

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

E-Hearing
REGIONAL BENCH - COURT NO.I

Excise Appeal No.71055 of 2018

(Arising out of Order-in-Appeal No.NOI-EXCUS-001-APP-1951-17-18 dated 27.03.2018 passed by Commissioner (Appeals) Central Goods & Services Tax, Noida)

M/s Ishita Bakers Pvt. Ltd.,
(B-128, Sector-63, Noida-201301)

.....Appellant

VERSUS

**Commissioner of Central Excise &
CGST, Noida**
(C-56/42, Sector-62, Noida-201309)

....Respondent

APPEARANCE:

Shri A. P. Singh, Consultant for the Appellant

Ms. Chitra Srivastava, Authorized Representative for the Respondent

**CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

FINAL ORDER NO.- 70712/2024

DATE OF HEARING : 25.07.2024
DATE OF DECISION : 13.11.2024

P. K. CHOUDHARY:

This appeal is directed against the impugned Order-in-Appeal No.NOI-EXCUS-001-APP-1951-17-18 dated 27.03.2018 passed by the Commissioner (Appeals), Central Excise & CGST, Noida.

2. Briefly stated, the facts of the case are that the Appellant, M/s Ishita Bakers Pvt. Ltd., was a manufacturer of Fennel Seeds/ Sugar Coated Saunf which were excisable goods and were classifiable under Sub-heading No.17049090 of the Central Excise Tariff. The Appellant was registered with Central Excise vide Registration No.AAACP7553NEM001 and was paying excise duty on the clearances of said items after availing SSI exemption of Rs.1.50 Cr. during every financial year. Besides manufacturing of said goods, the Appellant was also doing trading of dry dates/

chuhara. The Appellant used to buy dry dates/ chuhara from open market and sold them after undertaking the following processes on such goods:-

- i. Washing----- Washing from water for dust removal,
- ii. Pressing ----- For breaking dry dates for removal of seeds,
- iii. Deseeding----- Remove seeds from dry dates,
- iv. Cutting----- Cut dry dates in to small pieces,
- v. Dehydration----- Cut dry dates are subjected to oven drying for removal of moisture,
- vi. Sieving----- To get only requisite size of cut dates for final sale,
- vii. Packing & Despatch ----- Packing in 25 Kg and 50 Kg bags.

2.1 There was no change in the properties of the end-product different from dry dates. Only physical appearance was changed. The end products were sold as 'dry dates cut' or 'dry dates chura' to manufacturers of mouth fresheners. As dry dates remained the same after above processes, having same characteristics, qualities and name, the sale of the said goods was treated as trading of dry dates and no excise duty was paid thereon.

2.2 For determination of aggregate value for availing exemption from excise duty under SSI exemption Notification No.08/2003-CE dated 01.03.2023, value of trading items namely dry dates cut and dry dates chura was not included as the same was not chargeable to excise duty being trading goods.

2.3 Audit of the account books of the Appellant was conducted by the Departmental officers of the Central Excise Audit-II Meerut on 04.07.2014 and it was viewed by the visiting officers that 'processes' undertaken by the Appellant on bought out dry dates would amount to '*manufacture*' and therefore, the Appellant was required to pay excise duty on the end-product, i.e., *cut dry date* and *chura dry dates* appearing subsequent to said processes under Sub-heading No.20089999 of the Central Excise Tariff. Through Audit Note issued by the Department, the Appellant was informed that as per Chapter note 7 of Chapter 20

of the Central Excise Tariff, the 'processes' undertaken by him amounted to manufacture as they enhanced the properties of end product and rendered the same marketable. The Appellant was directed to pay excise duty on the clearances of dry dates cut and dry dates chura and also differential duty on account of re-computation of aggregate value for availing SSI exemption by including value of dry dates cut/ dry dates chura. The Appellant differed with the said direction and agitated against that. Therefore, Show Cause Notice No.02/Audit-II/Commr/2016-17 dated 29.04.2016 was issued proposing thereby to classify end product, i.e., cut *dry dates* and *chura dry dates* under SH 20089999 of the Central Excise Tariff and demanding excise duty amounting to Rs.39,39,444/- under Section 11A(4)&(5) of the Central Excise Act, 1944 along with interest, for the period from March, 2011 to March, 2015. Aggregate value for SSI exemption was re-computed and short paid excise duty amounting to Rs.59,34,237/- for the period 2011-12 to 2014-15 was also demanded under Section 11A(4) &(5) along with interest. Equal penalty was also proposed under Section 11AC of the Central Excise Act, 1944.

