of our Ahmedabad unit resulting in a Show Cause Notice by the issued by the Principal Additional Director General, vide F. No: DGCEI/AZU/36-64/2015-16, dated 08-Dec-2015 covering the period from November, 2014 up to July, 2015. This earlier SCN dated 08-Dec-2015 was confirmed fully, not taking into regard the evidences of uniformity of classification at global level by the Commissioner of Central Excise, Ahmedabad – II vide Order-in-original No: AHM-EXCUS-002-COMMR-3/2016-17, dated 31-March-2017. Inbisco's appeal against the O-i-O dated 31-March-2017 is pending in Ahmedabad Tribunal.

4.5 The subsequent Show Cause Notice no V.21/15-16/OA/2017 dated 18-July-2017 for the period from Aug-2015 up to Dec-2016 has been responded to vide our reply dated 30th August 2017.

*5. **Our submissions with regard to the points of allegations raised in the Notice***

5.1 At the outset, we wish to submit that the demand raised in the Notice (attached as Annexure A) is not sustainable, as the allegations are based on an incorrect appreciation of facts and law. The SCN follows the earlier notice covering the same issue for earlier period which has passed through the level of

original adjudication proceedings. It is through the deeming provisions of Section 11A(7A) of the Central Excise Act, 1944, that the impugned Notice is a deemed notice in terms of Section 11A(1), ibid, as the earlier SCN dated 08-Dec-2015 and SCN 18-July-2017 being issued under said Section 11A(1), we place before your considerate authority the submissions in response to each of the allegation raised in that earlier SCN dated 08-Dec-2015, as set out hereinafter.

5.2 Before we venture into battling the allegations, we invite attention to the formula in the manufacture for a batch of 462.251 kg of Kopiko Cappuccino as certified by our technical expert(Letter dated 23-Aug-2017):-

Sr. No.	*Ingredient*	*Quantity(kg)*	*Percentage(%)*	*Function*
1.	*Refined sugar*	*154.67*	*33.46*	*Sweetner*
2.	*Liquid Glucose*	*190.76*	*41.27*	*Sweetner*
3.	*Lecithin*	*1.228*	*0.26*	*Emulsifier*
4.	*Salt*	*1.45*	*0.31*	*For taste*
5.	*Unsalted Butter*	*8.70*	*1.88*	*For taste*
6.	*RBD Palm Olein*	*37.28*	*8.06*	*For taste*
7.	*Ethyl vanillin*	*0.024*	*0.005*	*For flavor*
8.	*Skim Milk Powder*	*3.424*	*0.74*	*For taste & texture*
9.	*Coffee Flavour*	*7.47*	*1.62*	*For flavor*
10.	*Water*	*56.214*	*12.16*	*Solvent*
11.	*Milk Flavour*	*0.171*	*0.037*	*For flavor*
12.	*Caramel Colour*	*0.86*	*0.19*	*For colour*
	Total quantity for 1 batch	*462.251 kg*		

*Thus, refined sugar and liquid glucose together constitute **nearly** 75% by weight of the Kopiko Cappuccino candy. Salt, unsalted butter, RBD palm olein, ethyl vanillin and milk powder form another 11% by weight for imparting the taste. Coffee flavor shares 1.62% by weight.*

5.3 <u>Allegation :"Coffee extract" as the "basis" for manufacture of Kopiko-Cappuccino</u>

The essential ingredients used in the manufacture of Kopiko-Cappuccino is Coffee extract which is imported under the description "flavor KPK-ID 001". Therefore, the same would be classifiable under Customs tariff item no. 2101 11 90 which reads as "extracts, essences and concentrates of coffee.... and preparation with basis of coffee". It is also alleged that "Coffee extract" which give the characteristic coffee flavor is the principal ingredient of the confectionery.

<u>Our submissions</u>:

5.3.1 We wish to submit that Kopiko Cappuccino is essentially a hard boiled sugar and glucose confectionary and not a preparation based on coffee or coffee extract and if at all basis of preparation has to be arrived at for Kopiko, then refined sugar and liquid glucose would constitute the basis. By no stretch of imagination, it can be said that flavour coffee is the basis of preparation of sugar boiled confectionery. We wish to submit that flavour coffee just produces an aromatic effect and such enrichment with coffee does not change the basic character and the use of the food product, i.e. 'candy'.

5.3.2 Chapter 21 titled as 'Miscellaneous Edible Preparation' deals with mixed products amongst others and the single dash description above the proposed CETSH 2101 1190 reads as 'extracts, essences and concentrates of coffee, tea or mate and preparations with a basis of these extracts, essencesor concentrates or with a basis of coffee'. On closer examination of the grouping of the products under heading '2101', it would be evident that the preparations under Heading '2101' refer to one where the extracts essence and concentrates of coffee is the 'basis'. The emphasis thus is laid on the term 'basis' and it is made evident that the preparations should be made with a basis of coffee, tea etc.

5.3.3 As per oxford dictionary, the term 'basis' means "the underlying support or foundation for a process"; in other words, 'basis' means 'underlying/ predominant material for preparation'. Admittedly,

the coffee essence which is used as a flavouring agent is not the basis/underlying/predominant material in the product. For this the process and ingredients of the Kopiko Cappuccino candy where one of the ingredients is the 'flavor KPK-ID 001' classified indeed as an extract of coffee. We have placed the listing of ingredients of a batch of Kopiko Cappucino on record and we submit that refined sugar and liquid glucose constitute the basis for preparation of any candy including Kopiko Cappuccino. By no stretch of imagination, it can be said that the added flavours including the extract of coffee is the basis of preparation of the sugar boiled confectionery Kopiko Cappuccino. We submit that flavours produce an aromatic effect and such enrichment with orange flavor, strawberry flavor or coffee flavor does not change the basic character and use of the confectionery, i.e. 'candy'.

5.4 ***Allegation: Characteristic Coffee taste and Coffee Extract as one of the Essential Ingredients***

It is alleged at para 5.4 in the SCN dated 08-Dec-2015 that "imported flavor KPK comprising of coffee extract to the extent of 30% imparts the characteristic coffee taste to the Kopiko Cappuccino which also contain coffee extract as one of the essential ingredients".

Our submission

5.4.1 We submit that the coffee flavour percentage of 1.62 % is very low as compared to the percentages of rest of the items that play the collective role for taste as well as flavor of the confectionery candy. Coffee is one of the several flavours in each Kopiko Cappuccino candy. The other flavours being milk and vanilla. However, sugars form the major ingredient by weight followed by water.

5.4.2 Refined Sugar forms 33.46 % by weight and Liquid Glucose forms 41.27 % by weight of Kopiko. Glucose is a simple sugar with the molecular formula C6H12O6. Glucose circulates in the blood of animals as blood sugar. In totosugar content by weight in Kopiko Cappuccino is nearly 75 %. The principality of major ingredients cannot be passed on to the substance that renders flavor to the principal ingredient, i.e. sugars.

5.4.3 We submit that although the name of coffee is used to market the sugar boiled confectionery, the essential character of candy is the delivery of the sugar shot which is carried out by the principal ingredients, namely sugars. Chapter Heading 1704 covers Sugar confectionery not containing cocoa. We further wish to submit that the chapter notes to chapter 17 specifically state that this chapter does not cover sugar confectionery containing cocoa, however the same is not specifically said for preparation made of coffee. Hence, we submit that Kopiko Cappuccino merits classification under chapter 17.

5.4.4 Chapter sub-heading 1704 9020 covers Boiled sweets, whether or not filled, indicating a filling of another item other than cocoa. Sugar Confectionery containing mint are classified as such as ruled in Commissioner Of C. Ex., Indore Versus Plethico Pharmaceuticals Ltd [2015 (328) E.L.T. 645 (Tri. - Del.)] where the Hon'ble Tribunal held that "Heading 1704 of the central excise tariff is based on the HSN heading 17.04. Therefore, the scope of heading 17.04 of the central excise tariff would be same as the scope of the HSN heading 17.04. Heading 17.04 of the central excise tariff and heading 17.04 of the HSN cover sugar confectionery (including white chocolate), not containing cocoa - Each table of Actifresh consists of 1495 mg of sucrose and 990.30 mg of liquid glucose and active ingredient is 4.8 mg of pudina ark and 3.90mg of nilgiri oil which is nothing but eucalyptus oil. In view of the HSN explanatory notes mentioned above, actifresh would be classifiable as sugar confectionery under heading 1704, as the ingredients are mainly flavoring agents not having any therapeutic value. For the same reason, plethico mint tablet which, in addition to the sugar/glucose base contains 0.15 mg of pudina ark would be classifiable as sugar confectionery under heading 1704 as the pudina ark is only a mouth freshener or flavoring agent."

5.4.5 Thus, it can be safely concluded that Heading 1704 permits any filler or content of any material other than cocoa in a sugar confectionery and we submit that Kopiko Cappuccino contains several flavours including the characteristic coffee flavor.

