IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

COURT-IV

Appeal Nos. E/1343,1344.1362/2008

[Arising out of the Order in Original No. 07/Commissioner/MRT-I/2008 dated 28.03.2008 passed by Commissioner, Central Excise, Meerut]

Adhunik Food Products … Appellant
Shri D.K. Garg, Director
Shri A.K. Gupta, Director

Vs.

Commissioner of Central Excise, Meerut … Respondent

Appearance:

Rep. by - Shri V. Lakshmi Kumaran & Shri H. Bajaj, Advocates for the appellants.
Rep. by - Shri R.K. Manjhi DR, for the respondent

Coram: Hon'ble Mr. M.V. Ravindran, Member (Judicial)
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Date of Hearing : **02.03.2017**

Date of Decision : **24.03.2017**

Final Order No. 52515-52517/2017-DB

Per V. Padmanabhan

These three appeals have been filed by M/s. Adhunik Food Limited as well as its directors Shri D.K. Garg and Shri A.K. Gupta against Order-in-Original No. 07/Commissioner/MRT-I/2008 dated 28.03.2008 passed by Commissioner, Central Excise, Meerut.

2. The matter is before the Tribunal for the second time. In the earlier round of litigation, the matter has gone up to the Hon'ble Supreme Court and the matter was remanded by the Hon'ble Supreme Court to the original authority i.e., the Commissioner for deciding the matter afresh in the light of the observations/ directions which are as follows:-

> "In the entire discussion in the impugned judgment there is no finding given by the Tribunal as to whether 'puffs' prepared from cereals would fall under the Chapter heading 19.04. As far as 'puffs' prepared from soya nuts are concerned there is no findings as to the quantity of puffed soya nuts sold by the assessee during the above period to ICDS; Haryana and the quantity of the said product sold by the assessee during the said period to public schools and five star hospitals. There is also no finding as to whether 'puffed soya nuts' were supplied to ICDS, Haryana under the brand name 'bonton' or whether they were supplied without any brand name being affixed to the unit containers. These questions are important since the entry 2108.91 refers to nil rate of duty for "Other Edible Preparations" as long as the product is supplied without a brand name. These questions are also important to be decided particularly since the General Exemption No. 83 states that the benefit of exemption shall be given only if the product is a soya based foods preparation for infant use. According to the assessee puffed soya nuts is a soya based food preparation under item No. 25 of the Notification No. 2 of 1994 (General Exemption No. 83). According to the assessee puffed soya nuts were supplied to the schools under ICDS programme. None of the questions have been decided.
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> In the circumstances, we set-aside the impugned judgment of the Tribunal and remand the matter to the adjudicating authority for fresh determination in accordance with law."

Thereafter, as per the directions of the Hon'ble Supreme Court, the assessee filed their submissions and appeared before the adjudicating authority on 20.12.2007. The adjudicating authority, after considering the submissions, issued the impugned order in which Central Excise duty demand stands confirmed against the assessee to the extent of Rs. 2,06,10,579/- along with imposition of penalty of equal amount besides ordering payment of interest. Penalties of Rs. 5 Lakh each have been imposed on Shri K.K. Garg and Shri A.K. Garg, Directors as well as Rs. 2 Lakh on Shri D.K. Garg, Director. Land and building and plant and machinery were also ordered for confiscation which were allowed to be redeemed on payment of redemption fine of Rs. 5 Lakh. The present appeals have been filed by the assessee as well as Shri A.K. Garg and Shri D.K. Garg, Directors which are being disposed by this common order.

3. With the above background, heard Shri V. Lakshmikumaran and Shri Hemant Bajaj, ld. Counsels appearing for the appellants and Shri R.K. Manjhi, ld DR appearing for the Revenue.

