

**Read** - 1. Application dt. 28.8.2007 by M/s. Kellogg India Pvt. Ltd., holder of TIN No. 27030241413V.

**Heard** - 1. Shri. Prakash Shah & Shri. Veera Chartered Accountant on behalf of M/s. Kellogg India Pvt. Ltd.

## **PROCEEDINGS**

**(u/s. 56 (1)(e) of the Maharashtra Value Added Tax Act, 2002)**

No. DDQ 11/2007/Adm-3/43 - 13/ B- 4

Mumbai, Date :-31.3.08

An application is filed by M/s. Kellogg India Pvt. Ltd., having address as The IL & FS Financial Centre, 1<sup>st</sup> floor, Bandra - Kurla Complex, Mumbai - 400 051 requesting determination order on the following question :

Whether 'Corn flakes', ' Banana Corn Flakes', Strawberry Corn Flakes', 'Mango Corn Flakes' and other products all sold through invoice no BBY/08/00001 dt. 2.1.2008 would be covered by entry no. 107(11)(f) of schedule C to the MVAT Act, 2002?

### **02. FACTS OF THE CASE**

Kellogg India Private Limited" ('Kellogg') is an Indian subsidiary of Kellogg. Kellogg India is a manufacturer of breakfast cereals. It is stated that in India, Kellogg is engaged in the manufacturing and selling of 'Ready to eat breakfast cereals' like flakes , muesli etc referred to as 'RTEC' by the applicant. Kellogg's is a registered dealer under the Maharashtra Value Added Tax Act, 2002 and the Central Sales Tax Act, 1956 for its head office located at Mumbai and manufacturing plant which is at Taloja (Maharashtra).

It is stated that Kellogg is engaged in the manufacturing and selling of food products ie. 'Ready to eat breakfast cereals' ('RTEC') which has a high nutritive value like protein, carbohydrates, vitamins and iron. The ready to eat breakfast cereals are prepared from ingredients like wheat flour, corn, sugar, cocoa powder, minerals, common salt, malt extracts, natural colours, vitamins, irons and antioxidants. The RTEC is available in various varieties and flavors like Banana Corn Flakes, Mango Corn Flakes, Honey Corn Flakes, Strawberry Corn Flakes, Wheat Flakes, Chocos Froot Loops, Frosties, Muesli etc. It is stated that 'RTEC' is mixed with other eatables like milk, hot or cold, yogurt, fresh fruits and dry fruits for eating/ consumption purpose. It is also stated that for eating, on each pack of RTEC, Kellogg recommends to mix RTEC with milk or yogurt and add fresh fruits, dry fruits or honey, as per taste.

The applicant has stated that with regard to RTEC, the sample (empty) retail packs attached states the following -

- RTEC are edible food products ie. Ready to eat breakfast cereal
- The list and proportion of ingredients used in the manufacture of RTEC which confirms that it is edible food.
- Recommendation to mix RTEC with milk or yoghurt, for eating.
- Expiry date before which it is best to consume.

### **03. CONTENTION**

It is contended that sub-entry (11) of entry 107 of schedule C applies to all kinds of food stuff and food provisions and ready to cook preparations but excludes 'ready to serve food' and foods 'when served for consumption'. It is contended that RTEC manufactured

and marketed by Kellogg can be classified as 'ready to mix food'. The following arguments are made by the applicant :-

- Food / food stuff

RTEC manufactured by Kellogg are edible food products prepared mainly from ingredients like wheat flour, corn, sugar, cocoa powder, minerals, common salt, malt extracts, natural colours, vitamins, irons and antioxidants and are sold as containing high nutrient value. The applicant has produced the following definitions :

- Meaning of 'Food' – As per Oxford English Dictionary

'What is taken into the system to maintain life and growth, and to supply the waste of tissue; aliment, nourishment, provisions, victuals'

- Meaning of 'Food' – As per Merriam Webster dictionary

'Material consisting essentially of protein, carbohydrate, and fat used in the body of an organism to sustain growth, repair and vital processes and to furnish energy; also : such food together with supplementary substances (as minerals, vitamins, and condiments);

- inorganic substances absorbed by plants in gaseous form or in water solution;
- nutriment in solid form;
- something that nourishes, sustains, or supplies
- Meaning of 'Food' – As per Prevention of Food Adulteration Act, 1954

'Food' means any article used as food or drink for human consumption other than drugs and water and includes -