2.4 Subsequent show cause notice dated 05.07.2016 for the period 2015-16 was also issued for demand of excise duty of Rs.11,05,450/- on the clearances of cut dry dates and chura dry dates and demand of excise duty of Rs.18,75,000/- for wrongly availing SSI exemption along with interest and penalty.

2.5 The allegations stated in the show cause notices can be summarized as below:-

- i. Dry dates were not traded as such but after undertaking above processes,
- ii. End product was classifiable under SH 20089999 of the Central Excise Tariff,
- iii. Processes undertaken by the Appellant on dry dates would amount to manufacture, and
- iv. As per chapter Note-7 Of chapter 20, labeling or relabeling, repacking from bulk to retail packing or adoption of any other treatment to render the product marketable to the consumer

would amount to manufacture even if processes undertaken did not amount to manufacture.

2.6 Both the show cause notices were adjudicated by the Joint Commissioner Central Excise Noida-I by a common order, OIO No.53-54/JC/NOIDA-I/2016-17 dated 31.03.2017 whereby the whole demand of excise duty was confirmed with equal penalty and interest. The Appellant filed appeal with the Commissioner (Appeals), CGST, Noida who upheld the OIO and dismissed the appeal of the Appellant vide OIA No.NOI-EXCUS-001-APPL-1951-17-18 dated 27.03.2018.

2.7 Hence, the present appeal before the Tribunal.

3. Shri A. P. Singh, Learned Counsel, appearing on behalf the Appellant submits that classification of *dry dates cut/ dry dates chura* emerging at the end of processes undertaken by the Appellant on dry dates have been wrongly classified by the learned Commissioner (Appeals) under subheading 20089999 of the Central Excise Tariff. He further submits that Chapter 8 of the Central Excise Tariff covers edible fruit and nuts, peel of citrus fruit or melons and dry dates being edible fruit would fall under Chapter 8. He also submits that chapter heading 0804 covers all types of dates viz., fresh dates, soft dates, hard dates and others. He emphasizes that as *dry dates cut* or *dry dates chura* are de-seeded dates only, they would cover under chapter heading 08041090 chargeable to nil rate of duty. He also refers General Rules for Interpretation(GIR) and submits that as per the said rules, *dry dates cut* and *dry dates chura* would be correctly classifiable under chapter heading 08041090 of the Central Excise Tariff.

3.1 Learned Counsel for the Appellant further submits that General Notes of Chapter 8 of HSN prescribes that fruit, nuts and peel of citrus fruit or melons (including watermelons), generally intended for human consumption (whether as presented or after processing) would be classified under Chapter 8. They may be fresh (including chilled), frozen (whether or not previously cooked by steaming or boiling in water or containing added sweetening matter) or *dried (including dehydrated,*

evaporated or freeze-dried) and if they are unsuitable for immediate consumption in that state, they may be provisionally preserved (e.g., by sulphur dioxide gas, in brine, in sulphur water or in other preservative solutions). In view of the above, he contended that dry dates cut and dry dates chura which were subjected to specified processes, as already submitted, were liable to be classified under sub-heading 08041090 of the Central Excise Tariff. It is also submitted that in trade parlance the end product was sold as dry dates as is evident from the invoices issued by the Appellant. He referred to the decision of the Supreme Court and other judicial authorities and contended that classification is to be based on statutory definition, if any, and in the absence thereof on trade or common parlance. He vehemently argued that normally, classification is to be done with reference to the specific wordings of the headings/sub-headings as mentioned in the tariff. However, where the goods, in question, are capable of being called by more than one name, the classification is to be done with reference to the most appropriate name and for this purpose, the basic functional/character/use would become more relevant. It is submitted that cut dry dates provides the essential character to the dry dates as the same provides the nutrition, aroma, consistency, mouth feel and appearance of dry dates. It is further submitted that cut dry dates/ chura dry dates are marketed and consumed in the open market as dry dates. Thus, cut dry dates form the essential character of dry dates, the same are classifiable as dry dates under Chapter heading 08041090. He places reliance on the following decisions:-