5.5. Coffee flavour whether responsible for classification

5.5.1 We wish to submit that the formula of Kopiko (as mentioned in 1.4 above) contains the following ingredients for the purpose of flavouring along with coffee flavour:

Sr. No	*Ingredient*	*Quantity(kg)*	*Percentage(%)*	*Function*
9.	*Coffee Flavour*	*7.47*	*1.62*	*For flavor*
11.	*Milk Flavour*	*0.171*	*0.037*	*For flavor*
12.	*Caramel Colour*	*0.86*	*0.19*	*For flavor*

As seen above, the Ethyl Vanillin, Skim Milk Powder, Flavour milk also merit consideration as flavours. However, the Department has elaborated on the usage of Flavour Coffee only which is unjust and only with an intention for claiming higher rate of duty ignoring the merits of the case.

5.5.2 We wish to submit that the product Flavour KPK-ID 001 containing 30% coffee extract imported under Chapter heading 21011190 should not be the basis for determination of classification of finished product cleared when admittedly it is just but one of the additives used for imparting flavour and does not form the basis of preparation of the manufactured product which is sugar confectionary with 33% refined sugar and 41% liquid glucose with a mere 2.5% / 4.5% of KPK-ID 001 depending on the variant, namely Cappuccino or Espresso.

5.5.3 We further wish to submit that in relation to classification of waffles and wafers between tariff headings 1905.31 vs 1905.90, the Honorable Supreme Court in the case of CCEx, Mumbai v. Britania Industries Ltd Civic appeal 4539-4540 of 2005 has made a reference and drew a clear distinction between cocoa and the chocolate that is made out of cocoa. In the instant case, an analogy can be drawn to the extent that there is a clear distinction between coffee extract and the product made with coffee extract. Hence the product Kopiko is rightly classifiable under Chapter Heading1704.We further wish to submit that Flavour KPK-ID 001 is a mere ingredient in very small quantity used in the manufacturing process. In this regard, we wish to submit that the input coffee flavor is different from the output candy manufactured and the two products cannot be construed as the same.

5.6 ***<u>Allegation :Candy Labels whether responsible for classification of KopikoCappucino</u>***

The SCN relies upon the labels of the finished product in support of the allegation that "Coffee extract" is the principal ingredient of the KopikoCappucino,

<u>Our submissions:</u>

5.6.1 We submit that the candy label does indeed display the message that Kopiko Cappucino offers the enjoyment of like having a rich coffee taste. That Kopiko is made from coffee extract is also declared on the label as below: -

> *"KOPIKO Cappuccino made from the highest quality coffee extract that enriched with milk to complete your Kopiko experience"*

5.6.2 We draw your kind attention to the findings of the High Court of Bombay in the case of Blue Star Ltd. v. UOI [1980 (6) E.L.T. 280] were advertising material had led the department to classify "walk-in-coolers" to the detriment of the assessee.

5.6.3 We therefore may be allowed to rest our case for continuing to classify the confectionery manufactured by us under the CETSH 17049090 and not be prejudicially swayed by the description of the same as 'pocket coffee' or a coffee sounding name like Kopiko Cappuccino or by the coffee flavoured additive.

5.6.4 The Blue Star judgement was referred by the Hon'ble CEGAT, Mumbai in the case of Hindustan Level Ltd. Vs. Collector Of Central Excise, Mumbai [2000(121) ELT 451 Tri]. In this case, the high claims made on the labels of 'Dove' were used as evidence by the department against the assessee's claim for classification as 'soap'. The material on the label as certified by the Chief Chemist read as under: -

> *"Dove is a beauty Bar that <u>does not dry the skin like soap</u> because it is made of natural cleansing ingredients and 1/4 moisturising cream..."*
>
> *Emphasis supplied.*

Allowing the assessee's appeal, the Tribunal based it's finding on the commercial perception rather than on the tall claims made in the sales literature and allowed the classification of Dove as a 'soap' rather than as a 'Beauty or make-up preparations and preparations for the care of the skin'. The relevant portion of the Hindustan Lever judgment is reproduced as below: -

> *24. The word "soap" as is commercially understood or is appreciated by an individual means a product which lathers, in the process cleansing the body of a person (or a fabric in the case of laundry cloth) of grime and dirt. This was the appreciation of the people used as samples in the test conducted referred to above. In a departmental store like Apna Bazaar, Dove is found nestling on the same shelf with other soaps.*

5.6.5 We therefore submit that the marketing content displayed the labels need not prejudice the classification of Kopiko Cappuccino under Chapter sub-heading 1704 9090. The Chapter sub-heading

2101 1200 proposed in the SCN is without basis of law and incorrect assessment of facts. We wish to submit that the advertisement carried by us is for attraction of customers and the same cannot be a criterion for deciding tariff classification which is based on nature of product and international parameters. In other words, payment of duty under a particular tariff item must depend upon the nature of product and not on the advertisement gimmick employed by the Company.

5.6.6 We further to submit that mere branding/advertisement campaigns run by the Company such as "Pocket Coffee", "Kopiko offers the enjoyment of like having a rich roasted coffee anytime" would not change the essence of the product and the same cannot be used like normal coffee powders along with milk/water for preparation of beverage's. Irrespective of the fact of how Kopiko is marketed/advertised, it can be used only for immediate consumption and not for further preparations. The classification under a particular tariff item cannot be fastened on mere advertisements carried out by the Company.

5.6.7 In this regard, we wish to submit that the Honorable CESTAT, Mumbai in the case of Hindustan Lever Ltd. v. Collector Of Central Excise, Mumbai [2000 (121) E.L.T. 451 (Tribunal)] has ruled that "The department cannot go by the advertising material in which it is claimed that the product 'dove' does not dry the skin like soap and hold that the product is not used as 'soap'. The list of components and the percentages thereof as also the process of manufacture shows that the product is an organic surface active agent for use as soap. Commercial nomenclature or trade understanding should be the basis of classification except when the statutory content, in the Tariff Entries require a departure". This case has been maintained by the Honorable Supreme court - Citation number Commissioner v. Hindustan Lever Ltd. – [2002 (146) E.L.T. A214].

5.6.8 Further, the Honorable Madras High Court in case of Union Of India and Others v. T.S.R. & CO. [1985 (22) E.L.T. 701], it was held that "In this case, the cover contains the expression, "bath oil"- The label of a woman in that style (displaying her lavishly grown and flowing hair) cannot be suggestive of the use of the thailams as hair oils and will depict ..... only the beauty of a woman and the refreshing effect the woman may have with the use of the thailams as bath oils. In any event it has only an advertising effect or value and nothing more. Further, tax on a product cannot be levied merely on the basis of a suggestive aspect of a picture found in the label which is intended to attract the customers to use the thailams. The expression "perfumed hair oil" will normally indicate oil which is exclusively prepared for the care of the hair and it will not in any sense include bath oil which is applied to the entire body or portions of the body before bath. It is the specific case of the respondent that in the commercial field the thailams manufactured by it are not treated as hair oils much less perfumed hair oils, as the thailams are intended for use for cooling the body as such. These thailams could never be considered as an item of cosmetic or toilet preparation."

5.6.9 Based on our submissions above, we submit that advertisements only have persuasive value and the same cannot be considered for determining classification disregarding the mandatory rules to be followed in the classificatory process. Thereby Kopiko would accordingly be classifiable only under heading 1704.

5.6.10 On the flip side we wish to submit that "Hygenic Deposited Sugar Boiled Confectionery" is printed on the product labels and wrappers clearly indicating the nature of the product as 'Sugar Confectionary/ Candy'. The sample labels and wrapper is attached.

5.7 ***<u>Allegation :General Rules of Interpretation</u>***

At para 6 the SCN invokes the Rule 3(c) of the General Rules for Interpretation of the First Schedule to the Central Excise Tariff Act, 1985, whereby goods that cannot be classified in terms of Rule 3(a) or Rule 3(b) shall be classified under the heading which occurs last in numerical order among those which merit consideration.

<u>Our submissions</u>

5.7.1 We wish to submit that the analysis of classification of Kopiko is to be made in sequential manner. Rule 1 states that "The titles of Sections and Chapters are provided for ease of reference only; for legal purposes, <u>classification shall be determined according to the terms of the headings</u> and any relative Section or Chapter Notes and, provided such headings or notes do not otherwise require, according to the provision hereinafter contained."

5.7.2 We wish to submit that on a plain reading of the GIR, classification has to be determined only on the basis of description of the heading, read with relevant section or chapter notes. The headings are of paramount importance, and as the HSN Explanatory Notes state, the headings are expected to cover the

broad ambit of classification since it is impossible to cover all the goods specifically in titles. It is self-evident that many goods in the tariff are classified without recourse to any further consideration of the interpretative rules.

5.7.3 Rule 3(c), ibid, would come in picture only after exhausting the applicability of subrules (a) and (b), ibid, which in turn would be necessitated after insufficiency of Rules 1 and 2 to classify under a singular entry. So, it is imperative that our submissions progress from Rule 1 onwards.

5.7.4 Inbisco's classification under Chapter sub-heading 1704 9090 is disputed by the department in the SCN by proposing to classify the Kopiko Cappuccino under Chapter sub-heading 2101 1200. Comparing the two, it is evident that the level of specificity is achieved at the level of Heading under Chapter 17 while generality prevails at the level of Subheading under Heading 2101 and identification remains incomplete. Even the titles of Chapters 17 and 21 generate unequal level of specificity. Chapter 17 applies to Sugar and Sugar Confectionery whereas Chapter 21 refers to Miscellaneous Edible Preparations.

