

**(1995) 01 MAD CK 0039**

**In the Madras High Court**

**Case No : Writ Petition No. 5347 of 1995**

Bush Boake Allen (India) Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

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**Date of Decision : 04-01-1995**

**Acts Referred:**

Customs Act, 1962 — Section 2(6), 45, 8

**Citation : (1995) 77 ELT 529**

**Hon'ble Judges : Srinivasan, J**

**Bench : Single Bench**

**Advocate : Shri Habibullah Badsha for Mr. B. S. Govindan, for the Appellant;  
Shri K. Jayachandran, Addl. C.G.S.C., for the Respondent**

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## **Judgement**

1. This writ petition can be disposed of on a very short ground. The petitioners are manufacturing among other things, flavouring essences for

edible food products. Notification No. 55/75-C.E., dated 1-3-1975 exempted certain goods specified in the Schedule and falling under Item No.

68 of the First Schedule to the Central Excises and Salt Act, 1944 from the whole of the duty of excise livable thereon. The first item mentioned

therein is "all kinds of food products and food preparations" including six items specified therein. It is not necessary for me to refer to those items

which are included. It is sufficient to note that all kinds of food products are exempted under the notification.

2. By Letter dated 11-8-1975 in C. No. V/68/30/21/75, the Assistant Collector of Central Excise, Madras IV Division issued a notice to the

petitioners to show cause why flavoring essences for edible food products should not be classified as non-food products assessable to duty under

Item No. 68 of the C.E. Tariff. The Assistant Collector rejected the contention of

the petitioners that they would fall under the expression "food products" and passed an order. The petitioners filed an appeal before the Appellate Collector of Customs and Central Excise. By order dated 6-4-1978 in Appeal No. 578/78, the Appellate Authority held that the flavouring essences in question for edible food products will fall within the meaning of Notification No. 55/75, dated 1-3-1975 and therefore exempt from duty under Item No. 68 of the Central Excise Tariff.

3. That decision became final as it was not challenged in any manner. When the petitioner submitted a classification list in the next year bearing No.

92/78 that was approved by the Superintendent of Central Excise on the basis of the order passed by the Appellate Authority referred to earlier.

In the next year the classification list No. 39/79 was filed by the petitioners as required by the rules. As against the relevant entry referring to

flavouring essences for edible food products (non-alcoholic), the list stated that they were exempted under the notification. The petitioners also

referred to the order of the Appellate Collector in Appeal No. 578/78 dated 6-4-1978. However, the Superintendent of Central Excise did not

choose to accept their claim for exemption and made an endorsement at the bottom of the list that the said items are excisable and tariff

classification and rate of duty are leviable in respect of those goods. He sent a memorandum, which is marked as Annexure VII along with the said

classification list, para 2 of the said memorandum reads thus :

Flavouring Essences for edible food products (non-alcoholic) and "Flavouring Essences (Alcoholic)" shown in Item No. 5 and Sl. No. 1 and 4 of

your classification list respectively are classified as the Excisable items. In this connection your kind attention is invited on this office Letter O.C.

No. 74/80 dated 18-1-1980. Clearance of the above said items could be made after payment of Central Excise Duty under Tariff item No. 68.

Receipt of this letter may please be acknowledged.

4. In spite of the fact that the order was against the petitioners herein, the Collector of Central Excise chose to issue a show cause notice u/s 35A

of the Act on 26-6-1980 to the petitioners to show cause why the classification made by the Superintendent should not be set aside the goods

should not be treated as excisable. Obviously the Collector was under the impression that the Superintendent's endorsement was in favour of the

petitioners herein. He has overlooked that the Superintendent had only held against the petitioners if at all. After the petitioners made their

representation a detailed order was passed by the Collector on 22-9-1980 holding that the products in question are not food or food products and

they are liable for duty. The last part of the said order reads as follows :-

For the reasons mentioned in para 16 above, I order that flavouring essences manufactured by M/s. Bush Boake Allen (India) Ltd., should be

classified under Tariff Item 68 and that they will not be eligible for the duty exemption under Notification No. 55/75, dated 1-3-1975.

Consequently, the approval given by the Superintendent of Central Excise to classification list No. 39/79, dated 3-8-1979 classifying the flavouring

essence as food products and food preparations is set aside. The Superintendent should now reclassify the goods in the light of this decision. Duty

under Tariff Item 68 should be collected for the period of 6 months preceding the issue of the show cause notice.

5. That part of the order also shows that the Collector was under wrong impression that the Superintendent has agreed with the petitioners and

held that the products were food products and food preparations. The petitioners have filed this writ petition challenging the said order. A revision

would lie u/s 36(1) of the Act to the Central Government. The petitioners have approached this Court as the order is, according to them, without

Jurisdiction. I am of the opinion that in the facts of this case it is not proper for the Court to dismiss the writ petition on the ground that an

alternative remedy is available to the petitioners. Moreover, the writ petition had been pending for nearly fourteen years after it was admitted in

1980 and it will be grave injustice if the petitioners are driven to work out their rights under the provisions of Section 36 of the Act. A similar view

has been expressed by me already in *Limenaph Chemicals Vs. Union of India*, .

6. Learned Senior Counsel for the petitioners has raised several contentions to say that the impugned order has to be quashed. It is unnecessary

for me to refer to all of them as I am agreeing with the first of the said contentions.

7. It is argued by learned Senior Counsel that the Appellate Collector having decided that matter judicially as regards the classification of the goods

and that order having become final already, it is not open to a coordinate

authority, who is the second respondent herein, to pass an order entirely contrary to the earlier order taking a different view as regards the classification particularly when there is no change of circumstances and when no new materials are placed before the said Authority to take a different view.

8. Learned counsel for the respondents contends that it was the duty of the petitioners to file a classification list every year as the rules stood at the time and whenever a classification list is filed, it is open to the concerned authorities to decide whether the classification is proper or not. I am unable to accept this contention. When once the classification is made on the basis of certain general principles that cannot be changed unless some change in circumstances has taken place or a decision of a superior authority or a judicial pronouncement has come into existence subsequent thereto. There should at least be some new materials placed before the authority such as the opinions of certain experts so as to show that the earlier classification was erroneous on principle. In this case, no such circumstance is in existence. No pronouncement has been made by any authority or any court. In the counter-affidavit filed by the respondents a statement is made in para 10 thereof that after 19-4-1978 there has been a change of judicial opinion. I am unable to find any support therefor. There is no judicial pronouncement or even a decision by any departmental authority to warrant a change of classification. Nor has any new material been placed before the respondents in order to enable them to come to a different conclusion.

9. No doubt, in taxation matters the Principle of res judicata will not apply. But, when particular goods are brought under a classification with reference to the tariff item that classification will continue to be in force so long as some change is not introduced either in the manner of production or otherwise. In these circumstances, the decision of the Appellate Collector rendered in the appeal, which was a judicial one cannot be changed by the second respondent in the subsequent year without any change of circumstances. Hence it follows that the present impugned order is wholly unsustainable and it has to be quashed. In view of this conclusion of mine I am not dealing with the other contentions raised by learned senior counsel for the petitioners.

10. In the result, the writ petition is allowed. The order passed by the second

respondent in C. No. V/68/30/76/80/CX. Adj. II, dated 22-9-1980

is quashed. The products of the petitioners set out in item 5 of the classification list No. 39/79 are exempted from excise duty and the order of the

Appellate Collector in Appeal No. 578/78 dated 6-4-1978 will apply to those goods. There will be no order as to costs.