- i. *Collector of Central Excise vs. Fusebase Eltoto Ltd. [1993 (67) E.L.T. 30 (SC)]*;
- ii. *Indian Cable Co. Ltd. Vs. Collector of Central Excise, Calcutta [1994 (74) E.L.T. 22 (SC)]*;
- iii. *Metagraphs Pvt. Ltd. Vs. Collector of Central Excise, Bombay [1996 (88) E.L.T. 630 (SC)]*;
- iv. *United Copiex (India) Pvt. Ltd. vs. Commissioner of Sales Tax [1997 (94) E.L.T. 28 (SC)]*;

- v. *Plasmac Machine MFG. Co. Pvt. Ltd. Vs. Collector of Central Excise* [1991 (51) E.L.T. 161 (SC)];
- vi. *Union of India Vs. Sahney Steel and Press Works Ltd.* [1992 (58) E.L.T. 38 (Bom)];
- vii. *Atul Glass Industries Ltd. Vs. Commissioner of Central Excise* [1986 (25) E.L.T. 473 (SC)];
- viii. *Indian Tool Manufacturers Vs. Assistant Collector of Central Excise, Nasik* [1994 (74) E.L.T. 12 (SC)];
- ix. *Collector of Customs Vs. Kumudam Publications (P) Ltd.* [1997 (96) E.L.T. 226 (SC)].

3.2 Learned Counsel for the Appellant further submits that 'processes' undertaken on dry dates did not amount to manufacture as no new commodity different from dry dates emerged subsequent to said process. Referring to the decision of the Hon'ble Supreme Court in the case of *UOI vs. Delhi Cloth and General Mills Co. Ltd.* [1977 (1) E.L.T. (J 199) (SC)], he submitted that an activity or process amounts to manufacture, when new product, different from its raw material appears. He pointed out that the processes undertaken on dry dates did not lead to emergence of any new product different from raw material. He submitted that raw material was dry dates having seeds inside and end product is again dry date without seeds as characteristics, quality and name of the product remained same. He further submitted that usages of dry date and cut dry date is the same. He contended that in the market both dry dates with seeds and dry dates without seeds, cut into small pieces, were sold as dry dates. Thus, no new product comes in to existence on account of the said processes on dry dates. Hence, processes undertaken by the Appellant did not amount to manufacture and as such not dutiable. Placing reliance on the decision of the Hon'ble Supreme Court in the case of *Deputy Commissioner Sales Tax Vs. PIO Food Packers* [(1980 (6) E.L.T. 343 (S.C.)], he submitted that every process would not amount to 'manufacture' as no new and distinct article came into existence.

3.3 As regards Chapter Note 7 of Chapter 20, the Learned Counsel submitted that classification of end-product under sub-heading 2008999 was incorrect inasmuch as after subjecting the above processes, the end product remained the same with regard to characteristics, name and quality. He contended that Sub heading 2008 of the Central Excise Tariff covers only those fruits which are not classifiable elsewhere. He emphasizes that as dry dates in all forms find entry in Chapter 8 of the Central Excise Tariff, it would not be classifiable under SH 2008. He stated that when the item does not fall under Chapter 20, there is no applicability of Chapter Note-7 of Chapter 20 which specifies as:-

"7. In relation to products of this Chapter, labelling or re-labelling of containers or repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to 'manufacture'."

He urged that the above provisions were not applicable when end products were not of Chapter 20.

3.4 The Learned Counsel stated that in the SCN, it was alleged that processes undertaken by the Appellant enhanced the value of goods many times, hence, such 'processes' amounted to manufacture. In this context he contended that value addition was no principle to consider processes as manufacture. There was statutory definition of term 'manufacture' under Section 2(f) of the Central Excise Act, 1944. He submitted that only those processes which are within ambit of Section 2(f) would be treated as amount to manufacture. He also refers to the following decisions:-

- i. **Swastic Rayon Process [2007 (209) E.L.T. 163 (SC)]**
- ii. **S. R. Tissues Pvt. Ltd. [2005 (186) E.L.T. 385 (SC)].**

3.5 Regarding denial of SSI exemption, the Learned Counsel submitted that as cut dry dates & dry dates chura were fully exempted from excise duty as subsequent to 'processes' undertaken for emergence of above items were not amounting to manufacture, the value of clearances of such cut dry

dates/chura dry dates would not be includible for determination of aggregate value. Thus, denial of exemption granted under SSI exemption Notification is improper and not sustainable.