Chapter titles	*CHAPTER 17* *Sugars and sugar confectionery*	*CHAPTER 21* *Miscellaneous edible preparations*
4 Digit Head	*1704 SUGAR CONFECTIONERY (INCLUDING WHITE CHOCOLATE), NOT CONTAINING COCOA*	*2101 EXTRACTS, ESSENCES AND CONCENTRATES, OF COFFEE, TEA OR MATE AND PREPARATIONS WITH A BASIS OF THESE PRODUCTS OR WITH A BASIS OF COFFEE, TEA OR MATE; ROASTED CHICORY AND OTHER ROASTED COFFEE SUBSTITUTES, AND EXTRACTS, ESSENCES AND CONCENTRATES THEREOF*
Single Dash	*1704 90 - Other:*	*- Extracts, essences and concentrates of coffee, and preparations with a basis of these extracts, essences or concentrates or with a basis of coffee*
8 Digit Sub-heading	*1704 90 20 --- Boiled sweets, whether or not filled*	*2101 12 00 -- Preparations with basis of extracts, essences, concentrates or with a basis of coffee*

Chapter 17 thus, exhibits relative unambiguity starting at level of the title of the Chapter to Chapter Heading to Subheading where all these descriptions specifically cover Sugar Boiled Confectionery. In comparison, the Chapter 21 proposed by the department contains wider ranges.

5.7.5 In the present case, sugar boiled confectionery finds is specifically homed in Chapter sub-heading 1704 90 20.A quick glance at the names of Chapters 16 to 24 shall reveal that while each of the Chapters refer to specific group of products, Chapter 21, though not placed at the end of Section IV, radially resonates residual coverage for items that do not otherwise find specific chapter.

Chapter 16 ***Preparations of meat, of fish or of crustaceans, molluscs or other aquatic invertebrates***
Chapter 17 ***Sugar and sugar confectionery.***
Chapter 18 ***Cocoa and cocoa preparations***
Chapter 19 ***Preparations of cereals, flour, starch or milk; pastry cooks' products***
Chapter 20 ***Preparations of vegetables, fruit, nuts or other parts of plants.***
Chapter 21 ***Miscellaneous edible preparations***
Chapter 22 ***Beverages, vinegar and spirits***
Chapter 23 ***Residues and wastes from the food industries; prepared animal fodder***
Chapter 24 ***Tobacco and manufactured tobacco substitutes***

5.7.6 When sugar confectionery has an entire chapter assigned to it there is no need to seek classification under the chapter for miscellaneous items. 'Sugar Confectionery' is described as such under Chapter 17 as well as under Chapter Heading 1704. Thus the terms of heading fairly covers the product in question satisfying Rule 1, ibid. Rule 2(b) lays down that "Any reference to goods of given material or

substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance". So, the reference to Sugar Confectionery need not refer to product being a sugar confectionery wholly.

5.7.7 The classification under Heading 1704 where the identification is more complete thus passes the test of interpretation in terms of Rule 3(a), ibid, and there is no need to travel further down. As per chapter 4 Para 2.6 of CBEC's Customs Manual, 2011 "classification is to be first tested in light of Rule 1. Only when it is not possible to resolve the issue by applying this rule, recourse is taken to rule 2,3,4 in seriatim" which reflects the contemporaneous understanding and the accepted position.

5.7.8 Thus, when classification has to be made on the basis of Rule 1, Heading 1704 "sugar confectionary not containing cocoa" would be appropriate instead of Heading No.2101 "Extracts, essences and concentrates, of coffee, tea or mate and preparations with a basis of these products or with a basis of coffee, tea or mate; roasted chicory and other roasted coffee substitutes, and extracts, essences and concentrates thereof" as of the first schedule to Central Excise Tariff Act, 1985. Therefore, Kopiko is clearly classifiable under chapter heading 1704 rather than chapter heading 2101. It is pertinent to mention that on the facts and in the circumstances of the case, Chapter Heading 2101 is not a competing entry at all.

5.7.9 The departmental case, while traversing to Chapter 21, pitched short at 2101 foraging for higher revenue rate and neglected the ultimate residual entry for all sweet meats pivoted by Note 6 in that Chapter. It is hoped that reasoning and merit prevail at the original level of the quasi-judicial proceedings.

5.7.10 Assuming but not admitting that Rule 1 fails, the next relevant rule would be Rule 3 which states "When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

> *(a) The heading which provides the <u>most specific description</u> shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as <u>equally specific</u> in relation to those goods, even if one of them gives a more complete or precise description of the goods.*
>
> *(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their <u>essential character</u>, in so far as this criterion is applicable.*
>
> *(c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs <u>last in numerical order</u> among those which equally merit consideration.*

5.7.11 The hon'ble Supreme Court while ruling in favour of the department in the widely referred judgement of Collector of Central Excise, Shillong v. Wood Craft Products Ltd. – [(1995) 3 SCC 454 = 1995 (77) <u>E.L.T.</u> 23 (S.C.)] ruled that resort can be made to a residuary heading only when by liberal construction the specific entry cannot accommodate the goods in question. Such a view was also relied upon in the case of Nestle India Ltd. v. Commissioner[2004 (169) <u>E.L.T.</u> 22 (Tri. - Del.] (Annexure L). This case affirmed in the Apex Court in Nestle India Ltd. v. Commissioner [2005 (179) E.L.T. A150 (S.C.)] (Annexure M)

*5.7.12 We further wish to submit that the Honorable Supreme Court of India in the case of Commr. Of c. Ex., Cus. &S.t., Vishakhapatnam vs Jocil Ltd [2011 (263) E.L.T. 9 (S.C.)] has held that "In the case at hand, the subject matter in question is specifically identified in Ch. sub-heading No. 3823 11 as "Palm Stearin", and further differentiated as "Crude" and "RBD" in sub-heading Nos. 3823 11 11 and 3823 11 12 respectively. **The Explanatory Notes are categorical in affirming the accepted practice that Rule 3(b), which the CESTAT and the Respondent has referred to, shall be used only if classification under Rule 3(a) fails. In this instance, we are of the considered opinion that the issue of the essential character of the subject matter in question may be resorted to only if identification under Rule 3(a) is impossible.** Since the description offered in Chapter 38 certainly attempts to identify 'Palm Stearin' within its ambit, we do not find it necessary to place reliance on the explanation offered by the Respondent." In light of the above ruling, it is evident that the method of classification opted by the department is without any basis and contrary to the GIR.*

5.7.13 We wish to submit that as per Rule 3(a) "heading which provides the most specific description shall be preferred to headings providing a more general description". While classifying under this rule, it is to be noted that description which more clearly identifies the product has to be chosen, in this context, the HSN states that "it is not practicable to lay down hard and fast rules by which to determine whether one heading more specifically describes the goods than another, but in general it may be said that:

*a) **A description by name is more specific than description by class***

*b) **If the goods answer to a description which more clearly identifies them, that description is more specific than one where identification is less complete.***

(The examples cited in the HSN have not been re-produced for sake of brevity)

5.7.14 We wish to submit that in the instant case, the heading 1704 "sugar confectionary not containing cocoa" is description by name whereas heading No.2101 describes a class of goods. Further, heading 1704 clearly identifies the goods i.e. sugar confectionery. Therefore, the Company submits that even as per HSN guidelines, Kopiko is classifiable under heading 1704.

*5.7.15 Assuming but not admitting, in spite of the product meriting classification under heading 1704 as per Rule 1 and even Rule 3(a), if at all Rule 3(b) has to be resorted to and classification has to be made on the basis of essential character. The term essential character has not been defined in the tariff. The Larger bench of Honorable CEGAT, New Delhi in the case of Bharat Heavy Electricals Ltd. vs. Collector Of Customs, Madras [1987 (28) E.L.T. 545 (Tribunal)] has sought to come to a conclusion in relation to the term 'essential character', wherein reference was made to the Customs Commodity Code Number (CCCN) explanatory notes, wherein it was held that "We find that the words "essential character" have been used in Rule 2(a). These words are again to be found in Rule 3(b) also. In Vol. 1 of the CCCN Explanatory Notes in dealing with this Rule 3(b) of the CCCN [which is the same as our Rule 3(b)], it has been observed that the factor which determines **essential character will vary as between different kinds of goods and may be determined by the nature of the material or component, its bulk, quantity, weight or value or by the role of a constituent material in relation to the use of the goods.** No doubt Rule 3(b) dealt with mixture and composite goods and it was in that context that the words "essential character" had been construed in the manner mentioned above. **But we feel that the test of essential character as mentioned in the CCCN under Rule 3(b) would also be very relevant in construing the said words in Rule 2(a) also".** On perusal of the ruling, it can be ascertained that "essential character"may be determined by:*

a) The nature of the material or component,

b) Its bulk, quantity, weight or value.