1. any article which ordinarily enters into, or is used in the composition or preparation of, human food,
2. any flavoring matter or condiments, and
3. any other article which the Central Government may, having regard to its use, nature, substance or quality, declare by notification in the Official Gazette, as food for the purpose of this act'

- Meaning of 'Food stuff' – As per Merriam Webster Dictionary

'A substance with food value; specifically: the raw material of food before or after processing

- Meaning of 'Food stuff' – As per Webster's International Dictionary (as cited in S Samuel Vs. Union of India, AIR 2004 SC 218)

Anything used as food, any substance of food value as protein, fat etc entering into the composition of food

- Meaning of 'Food stuff' – As per Advance Law Lexicon (3<sup>rd</sup> Edition)

Ready to eat food and food products, fast foods, processed and cooled food in liquid, powder, solid or semi solid form

- SC in case of 'S Samuel, Harrison Malayalam in (2004) 134 STC 610

The Hon'ble Supreme Court held that 'in common parlance "food" is something that is eaten. In a wider sense, "food" may include not only solid substances by also a drink. Still the fact remains that, whether a solid or a liquid, the substance called "food" should possess the quality to maintain life and its growth; it must have nutritive value so as to enable growth, repair or maintenance of the body.

A drink or beverage which acts merely as a stimulant is not food.'

It is stated that in case of RTEC, as clarified, is a food product which is prepared from edible nutritive ingredients like wheat flour, corn, sugar, cocoa powder, minerals, common salt, malt extracts, natural colors, vitamins, irons and antioxidants. The applicant claimed that RTEC is not just a stimulant and it has a high nutritive value such as proteins, carbohydrates, vitamins and iron assist human body to grow, repair and maintain. It is argued that in common/market parlance also, it is understood that RTEC, as a food product has a high nutrient value and is purchased by people for eating by mixing it with milk or yogurt, fresh fruits, dry fruits, honey, sugar etc. It is stated that based on the above, it is clear that RTEC manufactured by Kellogg is certainly a product to be covered/ categorized as 'food'.

It is stated that in case of food manufactured in India, 'The Prevention of Food Adulteration Act, 1954' applies as per which the expiry date up to which the contents ie. foods product, can be consumed are required to be mentioned on each retail pack. It is further stated that as explained above in clause 4.1, RTEC being food product, the date/month and year before which it would be best to consume content ie. RTEC, is mentioned on each retail pack of as 'Best Before \_\_\_\_\_' (Kellogg inserts here Date/ month/ year)' which is as per provisions of The Prevention of Food and Adulteration Act, 1954.

In view of the above, it is contended by the applicant that RTEC manufactured and sold by Kellogg are edible products to be covered / categorized as food.

- RTEC - 'Ready to mix'

It is stated that for eating/consumption , RTEC are required to be consumed after mixing with milk or yogurt as RTEC manufactured and sold are too dry to consume directly and in case eaten, one may face difficulty in chewing and swallowing the same. It is informed that in general also, consumers buy RTEC for mixing with other eatables such as milk, yogurt, fresh fruit and honey. It is further informed that Kellogg recommends its consumers to mix RTEC with milk, yogurt, fresh fruit and honey etc. as is evident from the printed retail pack of RTEC. It is argued that it is apparent that RTEC are edible nutritive ready to mix food that required to be mixed with milk / yogurt. Further fresh fruit / dry fruits are also added for better taste.

The applicant has also contended that though RTEC are food 'ready to mix', it cannot be considered as food ready to serve. They have quoted the judgement of the Hon'ble Tribunal in judgment of 'Chitale Bandhu' (SA 442 of 1990 dated 20.9.91).In the aforesaid judgment, the Tribunal has observed as under.

"The word 'food' is further qualified by two words 'ready' and 'serve'. The word 'ready' contemplates no doubt finished product, the food, which can be consumed directly without further process of cooking. However, the word 'serve' is to be distinguished from the word 'sale' in the context of entries in our schedule. The exclusion is of not for food ready for 'sale' but food ready for service. Thus, this amendment effected from 1.4.1984 has only excluded the food items which are ready and served in the hotels for consumption like the items which are taken in the meals, breakfast, lunch, dinner etc. and not the items which are ready for sale."