4. Learned Authorized Representative for the Department reiterated the reasoning given in the order of the Commissioner (Appeals) and pleaded that the *processing* undertaken by the Appellant on dry dates converted them in to a new commodity which was classifiable under HSN Chapter heading 2008. He further contended that as per Chapter Note 7 of Chapter 20 of the Central Excise Tariff, the processes carried out by the Appellant amounted to manufacture as they rendered dry dates marketable. He concluded that the Appellant was required to pay excise duty on *processed* dry dates and value of clearances of *processed* dry dates was required to be included for determination of aggregate value for SSI exemption.

4. Heard both the sides and perused the appeal records.

5. The issues that arise for consideration in this appeal are as under:-

- i. whether the end product emerging after certain processing undertaken on dry dates is classifiable under sub-heading No.080410300 or 20089999 of the Central Excise Tariff, and
- ii. whether the process of washing, pressing, deseeding, cutting, drying in oven, sieving and packing resulted in the production of new product in respect of dry dates.

As regards first issue relating to classification of dry dates after subjecting to certain processes like washing, pressing, deseeding, cutting, drying in oven, sieving and packing, it is found that the said product was sold as 'dry dates cut' or 'dry dates chura' in the packing of 25 Kg or 50 Kg as shown on invoices issued by the Appellant. The Appellant has contented that the product emerging after the above processes is again dry dates and as such classifiable under Sub-heading 08041030 as dry dates while the Department has viewed that the end product is processed dry dates different from dry dates and is classifiable

under Sub-heading 20089999 of the Central Excise Tariff as prepared fruit. In the impugned Order-in-Appeal, the Commissioner (Appeals) has given his observation on the said issue as under:-

"Cut dry dates so manufactured are hardly recognizable as raw dates or dates unless being specifically pointed out as these have lost original physical appearance."

The above findings for classification of end product under chapter heading 2008 in place of 0804 are only based on imaginary narrative without support of any legal provisions. Physical appearance of a commodity does not decide its classification. The classification of an item in the Central Excise Tariff is regulated in accordance with the principles enunciated in General Rules for Interpretation (GIR). Rule 1 of GIR provides that classification shall be determined according to the terms of the headings and any relative Sections or Chapter Notes. If the goods to be classified are covered by the words in a heading and the Section and Chapter Notes do not exclude classification in that heading, the heading applies. A heading that is worded in such a way as to include the product in question will be the correct classification. Section and Chapter notes are to be examined to find out if the product is mentioned specifically as being included or excluded. As per GIR if goods are ambiguous and two or more headings appear to be applicable, then Rule 3 should be applied which provides that specific heading should be preferred to general heading. Rule 3 of GIR provides, *"when by application of sub-rule (b) of rule 2 or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as given in rule 3(a), 3(b) or 3(c)"*. The heading which provides most specific description shall be preferred to heading providing a general description as held in CCE Vs. Maharshi Ayurveda Corp Ltd. [2006 (193) E.L.T. 10 (SC)], where it has been held that as per Rule 3(a) of GIR, the heading which provides specific description should be preferred to heading which provides general description. Only such goods as cannot be brought under the various specific entries in the

tariff could be attempted to be brought in residual entry as observed in the case of State of Karnataka vs. Durga Projects Inc. (2018) 4 SCC 633. For ready reference, entries of Chapter 8 and its Notes are reproduced as under:-

CHAPTER 8

Edible fruit and nuts; peel of citrus fruit or melons

NOTES

1. *This Chapter does not cover :*

(a) *inedible nuts or fruits; or*

(b) *betel nut product known as "Supari" of tariff item 2106 90 30.*

2. *Chilled fruits and nuts are to be classified in the same headings as the corresponding fresh fruits and nuts.*