5.7.16 This is already argued in para 5.4 above.

5.7.17 That Kopiko Cappuccino is a 'Sugar Boiled Confectionery', is per se, notdisputed. In fact, by invoking Rule 3(c), ibid, the SCN places the present classification by the Company and the one proposed in the SCN at equal footing of consideration. And therefore, even while in Chapter Heading 1704, the description which more clearly identifies the product has been answered the comparison between the existing classification and the one proposed in the SCN is imminent.

5.7.17 We wish to submit that in relation to Kopiko, KPK is a mere flavouring agent amongst others and as mentioned in page 1.4 above, the bulk, quantity, weight and value of KPK are insignificant in proportion to the final product. Therefore, we wish to submit that KPK flavour cannot be considered as imparting 'essential character' to Kopiko. In contrast, refined sugar and liquid glucose constituting 33% and 41% respectively imparts the essential character and accordingly even if recourse is had to Rule 3(b), Kopiko would merit classification under heading 1704.

5.8 <u>Case for Sugar Boiled Confectionery</u>

We have pointed above that that Kopiko Cappuccino is a 'Sugar Boiled Confectionery', is per se, notdisputed in the SCN and to merit we make further submissions as hereunder.

<u>Our submission</u>

5.8.1 Kopiko manufactured by INBISCO is essentially a hard boiled sugar and glucose confectionary containing high portion of sugar and glucose with flavoring essence of coffee. We wish also to submit that the Company in addition to Kopiko is also manufacturing sugar candy "Juizy Milk" with flavoring

essence of 'Strawberry fruit'. We wish to bring to your notice that Juizy milk is classified under chapter 17 04 90 90 and applicable rate of duty is paid.

5.8.2 We further wish to submit that Food Safety and Standards Authority of India, operating under the Ministry of Health and Family Welfare having its prime objective to regulate and monitor the manufacture, processing, distribution, sale and import of food so as to ensure safe and wholesome food, has framed regulations for various food products. The Food Safety and Standards Regulations, 2011 (for brevity 'FSSR') defines various food products, the rules take note of addition of small doses of extracts so as to enrich food products. The candy manufactured is classified under Rule 2.7.1 of Food Safety and Standards Regulations, 2011 ('FSSR') as sugar boiled confectionary.

*5.8.3 We invite kind attention of the quasi-judicial authority to Rule 2.7.1 of 'FSSR' that defines sugar boiled confectionary as "Sugar boiled confectionery whether sold as hard boiled sugar confectionery or pan goods confectionery or toffee or milk toffee or modified toffee or lacto-bon-bon or by any other name shall mean a processed composite food article made from sugar with or without doctoring agents such as cream of tartar by process of boiling whether panned or not. It may contain centre filling, or otherwise, which may be in the form of liquid, semi-solid or solids with or without coating of sugar or chocolate or both. **It may also contain any of the following:— ..... "(ix) tea extract, coffee extract, chocolate, cocoa;".***

5.8.4 From the above, it is evident that as per FSSR, addition of coffee flavour is permissible and sugar boiled confectionery containing such extracts still continues to remain 'Sugar boiled confectionery' only. This demonstrates the understanding of the relevant contemporaneous authorities that mere addition of coffee flavour does not change the nature of the sugar boiled candy. Applying the same analogy, we wish to submit that Kopiko would be classifiable under Chapter heading 1704.

5.8.5 We submit that sugar based confectionary with around 2.5% of coffee extract is not and cannot be considered as a preparation with coffee extract or essence as the basis and as such equated with a product which dominantly contains coffee or is prepared on the basis of coffee.

5.8.6 In this regard, we further wish to submit that the Honourable CESTAT Bangalore, in the case of SampreNutritions Ltd. v. Commissioner of Central Excise, Hyderabad [2004 (169) E.L.T. 42 (Tri. - Bang.)]. (Enclosed as while dealing with classification of vicks tablets enriched with vitamin Chas held that additions made to enrich the products do not change the identity.

5.8.7 The Company thus wishes to submit that the facts of the above case are identical in as much as:

i) Real identity of the product in question is sugar confectionery.

ii) "Hygenic Deposited Sugar Boiled Confectionery" is printed on the product labels and wrappers.

iii) The dominant materials used are liquid glucose and refined sugar.

iv) The Food Regulations also recognise the product under 'Sugar Boiled Confectionery'.

Import treatment at global level and Indian Customs

*5.9.1 **Attention is invited to the fact** that 'Kopiko' when imported in various countries such asMalaysia, Philippines and Japan, it has been classified under HSN Chapter heading 17049099(Annexures S, T&U). **It is not our case that** HSN is a multipurpose international product, nomenclature developed by the World Customs Organisation to ensure uniformity of classification in International Trade. **It is also not our case that** that as signatories to WTO **nations such as listed above as well as India** are bound by Tariff Classification under the Harmonized System. **The tariffs of Central Excise and Custom draw not just inspiration but align physically with the HSN, alike.** We further wish to submit that the HSN explanatory notes provide a safe guide for interpretation of an entry. As per the HSN explanatory notes to heading 1704, Sugar Confectionary includes, interalia, Boiled Sweets (including malt extract).*

5.9.2 Classification of Kopiko under 17049090 / 17049099 is thus accepted globally. Under the circumstances, we submit that based purely on considerations of revenue, the rational understanding of the identical entry as evidenced by the international practices which cannot be given a go-by, Kopiko would be classifiable only under 1704for the purpose of Central Excise Tariff. Copies of the import documents relating to imports in Malaysia, Philippines and Japanhave been enclosed. We submit that

classification by the excise authorities in India cannot be at variance with internationally accepted practices.

5.9.3 As set out in the facts of the case in 1.6 above, we submit that in addition to the global practice followed in classification of Kopiko, the Indian Customs Authority has assessed Kopiko under the chapter heading 17049090, the goods imported have been cleared for home consumption. It is pertinent to note that the goods were cleared after appraisal by the Customs Authorities by classifying the product under Chapter Heading 1704 90 90. We wish to submit that the original assessment once made on a bill of entry, if not challenged, becomes final. We submit that even in a BOE for import in India, the product 'Kopiko Candy Cappuccino' was cleared on payment of 6% CVD (plus cess). The customs authorities having been convinced that the products merits classification under Chapter 17 cleared the goods at concessional rate of duty and refrained from clearing the goods under Chapter 21 wherein higher rate of duty could have been demanded as the Customs Authorities made the assessment on merits and were not swayed by considerations of Revenue.

5.9.4 We wish to submit that when the relative entries are identically worded both in the Central Excise Tariff and the Customs Tariff which are based on Harmonized System of Nomenclature, the classification under Customs Tariff would be applicable to manufactured goods as well, the entries being parimateria.Thereby compelling classification of Kopiko under Chapter 1704 90 90 as accepted by the Customs Authorities in India

*5.9.5 We also wish to point here that the Company received a favourable order dated 08-Dec-2015, passed by the Commissioner of Central Excise, **Hyderabad- IV** for the Hyderabad unit basis the classification treatment at the global level. Basis this favorable order, the Principal Additional Director General, DGCEI, Ahmedabad Zonal Branch department was estoppeled from issue of the SCN dated 08-Dec-2015, and consequently the present Notice dated 20 September 2018 misses the grounds for issuance under subsection (7A) of Section 11A of the Act.*

5.9.6 Underlying facts of manufacture, contents and constituents of Kopiko Cappucino being the same at the Company factories in Hyderabad and at Ahmedabad, the investigating agency should not have issued SCN dated 08-Dec-2015 unless there was change in the law. Division Bench of the High Court in Associated Cement Company Limited v UPI [1996 (88) ELT 348 (Kar)] held that repeated issue of show cause notice after completion of adjudication in favour of the company was uncalled for.

5.9.7 Hon'ble Supreme Court in the case of Commissioner of Customs and Central Excise v Charminar Nonwovens Ltd. [2004 (167) ELT 372 (SC))] observed that subsequent notices could be issued and would not be challenged if new facts came to be noticed or the law has changed.

Interest& Penalty

Interest and Imposition of penalty in terms of Section 11AC of Central Excise Act, 1944; imposition of penalty in terms of Rule 25 of Central Excise Rules, 2002.

Our Submission:

6.1 Without prejudice to the foregoing, we submit that when excise duty itself is not payable, the question of interest does not arise. We submit that it is a natural corollary that when the principal is not payable, there can be no question of paying any interest as held by the Honorable Supreme Court in Prathiba Processors v. UOI, 1996 (88) ELT 12 (SC). So also, as the demand is not sustainable, the question of penalty would also not sustain.

7 <u>*Personal Hearing*</u>

We also request to your good self to be so good as to grant us an opportunity to personally present our case before your good self.

8 On the basis of above submissions, we request the learned Commissioner to take into consideration our submissions and drop further proceedings on the SCN. We trust that the above submissions clarify the position to the best of your good self's satisfaction. We shall request yourself to be so good as to take into consideration the facts of our case and our submissions based thereon and the legal position in the proper perspective. We would like to place on record that we reserve our right to add, alter, modify and/or delete any of our submissions any time before the show cause notice is adjudicated".