It is stated that the Tribunal has shown the difference between the items which are ready for sale and the items which are ready to serve. As per Tribunal, the items ready to serve on table are like hot foods items will be 'ready to serve' food on table for immediate consumption and not foods which are ready for sale/eat which are sold by network of

dealer to dealer till consumer. It is contended that in the aforesaid judgment, it was held that wafers as not being a food ready to serve through it can be eaten directly without process. It is stated that recently, the learned Commissioner of Sales Tax in the case of M/s. Parampara Food Products (DDQ - 11-2005/Adm-5/76/B-3), in the matter of 'ready to serve' observed as follows:

'Ready to eat' food can be consumed at the moment it is purchased and thus gets excluded from the scope of entry C-107(11)(f) being a 'ready to serve' food.

The applicant has contended that with regard to RTEC manufactured and sold by Kellogg, RTEC has to be necessarily mixed with other eatables such as milk, yogurt, fruits. It is further stated that with regard to RTEC manufactured and sold by Kellogg, it be noted that :

- RTEC are sold / distributed by Kellogg through network of distributors.
- RTEC are not served to consumer for immediate consumption as RTEC purchased by consumer are generally sorted at home or canteen or office and are consumed as and when required may be after few days or a week after purchasing it.
- RTEC purchased from retail stores are not readily served for consumption as the same are too dry to be eaten independently and could be difficult to chew and swallow if not softened by mixing it with milk or yogurt.

Based on the above discussions, it is contended that RTEC are not 'ready to serve food' for immediate consumption but these are 'ready to mix' which can be sorted and eaten by mixing it with other eatables such as milk, yogurt, fresh fruit, vegetables and honey, as and when required.

#### **04. HEARING**

The case was fixed for hearing on 26.2.08. Shri Prakash Shah and Shri Veera, CA attended the hearing. They argued that the Corn Flakes are not 'ready to serve' food. According to them, what is excluded is food ready for consumption i.e. food which is served in hotels and canteens. Ready to eat food breakfast cereals cannot be directly consumed. They may not be eaten as it is. People commonly eat the cereals with cold milk. In restaurant also the cereals are served with milk. They submitted that the applicant has collected 4% tax on the sale of the product. Mr. Prakash Shah referred to the multi-cereals and submitted that they are hard to chew and therefore they have to be eaten with milk. He packed food items are included in it. What is excluded is food served in hotels.

#### **05. OBSERVATIONS**

I have gone through the submissions of the applicant. The applicant manufactures ready to eat breakfast cereals which are described by them as 'RTEC breakfast cereals'. These RTEC are flakes, chocos, muesli. Ready to eat breakfast cereals as described by the applicant in his own application are available in various varieties and flavours like Banana Corn Flakes, Mango Corn Flakes, Honey Corn Flakes, Strawberry Corn Flakes etc. The RTEC are mixed with other eatables like milk, yogurt, fresh fruits and dry fruits. The applicant has submitted that Kelloggs cereals should be eaten with milk and yogurt. I have seen the samples of the product. The samples on record are flakes with multi-grains and real banana flakes. The packing of the product describes them as ready to eat breakfast cereals with the serving suggestions given on them as below:

""Tastes best with cold milk"".

“Serving Suggestion: Eat with fresh or dry fruits.”

The other packing of the Banana Corn Flakes also gives the same serving suggestion. The applicant is under the belief that the product would be covered by schedule entry C-107(11)(f) and is taxable @ 4%.

|              |                                                                                                                                                                                                                                                                                                                                   |
|--------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| C-107(11)(f) | Food stuffs and food provisions of all kinds including Raw, semi cooked or Semi-processed foods, Ready to mix and ready to cook preparations excluding ready to serve foods.<br><br>Explanation- The items referred to in clause (a) to (f) will not be covered by the scope of this entry when those are served for consumption. |
|--------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

I have discussed the aspect and the scope of the schedule entry C-107(11)(f) in several determination orders. While deciding the classification of food items like Cakes, Pastries, Mutter Karanji in the case of M/s. Monginis and M/s. Shrikrishna Foods as also the determination order in the case of Panama Marketing(No. DDQ-11/2005/Adm-3/102/B-02 dt 29.3.2008) wherein the issue of classification of Muesli was under consideration, I have clearly stated that food which is ready to serve i.e. food which can be directly served on the table without any further processing are not covered by the schedule entry C-107(11)(f). This is because of the specific wordings of the schedule entry C-107(11)(f).