3. *Dried fruit or dried nuts of this Chapter may be partially rehydrated, or treated for the following purposes:*

(a) *for additional preservation or stabilisation (for example, by moderate heat treatment, sulphuring, the addition of sorbic acid or potassium sorbate);*

(b) *to improve or maintain their appearance (for example, by the addition of vegetable oil or small quantities of glucose syrup), provided that they retain the character of dried fruit or dried nuts.*

Tariff Item	Description of goods
0804	DATES, FIGS, PINEAPPLES,
AVOCADOS,	GUAVAS,
MANGOES, AND	
MANGOSTEENS, FRESH OR DRIED	
080410	- Dates
08041010	--- Fresh (excluding wet dates)
08041020	--- Soft (khayzur or wet dates)
08041030	--- Hard (Chhohara or Kharek)
08041090	----- Other

Applying principle of rule 1 of GIR, all type of dates is covered

under heading 0804. As per Chapter note 3, even partially rehydrated or treated with certain other process would not change the classification. It is observed that after processes as given above, end product namely *dry date cut* or *dry date chura* remains dry date as its essential character is not lost. In Chapter note, it is clearly mentioned that even moderate heat treatment would not change the classification of the product namely dry date. In the sequence of processes undertaken by the Appellant, deseeded dates are subjected to moderate heating just to remove moisture. In view of the said note, classification cannot be altered on such heat treatment. It is also found that deseeded dates merit classification under Chapter heading 0804 as may be verified from import data available at *zauba.com*. It shows that up to the stage of de-seeding, dates are classifiable under chapter heading 0804 and thereafter only process of cutting, moderate heating and sieving are done which obviously do not change its essential character.

5.1 The processes mentioned in Chapter 8 include chilling, steaming, boiling, drying and provisionally preserving. These terms have to be understood in a commonly accepted sense. The Hon'ble Supreme Court in the ease of *Alladi Venkateswarlu vs. Government of Andhra Pradesh* 1978 AIR 945 held that,

"the commonly accepted sense of a term should prevail in construing the description of an article of food".

In common trade parlance, "drying" is a method of food preservation by the removal of water content. Therefore, drying is a moisture removal process involving methods such as dehydration, evaporation, etc and such process does not change essential character of the product. Now we examine entries of Chapter 20 and its Chapter notes which are reproduced as under:-

CHAPTER 20

Preparations of vegetables, fruit, nuts or other parts of plants

NOTES

1. This Chapter does not cover :

(a) vegetables, fruit or nuts, prepared or preserved by the processes specified in Chapter 7, 8 or 11;

(b) food preparations containing more than 20% by weight of sausage, meat, meat offal, blood, fish or crustaceans, molluscs or other aquatic invertebrates, or any combination thereof (Chapter 16);

(c) bakers wares and other products of heading 1905; or

(d) homogenised composite food preparations of heading 2104. 2. Headings 2007 and 2008 do not apply to fruit jellies, fruit pastes, sugar-coated almonds or the like in the form of sugar confectionery (heading 1704) or chocolate confectionery (heading 1806).

3. Headings 2001, 2004 and 2005 cover, as the case may be, only those products of Chapter 7 or of heading 1105 or 1106 (other than flour, meal and powder of the products of Chapter 8) which have been prepared or preserved by processes other than those referred to in Note 1(a).

4.

5.

6.

7. In relation to products of this Chapter, labelling or relabelling of containers or repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to 'manufacture'.

8.

SH 2008 covers entry as below:-

2008 FRUIT, NUTS AND OTHER EDIBLE PARTS OF PLANTS, OTHERWISE PREPARED OR PRESERVED, WHETHER OR NOT CONTAINING ADDED SUGAR OR OTHER SWEETENING MATTER OR SPIRIT, NOT ELSEWHERE SPECIFIED OR INCLUDED

- Nuts, ground-nuts and other seeds, whether or not mixed together :