PERSONAL HEARING :-

15. The Personal Hearing in this case was held on 27.12.2019 wherein Shri Sagar Shah, CA, Partner EY duly authorised by M/s.Inbisco India Pvt Ltd, appeared before me. He informed that there is an OIO passed by CCE, Hyderabad-IV on the exactly same issue in their own unit at Hyderabad. (OIO No.129/2015/Adj/Commr/CE dated 08.12.2015, wherein the Commissioner has decided the matter in their favour but the Department has filed appeal in CESTAT against the said order. They requested to decide the matter in view of their submissions and also the said order of the Commissioner.

DISCUSSION AND FINDINGS :-

16. I have carefully gone through the subject show cause notice, submissions made by the noticee in their written reply as well as during personal hearing and documents and evidences available on record. In this case, two show cause notices were issued (i) for the period from August 2015 to December 2016 for Rs.14,96,00,117/- and (ii) covering the period from January 2017 to June 2017 for Rs.2,23,97,059/- involving a total demand of Rs.17,19,97,176/-. As the issue involved in both cases is same and periodical in nature, I am taking up both the cases together for adjudication.

17. I find that the main issue involved in this case is whether the product KOPIKO manufactured by the noticee fall under Tariff Item 1704 9090 of the CETA, 1985, as claimed by the noticee, or under Tariff Item 2101 1200 of the CETA, 1985, as proposed in the show cause notice.

18. Before proceeding further, I would like to examine the relevant part of Tariff Heading 1704 and 2101 of CETA, 1985, which are as follows :-

Tariff Item	*Description of goods*	*Unit*	*Rate of duty*
(1)	*(2)*	*(3)*	*(4)*
1704	***Sugar confectionery (including white chocolate), not containing cocoa***		
1704 10 00	*- Chewing gum, whether or not sugar coated ... :*	*kg.*	
1704 90	*- Other :*		
1704 90 10	*--- Jelly confectionary*	*kg.*	
1704 90 20	*--- Boiled Sweets, whether or not filled*	*kg.*	
1704 90 30	*--- Toffees, caramels and similar sweets*	*kg.*	
1704 90 90	*--- Other*	*kg.*	

Tariff Item	*Description of goods*	*Unit*	*Rate of duty*
(1)	*(2)*	*(3)*	*(4)*
2101	***Extracts, essences and concentrates, of coffee, tea or mate and preparations with a basis of these products or with a basis of coffee, tea or mate; roasted chicory and other roasted coffee substitutes, and extracts, essences and concentrates thereof***		
	--- Extracts, essences and concentrates of coffee, and preparations with a basis of these extracts, essences or concentrates or with a basis of coffee :		
2101 11	*--- Extracts, essences and concentrates :*		
2101 11 10	*--- Instant Coffee, flavoured*	*kg.*	

2101 11 20	--- *Instant Coffee, not flavoured*	*kg.*	
2101 11 30	--- *Coffee aroma*	*kg.*	
2101 11 90	--- *Other*	*kg.*	
2101 12 00	***--- Preparations with basis of extracts, essences, concentrates or with a basis of coffee***	***kg.***	
2101 20	-		

18.1 I find that the words 'sugar confectionery' or 'preparations with basis of extracts, essences, concentrates or with a basis of coffee' have not been defined in the CETA, 1985. The noticee has classified their product under Tariff Item 17049090 of the CETA, 1985. In order to buttress their case, the noticee has submitted that the product manufactured by them is classified as sugar boiled confectionary as per Rule 2.7.1 under the Food Safety and Standards Regulations, 2011 ('FSSR').

18.2 An issue therefore arises whether the product manufactured by the noticee can be classified under CETA, 1985 in accordance with the definition of term "Sugar Boiled Confectionary" given in Rule 2.7.1 under the Food Safety and Standards Regulations, 2011 ('FSSR').

18.3 I find that it is a well settled principle of interpretation that in absence of any definition of a word / phrase in particular statute, the said word / phrase cannot be construed in accordance with its definition in another statute.

18.4 It is observed that in respect of an issue whether definition / meaning of a term / word given in Prevention of Food Adulteration Act, 1954 can be applied for the matter concerning Central Excise duty, exemption and classification, the issue has been decided by Hon'ble Apex Court in the case of Commissioner of Central Excise, New Delhi Vs. Connaught Plaza Restaurant (P) Ltd. [2012 (286) E.L.T. 321 (S.C.)], wherein it has been *inter-alia* held as follows –

> *"42. Learned counsel for the assessee had vociferously submitted that the common parlance understanding of "ice-cream" can be inferred by its definition as appearing under the PFA. According to Rule A 11.20.08 the milk fat content of "ice-cream" and "softy ice-cream" shall not be less than 8% by weight. Hence, according, to the learned counsel, the term "ice-cream" under Heading 21.05 had to be understood in light of the standards provided in the PFA, more so when selling "ice-cream" with fat content of less than 10% would attract criminal action, as held in Baburao Ravaji Mharulkar (supra).*
>
> *43. We are unable to persuade ourselves to agree with the submission. It is a settled principle in excise classification that the definition of one statute having a different object, purpose and scheme cannot be applied mechanically to another statute. As aforesaid, the object of the Excise Act is to raise revenue for which various goods are differently classified in the Act. The conditions or restrictions contemplated by one statute having a different object and purpose should not be lightly and mechanically imported and applied to a fiscal statute for non-levy of excise duty, thereby causing a loss of revenue. [See; Medley Pharmaceuticals Limited v. Commissioner of Central Excise and Customs, Daman - (2011) 2 SCC 601 = 2011 (263) E.L.T. 641 (S.C.) and Commissioner of Central Excise, Nagpur v. Shree Baidyanath Ayurved Bhavan Limited - 2009 (12) SCC 419 = 2009 (237) E.L.T. 225 (S.C.)]. The provisions of PFA, dedicated to food adulteration, would require a technical and scientific understanding of "ice-cream" and thus, may require different standards for a goods to be marketed as "ice-cream". These provisions are for ensuring quality control and have nothing to do with the class of goods which are subject to excise duty under a particular tariff entry under the Tariff Act. These provisions are not a standard for interpreting goods mentioned in the Tariff Act, the purpose and object of which is completely different."*
>
> *[underlining supplied]*

The Hon'ble Supreme Court, in the aforesaid judgement, has categorically held that the provisions of Prevention of Food Adulteration Act, dedicated to food adulteration, may require different standards; that these provisions are for ensuring quality control and have nothing to do with the class of goods which are subject to excise duty under a particular tariff entry under the

Tariff Act. The Hon'ble Supreme Court has further held that these provisions (provisions under PFA) are not a standard for interpreting goods mentioned in the Tariff Act, the purpose and object of which is completely different.

18.5 The same view was held by Hon'ble High Court of Bombay in the case of Kaira Dist. Co.Op. Milk Producers' Union Ltd. Vs. U.O.I. [1989 (41) E.L.T. 186 (Bom.)], as follows :-

> *"7. Mr. Taleyarkhan, the learned Advocate appearing in support of the petition, has taken me through the orders passed by the three authorities below and has, after narrating the facts which are necessary for the disposal of this petition, contended that the view taken by the three authorities below that cocoa butter is an item of food is wholly untenable. The meaning which is commonly attributed to the word "food" ought to have been relied upon by the authorities. The resort taken by the Central Government to the definition of food contained in the Prevention of Food Adulteration Act is wholly unjustified. I have no hesitation in accepting this criticism levelled by Mr. Taleyarkhan against the use made by the Central Government of the definition of food contained in the Prevention of Food Adulteration Act. That Act deals with entirely a different subject. It is not a part of the family of the same laws. Moreover, the definition of food' contained in the Prevention of Food Adulteration Act includes, apart from the things which are normally used for human consumption, articles which enter into or are used in the composition or preparation of human food. May be, cocoa butter is used in the composition or preparation of human food, though it is not ordinarily so used. But that itself cannot imprint it with the character of an item of food when we have to deal with a subject under the provisions of a taxing statutes such as the Indian Tariff Act. That resort to a definition contained in another Act is not justified is now well-settled by the authority of the Supreme Court. In Sales Tax Commissioner v. Jaswant Singh, A.I.R. 1967 Supreme Court 1454, the Supreme Court cautioned against resorting to the definition contained in one Act for understanding similar words contained in another Act. It was pointed out that it was a well-settled principle that in construing a word in an Act caution is necessary in adopting a meaning ascribed to that word in other statutes. While laying this proposition, the Supreme Court relied upon a judgment Macbeth v. Chislett, 1910 Appeal Cases, 220 at page 224.*
>
> *8. This view has been re-affirmed in a later judgment of the Supreme Court in M/s. MSCO Pvt. Ltd. v. Union of India, 1985 (19) ELT 15 (SC) = A.I.R. 1985 Supreme Court, 76. The latter judgment has been referred to by Kania J., as he then was, in Cadbury-Fry (India) Pvt. Ltd. v. Union of India (Miscellaneous Petition No. 702 of 1971, decided on 1st/2nd September, 1977). The resort made by the Central Government to the definition of the word "food" contained in the Prevention of Food Adulteration Act, therefore, is wholly erroneous. The view taken by the Central Government on the basis of this resort to the definition of the word "food" in another Act is also erroneous."*
>
> *[underlining supplied]*

18.6 This principle has been reiterated and elaborated by Hon'ble Supreme Court in various other cases also. In the case of MSCO Pvt. Ltd. Vs. Union of India & Others [1985 (19) E.L.T. 15 (S.C.)], Hon'ble Supreme Court has held as follows :-

> *"4. The expression 'industry' has many meanings. It means 'skill', 'ingenuity', 'dexterity', 'diligence', 'systematic work or labour', 'habitual employment in the productive arts', 'manufacturing establishment' etc. But while construing a word which occurs in a statute or a statutory instrument in the absence of any definition in that very document it must be given the same meaning which it receives in ordinary parlance or understood in the sense in which people conversant with the subject matter of the statute or statutory instrument understand it. It is hazardous to interpret a word in accordance with its definition in another statute or statutory instrument and more so when such statute or statutory instrument is not dealing with any cognate subject. Craies on Statute Law (6th Edn.) says thus at page 164 :*
>
> *"In construing a word in an Act caution is necessary in adopting the meaning ascribed to the word in other Acts." It would be a new terror in the construction of Acts of Parliament if we were required to limit a word to an unnatural sense because in some*

Act which is not incorporated or referred to such an interpretation is given to it for the purposes of that Act alone "Macbeth v. Chislett - (1910) A.C. 220, 223."