4. The assessee is engaged in the manufacture of Wheat Puff as well as Soya nuts. The dispute is with reference to the classification as well as rate of duty applicable to these two products, for the period 1993-94 to 1994-95 (for Soya Nuts) as well as for the period April 1992 to 21.07.1997 (for Wheat Puffs). The assessee sought their classification of Soya Nuts under CETH 2107 99 however, the department classified the same under CETH 2107 91. In respect of Wheat Puffs, the assessee wanted classification under CETA 2107 for the period up to 1994-95 and from 16.03.1995 onwards under 2108, whereas the department classified it under CETA 1904 10.

5. The claim of the assessee is that 98.5% of the goods manufactured by them have been cleared to Integrated Child Development Scheme (ICDS), which is an organization of the State Governments of Haryana and Delhi with the objective to improve the nutrition level among young children as well as

expecting and lactating mothers. In respect of the item Wheat Puff, the claim of the assessee is that it was prepared by getting puffed wheat coated with soya to improve the taste as well as protein level. The item Soya Nuts was prepared by popping soya bean in machines. The goods were dispatched by the assessee to Anganwadi in polythene packs of 10 Kgs./ 15Kgs. weight. This has been considered by the Revenue as packed in "Unit Container". The bags also contained conspicuous marking as "not for sale".

6. During the visit of the Central Excise officers to the assessee's factory on 22.01.1997, it was noticed that the goods manufactured by them were cleared in unit containers of 100gms./ 200gms./ 5Kgs and bearing brand name of 'BONTON'. The department has considered that the entire goods cleared from the factory was made bearing the brand name as above. Further, the appellant submitted that the clearances bearing brand name accounts for a very small percentage of the overall clearance.

7. First we consider the product Soya Nuts. The relevant CETH is reproduced below as it stood during the relevant time:-

Chapter 21		Miscellaneous Edible preparations	
Head-Ing No.	Sub Head-ing No.	Description of goods	Rate of duty
21.07		**Edible preparations, not elsewhere specified or included**	
	2107.10	- Prasad or prasadam	Nil
	2107.20	- Sterlised or pasteurized miltone	Nil
		- *Other :*	Nil
	2107.91	-- Put up in unit containers and ordinarily intended for sale	15%

	2107.99	-- Other	Nil

The assessee has sought the classification under CETH 2107.99 (other) whereas the department has sought classification under 2107.91, considering the goods as packed in unit containers and ordinarily intended for sale. We note that the clearances made for ICDS scheme were in bulk packs of 10Kgs. / 15 Kgs. sizes. Revenue has considered these packings as 'unit containers' to decide the classification under 2107.91. They have also considered the goods as sold to the implementing authority of ICDS even though these are delivered to Anganwadis on free distribution and specifically mentioned on the packing as 'Not for Sale'.

The contra claim of the assessee is that the goods have been supplied to the State government (ICDS) for free supply and were not meant for sale. Further, the goods packed in 10 Kgs./ 15 Kgs. packs cannot be considered as put up in unit containers. We find considerable force in the submissions made by the assessee. The wording "put up in unit containers and ordinarily intended for sale", in trade parlance refers to goods cleared for sale in convenient sizes of 100 gms., 200 gms. etc. for retail sale. The unit container cannot be used to refer to bulk packing of 10 Kgs. / 15 Kgs. which are mostly used in clearance for wholesale. It is also not in dispute that the goods have been cleared to ICDS for free supply and not for sale. Hence, the most appropriate classification for these goods is 2107.99. We note that the goods of 2107.99 were chargeable to 'nil' rate of duty as per tariff rate up to 28.02.1994 and with effect from 01.03.1994 the goods enjoyed 'nil' rate of duty under various notifications i.e. 6/92-CE dated 01.03.1992 and 2/94 dated 01.03.1994. The appellant has made an alternate plea for the benefit of notification 4/1993-CE and 2/1993-CE in the event of classification under 2107.91. Since we are allowing the classification under CETH 2107.99, we are not discussing the alternate submissions of the assessee.