2008 11 00 --- Ground-nuts kg. 6%

2008 19 --- Other, including mixtures:
 2008 19 10 --- Cashew nut, roasted, salted or roasted kg. 6%
 and salted
 2008 19 20 --- Other roasted nuts and seeds kg. 6%
 2008 19 30 --- Other nuts, otherwise prepared or preserved
 kg. 6%
 2008 19 40 --- Other roasted and fried vegetable products kg.
 6%
 2008 19 90 --- Other kg. 6%
 2008 20 00 --- Pineapples kg. 6%
 2008 30 --- Citrus fruit:
 2008 30 10 --- Orange kg. 6%
 2008 30 90 --- Other kg. 6%
 2008 40 00 --- Pears kg. 6%
 2008 50 00 --- Apricots kg. 6%
 2008 60 00 --- Cherries kg. 6%
 2008 70 00 --- Peaches, including nectarines kg. 6%
 2008 80 00 --- Strawberries kg. 6%
 -Other, including mixtures other than those of sub-heading 2008
 19 :
 2008 91 00 -- Palm hearts kg. 6%
 2008 93 00 --- Cranberries (*Vaccinium macrocarpon*, kg. 6%
Vaccinium Oxycoccos *Vaccinium vitis-idaea*)
 2008 97 00 --- Mixtures kg. 6%
 2008 99 --- Other: --- Squash :
 2008 99 11 --- Mango kg. 6%
 2008 99 12 ---- Lemon kg. 6%
 2008 99 13 ---- Orange kg. 6%
 2008 99 14 ---- Pineapple kg. 6%
 2008 99 19 ---- Other kg. 6%
 --- Other :
 2008 99 91 ---- Fruit cocktail kg. 6%
 2008 99 92 ---- Grapes kg. 6%
 2008 99 93 ---- Apples kg. 6%
 2008 99 94 ---- Guava kg. 6%
 2008 99 99 ---- Other kg. 6%

It is seen from the above Chapter that the said Chapter does not cover (a) vegetables, fruit or nuts, prepared or preserved by the processes specified in Chapter 7, 8 or 11. It shows that drying process in oven which is specified in chapter Note 3 of Chapter 8 would not change classification of dry dates from Chapter 8. It may further be seen that HSN 2008 covers only those fruits, nuts and edible parts of plants which are not specified elsewhere. For dry dates, there is specific entry under SH 0804 of the Central Excise Tariff. Hence, dates without seeds and dried in oven are again dates. So, it would be classifiable under SH 0804 of the Central Excise Tariff.

5.2 It is a settled legal position that for classification of an item in Central Excise Tariff, assistance may be taken from *General Chapter Notes of HSN* on the basis of which Central Excise Tariff is prepared. It is an established fact that in case of any doubt, the HSN is a safe guide for ascertaining the true meaning of any expression used in the Tariff Act. The case of *Commissioner of Customs & Central Excise vs. Phil Corporation Ltd.* [2008 (223) E.L.T. 9 (SC)] is directly relevant and applicable in the instant case of the Appellant. In the judgement of the said case Hon'ble Supreme Court has held "*a number of cases, this Court has clearly enunciated that HSN is a safe guide for the purpose of deciding issues of classification.*" So, we refer HSN General Note of Chapter -8 which provides as :-

*This Chapter covers fruit, nuts and peel of citrus fruit or melons (including watermelons), generally intended for human consumption (whether as presented or after processing). They may be fresh (including chilled), frozen (whether or not previously cooked by steaming or boiling in water or containing added sweetening matter) or dried (**including dehydrated, evaporated or freeze-dried**); provided they are unsuitable for immediate consumption in that state, they may be provisionally preserved (e.g., by sulphur dioxide gas, in brine, in sulphur water or in other preservative solutions).*

The term "chilled" means that the temperature of a product has been reduced, generally to around 0°C, without the product being frozen. However, some products, such as melons and certain citrus fruit, may be considered to be chilled when their temperature has been reduced to and maintained at + 10 °C. The expression "frozen" means that the product has been cooled to below the product's freezing point until it is frozen throughout. Fruit and nuts of this Chapter may be whole, sliced, chopped, shredded, stoned, pulped, grated, peeled or shelled.

5.3 The processes mentioned in Chapter 8 include chilling, steaming, boiling, drying and provisionally preserving. It shows that even after drying the product of Chapter 8, the classification would not be changed. It may further be seen that General Note of HSN Chapter Note 20 specifies as:-

"Heading 2008 covers fruit, nuts and other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise than by any of the processes specified in other Chapters or in the preceding headings of this Chapter."