[underlining supplied]

18.7 Similarly, Hon'ble Supreme Court, in the case of Hotel & Restaurant Association Vs. Star India Pvt. Ltd. [2007 (5) S.T.R. 161 (S.C.)] has reiterated the same views. The relevant paras of the said judgement are reproduced below :-

"41. An attempt has been made by Mr. Desai to contend that the 1986 Act is a cognate legislation. Section 2(2) of TRAI Act provides that words and expression used and not defined in the said Act but defined in Indian Telegraph Act, 1885 or the Indian Wireless Telegraphy Act, 1933 shall have the meanings respectively assigned to them in those Acts. Thus, meaning of only such words which are not defined under TRAI Act but defined under those Acts could be taken into consideration. It is furthermore well known 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.

42. In Hari Khemu Gawali v. Deputy Commissioner of Police, Bombay and another[AIR 1956 SC 559], a Constitution Bench of this Court stated :

"...It has been repeatedly said by this Court that it is not safe to pronounce on the provisions of one Act with reference to decisions dealing with other Acts which may not be in pari materia."

43. In M/s. MSCO. Pvt. Ltd. v. Union of India and Others [(1985) 1 SCC 51], this Court held :

"4. ....."

44. In Maheshwari Fish Seed Farm v. T.N. Electricity Board and Another [(2004) 4 SCC 705], this Court in regard to different meanings of 'agriculture' as noticed in different decisions held :

"9...A reading of the judgment shows a research by looking into several authorities, meaning assigned by dictionaries and finding out how the term is understood in common parlance. The Court held that the term 'agriculture' has been defined in various dictionaries both in the narrow sense and in the wider sense. In the narrow sense agriculture is the cultivation of the field. In the wider sense it comprises of all activities in relation to the land including horticulture, forestry, breeding and rearing of livestock, dairying, butter and cheese-making, husbandry etc. Whether the narrower or the wider sense of the term 'agriculture' should be adopted in a particular case depends not only upon the provisions of the various statutes in which the same occurs but also upon the facts and circumstances of each case. The definition of the term in one statute does not afford a guide to the construction of the same term in another statute and the sense in which the term has been understood in the several statutes does not necessarily throw any light on the manner in which the term should be understood generally."

45. In Tata Consultancy Services v. State of A.P. [(2005) 1 SCC 308], this Court held :

"40. Copyright Act and the Sales Tax Act are also not statutes in pari materia and as such the definition contained in the former should not be applied in the latter. [See Jagatram Ahuja v. Commissioner of Gift-tax, Hyderabad].

41. In absence of incorporation or reference, it is trite that it is not permissible to interpret a word in accordance with its definition in other statute and more so when the same is not dealing with any cognate subject..."

[underlining supplied]

18.8 I therefore respectfully follow the aforesaid decisions of Hon'ble Apex Court and hold that the meaning of "Sugar Boiled Confectionary" given under Food Safety and Standards Regulations, 2011 ('FSSR') cannot be applied in the present case for the purpose of proper classification of product 'KOPIKO' under Tariff Item 1704 90 90 or 2101 12 00 of the CETA, 1985.

19.1 The noticee has argued that the product Flavour KPK-ID 001 containing 30% coffee extract imported under Chapter Heading 2101 1190 should not be the basis for determination of classification of finished product cleared when admittedly it is just but one of the additives used for imparting flavour and does not form the basis of preparation for the manufactured product which is sugar confectionary with 33% refined sugar and 41% liquid glucose with a mere 2.5% / 4.5% of KPK-ID 001 depending on the variant, namely Cappuccino or Espresso.

19.2 Therefore, an issue arises how much importance should be given to the volume of ingredients used in the manufacture of a product for deciding proper classification of the said product.

19.3 I find that this issue has been decided in various decisions of higher judicial authorities. In the case of Commissioner of Central Excise, Indore Vs. Plethico Pharmaceuticals Ltd. [2015 (328) E.L.T. 645 (Tri. - Del.)], wherein the issue pertain to the classification of product under Chapter Heading 1704 as 'confectionary' or under 3004 as 'ayurvedic medicaments', the Hon'ble Tribunal held as follows :-

"11. One of the objections of the Department is that in respect of the products, in question, the percentage of medicament is very small and also no doses are prescribed and, therefore, these products do not merit classification under chapter 30. However, in this regard, we find that the Apex Court in the case of CCE, Calcutta v. Sharma Medical works reported in 2003 (154) E.L.T. 328 (S.C.) has held that merely because the percentage of active ingredients in a product is less, it does not mean that the product is not medicament, as generally, the percentage or doses of the medicament will be such as can be absorbed by the human body and the medicament would necessarily be covered by fillers/vehicles in order to make the product useable. In this judgment, the Apex Court held that the main criteria for determining classification is normally the use it is put to by the customers who use it and for classification of a product as a medicament it is not necessary that the same should be sold against the Doctors prescription. ....."

19.4 In the case of Mehta Unani Pharmacy & Co. Vs. Commissioner of Central Excise, Rajkot [2007 (218) E.L.T. 74 (Tri.-Ahmd.)], the argument of the department in support of the case for classifying the product as confectionary under Chapter Heading 1704 that the product needs to be treated as a confectionery on the basis of high percentage of the sugar in the product, was not found legal and justifiable by the Hon'ble Tribunal. In this case, it was held as follows :-

7.2 The Commissioner in his order dated 12-6-2003 has come to the conclusion that the product has to be treated as a confectionary mainly on the basis of high percentage of the sugar in the product. He also held that the exact composition of Test-up is not prescribed in the ayurvedic textbook or any authorative literature; that the exact composition of Coolex and Cold-drops cannot be found in any authorative ayurvedic textbook; ayurvedic composition of Test-up are not per se low and negligible but low only as compared with non-ayurvedic components i.e. sugar or glucose; menthol cannot be

considered purely as ayurvedic ingredient; that evidences not convincing that the products are marketed as ayurvedic drugs or are prescribed by ayurvedic practioners.

7.3 However, the Commissioner (Appeals) vide order dated 19-1-2005, compared the ingredients of Test-up with that of swad; the ingredients of Cold-drop with that of Vicks cough drops and the ingredients of Coolex with that of Vicks Herbal Throat Drops and came to the conclusion that the percentage of ayurvedic content in the product should not be accorded excessive importance; percentage of the sugar being high, is not a significant factor in classifying this product. He has also relied on Judgments of the Hon'ble Supreme Court in support of his decision.

7.4 In the case of Puma Ayurvedic Herbal (P) Ltd. v. CCE, Nagpur cited supra, it has been held as follows:

"It will be seen from the above definition of cosmetic that the cosmetic products are meant to improve appearance of a person, that is, they enhance beauty. Whereas a medicinal product or a medicament is meant to treat some medical condition. It may happen that while treating a particular medical problem, after the problem is cured, the appearance of the person concerned may improve. What is to be seen is the primary use of the product. To illustrate, a particular Ayurvedic product may be used for treating baldness. Baldness is a medical problem. By use of the product if a person is able to grow hair on his head, his ailment of baldness is cured and the person's appearance may improve. The product used for the purpose cannot be described as cosmetic simply because it has ultimately led to improvement in appearance of the person. The primary role of the product was to grow hair on his head and cure his baldness.

21. The extent or the quantity of medicament used in a particular product will also not be a relevant factor. Normally, the extent of use of medicinal ingredients is very low because a larger use may be harmful for the human body. The medical ingredients are mixed with what is in the trade parlance called fillers, or vehicles in order to make the medicament useful. To illustrate an example of Vicks Vaporub is given in which 98% is said to be paraffine wax, while the medicinal part i.e. Menthol is only 2%. Vicks Vaporub has been held to be medicament by this Court in CCE v. Richardson Hindustan Ltd. - 1989 (42) E.L.T. A100. Therefore, the fact that use of medicinal element in a product was minimal does not detract from it being classified as a medicament.