The following can be easily observed on a dissection of the entry:

1. Schedule entry C-107(11)(f) covers ‘food stuff and food provisions’ which are in the nature of semi processed, raw ,semi cooked food.
2. The entry excludes ready to serve food. Ready to serve food means ready to eat food i.e. food which is ready for consumption.
3. The explanation excludes food served for consumption. Food served for consumption means food which is served in hotel, eating houses, restaurant etc.
4. Thus, there are two exclusions in the entry. The exclusion in the main clause excludes food which is ready to eat. The explanation excludes food which is served for consumption.

By applying the criteria, it has been held by me in several determination orders that cakes, pastries, mutter karanji, kothimbir vadi, muesli are all food which are excluded from the entry by virtue of the fact that they are ready to serve food i.e food which can be eaten as it is and which does not need any further processing. Thus the term “ready-to-serve’ means ‘ready-to-eat food’. Such ‘ready-to-serve’ food is excluded from the main entry itself. The misconception was that the exclusion to ready to serve food in the main entry necessarily means and therefore excludes food served in hotel, eating houses etc and it does not refer to such food which are ready-to-eat and which are not served in a hotel. However, the food which is served in hotel is excluded through the explanation and not through the exclusion in the main clause. There are two exclusions in the entries both of which have to be given same meaning. The explanation excludes food served in a hotel, eating house etc and the exclusion in the main entry excludes ready-to-eat food. Therefore, the argument of the applicants in the earlier cases as well as in the case before me that both the exclusions exclude food served in hotel, eating house etc. is not acceptable simply because if the legislature had intended to exclude only food served in hotel, eating house etc. it would not

have provided two exclusion clauses to provide for the same contingency. The fact that it has given two exclusion clauses is indicative of the fact that two different classes of goods or two different situations were meant to be excluded. While drafting the schedule entry, the draftsman was fully conscious of the explanation or the exclusion in the main clause and when the explanation was added to the entry C-107(11)(f) necessary care would have been taken by him to restrict the application of the explanation to the other sub entries excluding (f). But such is not the case. It was intended there should be two exclusions in the schedule entry and which were accordingly interpreted by me in all the earlier determination orders. Thus the following meaning only can be given to the two exclusions.

- a) The exclusion in the main clause of the schedule entry excludes food ready to serve.
- b) The explanation to the schedule entry excludes food served in the eating houses, hotels etc.

Turning to the present case, I have decided the issue in the case of M/s. Panama Marketing wherein I have held that 'muesli' which is ready to eat breakfast cereals would not come within the scope of schedule entry C-107(11)(f). Muesli, like the products in the present case is a breakfast cereal wherein the serving suggestion was that it should be eaten with milk. The applicant in that case had made similar arguments to the one in the present case which is that the foods are not ready to serve food because they are not ready for consumption as milk has to be added to them before they are served on the table. However, what I wish to emphasise here is that the addition of milk does not make a difference as far as its readiness for eating is concerned. The breakfast cereals can be eaten as ready snacks and the argument that the food cannot be eaten as it is would not make a difference to the ultimate conclusion. The addition of milk to the product does not amount to any process. It only adds taste to the cereals. When we are served an Indian meal i.e. a meal comprising roti and subzi, we do not eat subzi without roti or roti without subzi. Although we can perfectly eat them individually we do not do so because the combination of roti and subji is tastier than roti or subzi eaten singly. In the same way, the breakfast cereals can be eaten as it is but they are not generally eaten so but are consumed along with milk because the addition of milk adds taste to it. It therefore, follows that the breakfast cereals are without a doubt ready to serve food which are excluded from the schedule entry C-107(11)(f). They would therefore be taxable @ 12.5% being covered by schedule entry E-1.

As the matter has been dealt with by me in detail in the earlier cases the issue does not merit any further discussion. The applicant can refer to the DDQ in the Panama Marketing() which squarely applies to the case in hand.

6. In view of the discussion held in the preceding paragraphs, I pass an order as follows:

## **ORDER**

(Under Section 56(1) (e) of the Maharashtra Value Added Tax Act, 2002)

No.DDQ-11/2007/Adm-2/43/B- 4

Mumbai, dt. 31.3.08

The sale of 'Corn flakes', 'Banana Corn Flakes', Strawberry corn flakes', 'Mango Corn Flakes' and other products all sold through invoice no BBY/08/00001 dt.2.1.2008

would be covered by the schedule entry E-1 of the MVAT ,2002 and thereby taxable @ 12.5%.

**(Sanjay Bhatia)**  
**Commissioner of Sales Tax,**  
**Maharashtra State, Mumbai**