8. Next we consider the product Wheat Puff. The dispute in this commodity also revolves around the question whether clearances made in 10/15 Kg packs are to be considered as “goods cleared in unit containers and ordinarily intended for sale”. The assessee originally sought the classification of this item under Chapter heading 2107 and claimed full exemption under various notifications prevalent during the relevant time i.e. 12/1990 dated 20.03.1990, 2/1994 dated 01.03.1994. Central Excise Tariff entry under Chapter 21 underwent changes in the budget of 1995-96 (with effect from 16.03.1995). After such amendment, the assessee sought classification under heading 2108. After the amendment, from 22.09.1996 the assessee sought classification under 2108.91 as “edible preparation not bearing brand name” and claimed nil rate of duty. Against such claim of the assessee, in the impugned order, the adjudicating authority classified the item under 1904 10 as “prepared foods obtained by the swelling or roasting of cereals or cereal products”.

In the present appeal, the submission of the assessee is that the Wheat Puff merits classification under 2107 91 and claimed benefit of the exemption notification 17/1995 with effect from 16.03.1995 as Soya based food preparation for infant use. They have made an alternate submission that in the event of department seeking to classify the goods under 1904, it is liable for classification under 1904 90 and not under 1904 10 as ordered by the ld. Commissioner. The relevant CETH entries are reproduced below:-

Head-ing No.	Sub Heading No.	Description of goods	Rate of duty
19.04		**Prepared foods obtained by the swelling or roasting of cereals or cereal products (for example, corn flakes); cereals, other than maize (corn), in grain form, pre-cooked or otherwise prepared**	
	1904.10	- Put up in unit containers and ordinarily intended for sale	15%
	1904.90	**- Other**.	

The claim of the assessee is that only a very small percentage of product is cleared in unit containers with brand name, whereas, bulk of the clearances were made to ICDS in jumbo packs of 10 Kg/ 15 Kgs sizes. As already observed in the above paragraphs, clearances made to ICDS in jumbo packs cannot be considered as clearance in unit containers. Consequently, the classification of the product Wheat Puff will be most appropriate under CETH 1904.90 and not under 1904 10 as decided by the adjudicating authority.

9. We make it clear that the above classification has been made for the goods cleared in jumbo packs to ICDS considering them as not put up in unit containers and not intended ordinarily for sale. However, it is also on record that in addition to such clearances, the assessee has been making clearance of both the above products in unit containers of sizes between 100gms and 5 Kgs. which have been cleared bearing brand name 'BONTON'. Such clearances of the

Wheat Puffs will not be eligible for classification under 1904 90 and the same will be classifiable under 1904 10. In respect of the product Soya Nuts, such goods cleared in unit containers with brand name will be classifiable under 2109 91. The clearances of such goods will be liable to payment of excise duty at appropriate rates. The assessee, during the course of hearing has submitted a Chartered Accountant's certificate in which the percentage of sales made to government vis-à-vis total sale during the year 1992-93 to 1996-97 has been shown. From the above certificate of the Chartered Accountant, we note that quantities, varying from 91.55% to 98.80% in various years have been made to government (ICDS) which, as discussed in the above paragraphs, will be entitled to clearance at 'nil' rate of duty. However, the balance clearance made in unit containers will be liable to payment of Central Excise duty at appropriate rates. The assessee has claimed the benefit of various notifications prevalent during the period under dispute. There is also discussion in the impugned order about the SSI exemption notification benefits. Hence, it is necessary for the issue to go back to the adjudicating authority for re-quantification of such demand of excise duty in respect of clearances of both the products made in unit containers to the agencies other than government (ICDS). Issues of duty demand, interest and penalties, if any, are kept open for such clearances. Ld. Counsel for the assessee fairly agreed that excise duty was payable on such clearances, even though such clearances form a very small quantity of turn over. The adjudicating authority is directed to pass de-novo order only in respect of such clearances, after extending effective opportunity of hearing to the appellant to put forth their submissions.

10. With the above observations, the appeals are disposed in above terms, by way of remand.

[Order pronounced in open court on 24.03.2017]

(**M.V. Ravindran**)
Member (Judicial)

(**V. Padmanabhan**)
Member (Technical)

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