22. In order to be a medicinal preparation or a medicament, it is not necessary that the item must be sold under a doctor's prescription. Similarly, availability of the products across the counter in shops is not relevant as it makes no difference either way."

7.5 In the case of Nathulle Health Products (P) Ltd. v. CCE, Hyderabad cited supra, it has been held by the Hon'ble Supreme Court that essential character of the medicine and primary function of the medicine is derived from the active ingredients contained therein and it has certainly bearing on the determination of the classification.

8. In the light of the above, the classification claimed by the appellant as ayurvedic medicaments as upheld by the Commissioner (Appeals) is held to be correct. Consequently, the order of the Commissioner classifying the product under 170490 is to be set aside."

19.5 In these decisions of Hon'ble CESTAT, it has been held by relying on the judgements of Hon'ble Supreme Court, that the products cannot be classified under Chapter Heading 1704 as 'Confectionery' merely on the ground of high percentage of sugar content in the product.

19.6 In view of the ratio laid down in the aforesaid judgements, in the context of 'preparations with basis of extracts, essences, concentrates or with a basis of coffee', the term 'basis' would refer to the chief constituent or fundamental ingredient, which is Coffee Extract in the present case. The term 'basis' would not refer to the major ingredient, which is Refined Sugar and Liquid Glucose in the present case. Here, it would also be pertinent to note that as informed by Shri Mukesh Sharma, Senior Manager (R&D) of M/s. Inbisco, during the course of investigation

by DGCEI that the 'Flavour KPK-ID 001 (Coffee Flavour) – a food flavour which consists of artificial and natural components – **give characteristic coffee taste and aroma to any food item in which it is added**. Therefore, it is evident that the Coffee Extract is the chief constituent or fundamental ingredient, which can be added to any food item. In the case of KOPIKO, this Coffee Extract ['Flavour KPK-ID 001 (Coffee Flavour)] has been added to Refined Sugar, Liquid Glucose and other items but the fact remains that the basis of KOPIKO is coffee extract and therefore the said product KOPIKO is marketed, sold and known as coffee candy.

20.1 I find that the classification of the goods under the First Schedule of Central Excise Tariff Act, 1985 is governed by the 'General Rules for the Interpretation', which are part of the statute itself.

20.2 Rule 1 of the said General Rules for Interpretations provides that –

> *"1. The titles of Sections, Chapters and Sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes doe not otherwise require, according to the following provisions."*

20.3 Chapter Heading 1704 of the CETA, 1985 covers 'Sugar Confectionery (including white chocolate), not containing cocoa', whereas Chapter Heading 2101 covers 'Extracts, essences and concentrates, of coffee, tea or mate and preparations with a basis of these products or with a basis of coffee, tea or mate; roasted chicory and other roasted coffee substitutes, and extracts, essences and concentrates thereof'.

20.4 I find that the Chapter Heading 2101 (and Tariff Item 2101 12 00 in particular) specifically covers the 'preparations with basis of extracts, essences, concentrates or with a basis of coffee'. It is an admitted fact that 'flavour KPK', which is Coffee Extract, is one of the ingredient of 'KOPIKO'. The said Coffee Extract gives the essential characteristics to the product 'KOPIKO', which is evident from the fact that the said product is marketed and sold as 'Pocket Coffee Candy'. I find that, on the labels of the product 'KOPIKO', it is mentioned as follows :-

> *"KOPIKO is known in many countries as the original coffee candy.*
>
> *KOPIKO Cappuccino made from the highest quality coffee extract that enriched with milk to complete your KOPIKO experience.*
>
> *KOPIKO offers the enjoyment of like having a rich coffee taste anytime anywhere."*

It is evident that the KOPIKO is made from the coffee extract, which has been enriched with milk. The said product is marketed, sold and known as coffee candy. Further, it has been claimed by the noticee on the labels that the said product offers the enjoyment of like having a rich coffee taste.

20.5 I also find that Shri Rajesh Kushwaha, Department Head of M/s. Inbisco, in his statement dated 13.08.2015 *inter-alia* deposed that the role of flavour KPK was to give coffee flavour to the product KOPIKO Cappuccino Coffee Candy. Shri Mukesh Sharma, Senior Manager (R&D) of M/s. Inbisco, in his statement dated 27.08.2015 *inter-alia* deposed that KOPIKO Cappuccino Coffee Candy gives a taste and aroma of rich roasted coffee; that they used a flavour 'Flavour KPK-ID001 (Coffee Flavour)' for manufacturing of KOPIKO Cappuccino Coffee Candy which gives taste and aroma of rich roasted coffee; that flavour 'Flavour KPK-ID001 (Coffee Flavour)' a food flavour which consists of artificial and natural components, it gave characteristic Coffee taste and aroma to any food item in which it is added, generally it is added less than 5%. Shri Nimesh Vyas, Manager (Finance & Accounts) of M/s. Inbisco, in his statement dated 23.11.2015 before DGCEI, *inter-alia* deposed that they used flavour 'Flavour KPK-ID001 (Coffee Flavour)' for KOPIKO Cappuccino; that it contains Natural Coffee Extract 30% and Artificial Coffee Flavour 70%; that flavour 'Flavour KPK' gives Coffee taste and Aroma to the product KOPIKO Cappuccino candy; that 'Flavour KPK' was main ingredient in product KOPIKO Cappuccino to give coffee taste.

20.6 In view of the aforesaid evidences, I find that the primary characteristics of the product KOPIKO are those of a preparation with a basis of extracts of coffee. I, therefore find that in view of Rule 1 of General Rules for Interpretation of the First Schedule of the CETA, 1985, the product KOPIKO is appropriately classifiable under Tariff Item 2101 1200 as 'preparations with basis of extracts, essences, concentrates or with a basis of coffee'.

21.1 I find that even if the submissions of the noticee are examined in the context of subsequent Rules of General Rules for Interpretation of the First Schedule of the CETA, 1985, it doesn't assist the case of the noticee any further.

21.2 Rule 2(a) of the General Rules for Interpretation refers to the article in incomplete or unfinished stage, which is not the issue in the present case. Rule 2(b) of General Rules for Interpretation refers to mixtures or combination of material or substance with other materials or substances. If the product KOPIKO is considered as mixture or combination of material or substance with other materials or substances, then the classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

21.3 Rule 3 of the General Rules for Interpretation provide the principles for classification of the goods which are *prima–facie* classifiable under two or more headings. The said Rule 3 is reproduced herein below for ease of reference :-

> *"3. When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows :*
>
> *(a) the heading which provides the most specific description shall be preferred to headings providing more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.*
>
> *(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, 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 numerical order among those which equally merit consideration."*

21.4 Even by applying Rule 3(a) of General Rules for Interpretation, I find that Chapter Heading 2101 pertaining to 'Extracts, essences and concentrates, of coffee, tea or mate and preparations with a basis of these products or with a basis of coffee, tea or mate' provides most specific description to the product KOPIKO (which is made from the coffee extract, which is marketed, sold and known as coffee candy and which offers the enjoyment of like having a rich coffee taste) as compared to Chapter Heading 1704 pertaining to 'Sugar Confectionery (including white chocolate), nor containing cocoa' which heading provides more general description. Therefore, by application of Rule 3(a) of General Rules for Interpretation also, the product KOPIKO is classifiable under Tariff Item 2101 1200 of the CETA, 1985.

21.5 If the product KOPIKO is considered as mixture, composite goods consisting of different materials or made up of different components or goods put up in sets for retails sale, then as per Rule 3(b) of General Rules for Interpretation, the product shall be classified as if they consisted of the material or component which gives them essential character. In this regard, I find that Hon'ble CESTAT, in the case of Dhariwal Industries Ltd. Vs. Commissioner of Central Excise, Pune-III [2014 (304) E.L.T. 585 (Tri. – Mumbai)] applied the principle of essential characteristics and observed that the mixtures shall be classified based on the material which gives their essential character. The decision of the Hon'ble CESTAT has been upheld by the Hon'ble Supreme Court and the Civil Appeal filed against the said decision has been dismissed

[2015 (319) E.L.T. A123 (S.C.)]. Further, in the case of Rana Enterprises Vs. Commissioner of Customs, Mumbai [2011 (267) E.L.T. 546 (Tri.-Mumbai)], it has been held as follows :-

> *"5. The Hon'ble Supreme Court's decision is of immense support to the appellant's case. In that case, decorative laminated sheets were classified under Chapter 39 after finding that the property of the item to resist heat and moisture was imparted by synthetic resin and not by paper content in the composite material. The percentage of paper in the composite material was 60 to 70% and that of synthetic resin was 30 to 40%. The minor component in terms of percentage content was found to be determinative of the essential character of the composite material. This decision of the Hon'ble Supreme Court in the case of Bakelite Hylam Ltd. (supra) squarely supports the learned consultant's submission that one must not blindly go by the percentage composition to determine the classification of a composite material under the Customs Tariff Schedule. It is the essential character of the goods which has to be reckoned for the purpose. Rule 3(b) of the General Rules for the interpretation of the said Schedule is to the effect that composite goods consisting of different materials or made of different components, which cannot be classified by the reference to Rule 3(a), shall be classified as if they consisted of the material/component which gives them their essential character."*

21.6 Rule 3(c) of General Rules for Interpretation provides that 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. Obviously, Chapter Heading 2101 occurs later in numerical order in comparison to Chapter Heading 1704. Therefore, in view of Rule 3(c) of General Rules for Interpretation also the product KOPIKO is classifiable under Tariff Item 2101 1200 of the CETA, 1985.

21.7 Thus, in view of sub-rules (a), (b) and (c) of Rule 3 of General Rules for Interpretation also, the product KOPIKO merit classification under Tariff Item 2101 1200 of the CETA, 1985.

22.1 The noticee has submitted that the product KOPIKO, when imported into various countries, including Singapore, USA, UK, Malaysia, Thailand, Myanmar, Australia, Korea, Vietnam and Nigeria, has been classified under HSN Chapter Heading 17049090, and it has also been followed when imported in India.

22.2 In this regard, I hold that the classification of the product KOPIKO and other issues involved in this case needs to be decided after proper evaluation of the materials placed before me by the investigation and by the noticee, and in light of the relevant statutory provisions, without being influenced by the classification of the product adopted in other countries or by the Customs authorities.

23. I, therefore hold that the product KOPIKO is appropriately classifiable under Tariff Item 2101 1200 of the CETA, 1985 as 'preparations with basis of extracts, essences, concentrates or with a basis of coffee'.

24.1 The said noticee is found to have contravened the provisions of Section 3 of the CEA, 1944 inasmuch as they have cleared the excisable goods 'KOPIKO' without payment of appropriate Central Excise duty; Section 5A of the CEA, 1944 inasmuch as they have wrongly availed the benefit of Notification No. 12/2012-CE (Sl. No. 19); Rule 4 read with Rule 8 of CER, 2002 inasmuch as they have removed the excisable goods without discharging the appropriate Central Excise duty in the manner prescribed under the said Rules; Rule 6 of CER, 2002 inasmuch as they failed to correctly assess the duty payable on the clearances of excisable goods made by them.

24.2 I also observe that the whole system of collection of indirect taxes now is based on the trust placed on the assessee. The assessee has to do the self-assessment and various aspects related to assessment such as proper classification of excisable goods, their valuation, admissibility of exemption notification etc. are part of assessment process. The department cannot, nor are they expected to, find out on their own in all cases what each assessee is doing and whether discharging the correct duty liability. Had the officers of Directorate General of Central Excise Intelligence not found out the mis-classification of the product KOPIKO and

thereby wrong availment of benefit of Notification No. 12/2012-CE dated 17.03.2012, as amended, the short payment of huge amount of Central Excise duty would have remained undetected.

24.3 As regards the noticee's contention that the Indian Customs authorities assessed KOPIKO under Chapter Heading 17049090 of the Customs Tariff Act, 1975, hence there can be no case for alleging suppression, I find that this aspect can not absolve the noticee from their responsibility under the provisions of Central Excise Law to properly classify their goods KOPIKO and to discharge appropriate Central Excise Duty. The decision of Hon'ble Supreme Court decision in the case of CCEX Mumbai Vs. Britania Industries Ltd in Civil Appeal 4539-4540 of 2005, findings of High Court of Bombay in the case of Blue Star Ltd Vs UOI (1980 (6) ELT 280, decision of Hon'ble CESTAT Mumbai in the case of Hindustan Lever Ltd Vs Collector of Central Excise, Mumbai (2000(121) ELT 451 (Tri) decision of Hon'ble Madras High Court in the case of Union of India and Others Vs TSR & Co (1985(22) ELT 701) and other case laws cited by the noticee is also not found applicable in the facts of the present case, inasmuch as the issue involved, facts and circumstances of the cases and period involved are different in those cases. Further, I find that the case laws relied up on by me is more appropriate and relevant to the present case than the cases relied by the noticee.

25. I, therefore hold that the noticee has short paid Central Excise duty amounting to ` 17,19,97,176.00/- during the period from August, 2015 to June, 2017, demand of which is liable to be confirmed under sub-sections (1) and (10) of Section 11A of the CEA, 1944 and the said noticee is liable to pay the said amount forthwith.

26. The said noticee is also liable to pay interest at appropriate rate on the amount of duty short paid, as provided under Section 11AA of the CEA, 1944.

27.1 The noticee has relied on a number of decisions in support of their contention that penalty should not be imposed on them. I find that the issues involved in those cases are not comparable with the present case as the facts and circumstances of the said cases are different. I find that the noticee is liable to pay penalty in terms of Section 11AC(1)(a) of the CEA, 1944 read with Rule 25(1) of the CER, 2002.

27.2 I also find that Section 11AC of the CEA, 1944 has been substituted with effect from 14.05.2015. Clause (a) of sub-section (1) of the substituted Section 11AC provides for imposition of penalty not exceeding ten per cent of the duty determined or rupees five thousand, whichever is higher, in case where any duty of excise has not been levied or paid or has been short levied or short-paid or erroneously refunded, for any reason other than the reason of fraud or collusion or any wilfull mis-statement or suppression of facts or contravention of any of the provisions of CEA, 1944 or rules made thereunder with intent to evade payment of duty.

27.3 I find that the said noticee has removed the excisable goods KOPIKO in contravention of the provisions of Section 3 and 5A of the CEA, 1944 and Rules 4, 6 and 8 of the CER, 2002, as discussed above. I hold that all these acts of omissions and commissions on the part of the said noticee have rendered them liable to penalty as provided under Section 11AC(1)(a) of the CEA, 1944 read with Rule 25(1) of the CER, 2002.

28. In view of my above findings, I pass the following order.

ORDER

(i) I hold that Excisable goods viz. Kopiko Cappuccino is classifiable under Tariff Item 2101 1200 of the first Schedule of the Central Excise Tariff Act, 1985 as 'preparations with basis of extracts, essences, concentrates or with a basis of coffee'.

(A)

(1) I confirm the demand of Central Excise duty of **Rs.14,96,00,117/-** (Rupees Fourteen Crore Ninety Six Lakh One Hundred Seventeen Only) being duty short paid during the period August, 2015 to December 2016, under sub-section (1) and (10) of

Section 11A of the Central Excise Act, 1944 and order recovery of the same from M/s. Inbisco India Pvt. Ltd.

(2) I order for recovery of interest at appropriate rate on the amount of Central Excise Duty short paid as mentioned at sr. no A (1) above, from M/s. Inbisco India Pvt. Ltd. under Section 11AA of the Central Excise Act, 1944.

(3) I impose penalty of **Rs. 1,49,60,011/-** (Rupees One Crore Forty Nine Lakhs Sixty Thousand Eleven Only) on M/s. Inbisco India Pvt. Ltd. under Section11AC(1)(a) of the Central Excise Act, 1944, read with Rule 25(1) of Central Excise Rules, 2002.

(B)

(1) I confirm the demand of Central Excise duty of **Rs.2,23,97,059/-** (Rupees Two Crore Twenty Three Lakh Ninety Seven Thousand Fifty Nine Only) being duty short paid during the period January 2017 to June 2017, under sub-section (1) and (10) of Section 11A of the Central Excise Act, 1944 and order recovery of the same from M/s. Inbisco India Pvt. Ltd.

(2) I order for recovery of interest at appropriate rate on the amount of Central Excise Duty short paid as mentioned at sr. no B (1) above, from M/s. Inbisco India Pvt. Ltd. under Section 11AA of the Central Excise Act, 1944.

(3) I impose penalty of Rs. **22,39,705/-** (Rupees Twenty Two Lakhs Thirty Nine Thousand Seven Hundred Five Only) on M/s. Inbisco India Pvt. Ltd. under Section11AC(1)(a) of the Central Excise Act, 1944, read with Rule 25(1) of Central Excise Rules, 2002.

If M/s. Inbisco India Pvt. Ltd. pays the Central Excise duty determined at Sl. No. A (1) & B (1) above and interest payable thereon at A (2) & B (2) above within thirty days of the date of communication of this order, the amount of penalty liable to be paid by M/s. Inbisco India Pvt. Ltd. shall be twenty-five per cent of the penalty imposed, subject to the condition that such reduced penalty is also paid within the period so specified.

29. Proceedings against SCN no. **V.21/15-16/OA/2017** dated **18.07.2017** & **V.21/15-03/OA/2018** dated **20.09.2018** are disposed of in the above terms.

(Dr.Balbir Singh)
Commissioner
CGST, Ahmedabad North

F.No: V.21/15-16/OA/2017

Date: 10/01/2020

By Regd. Post AD.

To
M/s Inbisco India Pvt. Ltd.,
Plot No. SM-9/5, GIDC Phase – II,
Village – Bol, Sanand,
Ahmedabad – 382 170.

Copy to:

1. The Principal Chief Commissioner, CGST & C.Excise, Ahmedabad Zone, Ahmedabad.
2. The Deputy/Assistant Commissioner, CGST & C. Excise, Division-III, Ahmedabad North.
3. The Superintendent, CGST & C Excise, A.R-V, Division-III, Ahmedabad-North
4. Guard File.