5.4 Specifying what is included in this heading, the explanatory note states that almonds, ground nuts, areca (or betel) nuts and other nuts, dry-roasted, oil-roasted or fat-roasted, whether or not containing or coated with vegetable oil, salt, flavours, spices or other additives. Dry-roasting, oil-roasting & fat-roasting, as a process, are very much a part of chapter heading 2008 by virtue of HSN Explanatory Notes. Roasting and drying are two different processes. In dry roasting, characteristics of the product does not change whereas in roasting the product is chemically changed. In Chapter-20, roasted fruits are covered, not fruits which are subjected to drying only. It is also pertinent to observe that on dry dates, in question, none of these processes as mentioned above are carried out. We find that product emerging subsequent to the processes undertaken by the Appellant can be consumed as

such. Going by the entry of Chapter-08, we are of the considered view that the product can rightly be classified as dry date. When the product is covered under Chapter -08, the need to go to the Chapter-20 which is residuary in nature does not arise. Therefore, we fully agree with the contention of the Appellant to classify the processed dry dates under Chapter-08 attracting nil rate of duty.

6. With regard to the second issue, we find that the Appellant carried out washing with water for dust removal from dry dates, breaking dry dates for removal of seeds, removing seeds from dry dates, cutting deseeded dry dates into small piece, such small pieces of deseeded dry dates are subjected to oven drying for removal of moisture which occurred during washing, for getting requisite size sieving of moisture free dates is undertaken and thereafter packing in 25 Kgs and 50 Kgs bags for sale. The observation of the Commissioner (Appeals) regarding the above is as under:-

"3.3 the manufacture process adopted by the appellant confirms that treatment given to raw dates before selling them to consumer is manufacturing process in terms of section 2(f) of the Central Excise Act,1944 and chapter Notes of chapter 20 of the Tariff Act,1985 as it has definitely rendered dry dates in to a new product that are distinct and easily distinguishable from raw material (Dates in natural form) . Cut dry dates so manufactured are hardly recognisable as raw material."

The Commissioner (Appeals) has treated the end product as new product only on the ground that it was different from raw dry date and it could not be recognized as dry dates. With a view to understand what process amounts to manufacture under Central Excise, we refer the provision of section 2(f) of the Central Excise Act, 1944 (CEA) which defines "manufacture" as: *"manufacture" includes any process: (i) incidental or ancillary to the completion of a manufactured product; (ii) which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985, as*

amounting to manufacture. The statutory definition would indicate that "manufacture" under Central Excise has to be construed in two ways:

(A) "general concept" of manufacture:

(B) "deemed concept" of manufacture.

General concept- It has been held by the Hon'ble Supreme Court in the case of ***UOI vs. Delhi Cloth and General Mills Co. Ltd. [1977 (1) E.L.T. J 199 (SC)]*** that an activity or process, in order to amount to manufacture must lead to emergence of a new commercial product, different from the one with which the process was started. In other words, it should be article with different name, character and use.' 'Manufacture' implies a change but every change in raw material is not manufacture. Something more is necessary. There must be such transformation of raw material into a new and different article emerges having a distinct name character and use. In the case of ***State of Maharashtra Vs. Mahalaxmi Stores [2003 (152) E.L.T. 30 (S.C)]***, the Hon. Supreme Court observed that "*Every type of variation of goods or finishing of goods would not amount to manufacture unless it results in emergence of new commercial commodity*".

7. Processes as enumerated above undertaken on dry dates do not lead to emergence of any new product different from raw material. Raw material is dry dates having seeds inside and end product is dry dates without seeds. Characteristics, quality and name of the product remained same. As per information available on internet dry dates with seed and without seed have same qualities and characteristics. Its usages are same. In the market both dry dates with seeds and dry dates without seeds, cut in to small pieces, are sold as dry dates. Thus, no new product comes in to existence on account of the said processes on dry dates. Our above finding find support from the decision of the Supreme Court in the case of **Deputy Commissioner Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. PIO Food Packers [(1980 (6) E.L.T. 343 (S.C.))]**. In that case, the process undertaken by the assessee was to wash the

pineapple, after purchase, and then remove inedible portion, the end crown as well as skin and inner core. After removing those inedible portions the pineapple fruit used to be sliced and the slices were filled in canes after adding sugar as preservative. Thereafter, canes would be sealed under temperature and then put in a boiled water for sterilization. Identical question was posed viz. whether this process amounted to 'manufacture'. Giving the answer in the negative, the Court held that even when with each process suffered, the original commodity experienced a change, such a change would not amount to 'manufacture' unless it seized to be the original commodity and a new and distinct article was produced therefrom. In the present case no new commodity emerges on account of the cited process, no manufacturing therefore took place. In view of the above we hold that processes undertaken by the appellant do not amount to manufacture and as such not dutiable.

8. As regards 'Deemed' concept of manufacture- Section 2(f) (ii) of CEA, provides for concept of deemed manufacture. If an activity, in relation to specified goods, is specified as amounting to manufacturing activity in the relevant Chapter Notes/Section Notes of CETA, then such activity would amount to manufacture and the resultant products would attract levy of excise duty. Normally, an activity of repacking from a bulk pack to smaller packs would not amount to manufacture under the general concept. However, in respect of goods of some Chapters, such an activity is specified as amounting to manufacture by way of a Chapter note. The Commissioner (Appeals) has observed that dry dates are subjected to the process of cutting dry dates after washing & drying are classifiable to SH20089999 of the Central Excise Tariff. He further observed that the process of cutting dry dates after washing and drying changed them in to a product that was ready for consumption and certainly marketable to industrial consumer or individual consumer. Therefore, according to Chapter Note 7 of Chapter 20, the processes undertaken by the Appellant amounts to manufacture under deemed concept even if the said processes do not amount to manufacture under

general concept. This view is incorrect inasmuch as that after subjecting the above processes, the end product remains the same in regard to characteristics, name and quality. Sub heading 2008 of the Central Excise Tariff covers only those fruits which are not classifiable elsewhere. As dry dates in all forms find entry in Chapter 8 of the Central Excise Tariff, it would not be classifiable under SH 2008. When the item does not fall under Chapter 20, there is no applicability of Chapter Note-7 of Chapter 20. We therefore, find no weightage in the finding of the Commissioner (Appeals) for treating the processes as amounts to manufacture.

9. It has been alleged in the SCN that processes undertaken by the Appellant enhance the value of goods many times, hence, such processes amount to manufacture. In this context, we find that enhancement in value is no basis to consider processes as manufacture. There is statutory definition of term 'manufacture' under Section 2(f) of the Central Excise Act, 1944. Only those processes which pass litmus test of section 2(f) would be treated as amounts to manufacture. In the case of **Swastic Rayon Process [2007 (209) E.L.T. 163 (SC)]**, it has been held by the Hon'ble Supreme Court that merely because there is value addition, it does not mean that manufacture has taken place. Even if the processes as mentioned above had taken place, the end product remains the same. In the case of **S.R. Tissues Pvt. Ltd. [2005 (186) E.L.T. 385 (SC)]**, the Hon'ble Supreme Court has held that value addition, without any change in the name, character and use cannot be criteria to declare what is manufacture.

10. SSI exemption has been denied to the Appellant on the ground that value of clearances of cut dry dates and chura dry dates is required to be included for determination of aggregate value of clearances as the said goods were dutiable excise goods. Since said goods namely cut dry dates and chura dry dates were fully exempted from excise duty as processes undertaken thereon were not amounting to manufacture, the value of clearances of such cut dry dates/chura dry dates would

not be includible for determination of aggregate value. Thus, denial of exemption granted under SSI exemption Notification is improper and not sustainable.

11. As regards imposition of penalty under Section 11AC of the Central Excise Act, 1944, we find that the same is leviable proportionate to duty amount confirmed. If no duty is confirmed, no penalty would be imposable under Section 11AC of the Central Excise Act, 1944. In this context we refer to the decision of the Tribunal in the case of Deek Printers [2011-TIOL-2009-CESTAT-AHM] wherein it has been held that in case demand is not sustainable, penalty would not be imposable. Hence, in the present case, no penalty is imposable.

12. In view of the above discussion, we set aside the impugned order and allow the appeal with consequential relief, as per law.

(Order pronounced in open court on – **13th November, 2024**)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS