CASE NO.:
Appeal (civil) 8595-8596 of 2001

PETITIONER:
M/s Amrit Agro Industries Ltd. & Anr

RESPONDENT:
Commissioner of Central Excise, Ghaziabad

DATE OF JUDGMENT: 19/03/2007

BENCH:
S. H. Kapadia & B. Sudershan Reddy

JUDGMENT:
J U D G M E N T
With Civil Appeal Nos. 1459-60/2002

KAPADIA, J.

Civil Appeal Nos. 8595-8596/2001:

These civil appeals are filed by the assessee under section 35L of the Central Excise Act, 1944 against decision dated 10.9.2001 passed by CEGAT. The short question which arises for determination is the classification of 'roasted peanuts' and 'moongfali masala mazedar' under the Schedule to the Central Excise Tariff Act and consequential demand for duty of excise.

The Appellant-assessee manufactures namkeens like aloo bhujia, chholey masala, roasted peanuts and moongfali masala mazedar. Appellant claims that all the four items fall under Heading 21.08 as Namkeen. The Appellant claims that accordingly all the four items are exempted vide Notification No. 4/97-C.E. dated 1.3.1997. In that declaration/classification with effect from 1.3.1997, they declared all the above items as namkeens. They relied upon Heading 21.08 which refers to namkeens such as bhujia and chabena. The Appellant started production of two out of four items abovementioned, namely, roasted peanuts and moongfali masala mazedar only in July and September, 1997 respectively. Prior to the above dates, they were in the business of manufacturing chholey masala and aloo bhujia.

At this stage, we may clarify that the Department has accepted the claim of the appellant that chholey masala and aloo bhujia fell under Heading 'namkeen' under 21.08. The appellant has been given exemption benefit accordingly. Therefore, in the present civil appeals there is no dispute regarding chholey masala and aloo bhujia.

It is the case of the Department that roasted peanuts and moongfali masala mazedar are the two items which do not fall under Heading 21.08. It is the case of the Department that Chapter 21 deals with Miscellaneous Edible Preparations. It is the case of the Department that chholey masala and aloo bhujia fall under Chapter 21, but not roasted peanuts and moongfali masala mazedar. According to the Department, roasted peanuts and moongfali masala mazedar are the two items which will fall under Heading 20.01 in Chapter 20. According to the Department, Chapter 20.01 deals with Preparations of Vegetables, Fruit, Nuts and Other Edible Parts

of Plants. According to the Department, in the case of roasted peanuts, the character of a nut remains intact. According to the Department, in the present case, the assessee applies salt on the peanuts, thereafter, the assessee roasts peanuts which are then put in a container. Therefore, according to the Department, in the process of roasting the character of a nut remains intact. According to the Department, a roasted peanut is a preparation from the peanut. Accordingly, the Department sought to classify roasted peanuts under Heading No. 20.01.

As regards moongfali masala mazedar, the same test is sought to be applied by the Department saying that an essential character of moongfali is not lost even when it is salted and fried, therefore, according to the Department, roasted peanuts and moongfali masala mazedar are the items classifiable under Heading 20.01.

Having gone through the records and having examined the process undertaken by the assessee, we are in agreement with the view expressed by the Tribunal ("CEGAT") regarding classification of roasted peanuts under Heading 20.01. The Tribunal had adopted a correct test when it says that the essential structure of the peanut is not changed by the process of roasting. The assessee merely applies salt to roasted peanuts which does not obliterate the essential character. Moreover, roasting is a process. That process has not been excluded in Note 1 to Chapter 20. Therefore, roasted peanuts are covered by Chapter 20. Even according to the Explanatory notes of HSN under Heading 20.08 ground-nuts, almonds, peanuts etc. which are dry-roasted, fat-roasted whether or not containing vegetable oil are the items which all would stand covered by the said Heading 20.08.

According to the appellant-assessee, roasted peanuts would fall under Chapter 21\026Miscellaneous Edible Preparations. In this connection, reliance is placed by the appellant on Heading 21.08 which refers to Edible preparations, not elsewhere specified or included. Learned counsel in particular also relies upon sub-heading 2108.99 \026 Other. According to the appellant, roasted peanut falls under Heading 21.01, hence they are entitled to exemption. Learned counsel for the appellants further submits that in the following year 1998-99 Chapter Note no. 10 was modified to include products commonly known as namkeens, mixtures, bhujia, chabena or by any other name. According to Chapter Note no. 10, such products shall remain classifiable under sub-heading 2108.99 and, therefore, the appellants were entitled to the benefit of exemption notification. We do not find any merit in this contention. Firstly, a roasted peanut is not a product commonly known as namkeen. It cannot be compared to bhujia. In the case of bhujia, e.g., not only salt but even masala, salt, gram flour are some of the ingredients which are used in the preparation of bhujia. Therefore, a roasted peanut cannot be compared to a bhujia. Similarly, a roasted peanut is not only known in the market as a bhujia or chabena. In the circumstances, there is no merit in the contentions raised on behalf of the appellant-assessee. As stated above, roasted peanut is also a preparation, however, it is a preparation of nuts like almonds, peanuts, ground-nuts etc.. They are products which are prepared or preserved by processes like roasting. As stated above, roasting is not chilling, it is not freezing. As stated above, roasting is not one of the enumerated processes in Chapter Note No. 1 to Chapter 20. Heading 20.01 specifically refers to preparations of vegetables fruit, nuts or plants. Sub-heading 2001.90 refers to the word

'Other'. In the circumstances, we are in agreement with the view expressed by the Tribunal that roasted peanut falls under Chapter 20 and not under Chapter 21.

As regards moongfali masala mazedar, the Department has adopted the same test to say that even in the case of the said item the basic character of moongfali is not altered. This view is erroneous. We have examined the process. In the case of moongfali masala mazedar, the preparation is very similar to bhujia. As stated above, even according to the Department aloo bhujia falls under heading 21.08. In the case of moongfali masala mazedar, the principle of predominance cannot be applied, particularly in absence of any Section Note or Chapter Note propounding the said principle. In this process the capacity to germinate is obliterated. Moongfali masala mazedar is the mixture of material other than the nuts. It is an oil preparation. It makes use of gram flour (besan). It undergoes the process of deep frying. When such a process is applied one cannot apply the principle of predominance. The only difference between aloo bhujia and moongfali masala mazedar is that in the former case the namkeen is essentially made of aloo whereas in the later case it is a namkeen essentially made from a pulse (dal). Pulse can be chana, malka, masoor, moong, urad etc.. All these products are only known as namkeens in the market. In the circumstances, we are of the view that moongfali masala mazedar falls under Chapter 21. It falls under Heading 21.01, sub-heading 2108.99 and, therefore, the assessee is entitled to exemption.

In the present matter, one of the points which arises for determination is whether the Department was entitled to invoke the extended period of limitation. Although, the courts below have examined the said question, they have lost sight of an important fact, namely, that at the instance of the Department, the assessee had filed a revised declaration on 19.11.1997, in the circumstances, the show cause notice dated 5.5.1998 is within six months, consequently, the question of extended period does not arise in the present case.

Accordingly, the appeals are partly allowed with no order as to costs.

Civil Appeal Nos. 1459-1460/2002

These appeals are a sequel to the appeals decided today by us being Civil Appeal Nos. 8595-8596/2001.

In our judgment in Civil Appeal Nos. 8595-8596/2001, we have held that roasted peanuts unlike moongfali masala mazedar is a preparation falling under sub-heading 2001.90 of Chapter 20. To that extent, we have held in favour of the Department. Consequently, the question which arises in present Civil Appeal nos. 1459-1460/2002 is whether the price charged by the assessee, in the facts and circumstances of the case, has to be considered as cum-duty price. Essentially these civil appeals are quantum appeals. It is the case of the Department in the present civil appeals that all throughout the years the assessee has claimed that roasted peanuts came under Chapter 21 and, consequently, the said item stood exempted from payment of duty under above exemption notification dated 1.3.1997. Therefore, according to the Department, all these years the assessee had cleared the goods on the footing that roasted peanuts were exempted. They have filed the requisite declarations/ classifications on that basis. According to the Department, since the assessee had cleared roasted peanuts without payment of duty during

the relevant years, the quantum of duty is required to be recomputed. According to the Department, in the normal case where the assessee does not seek exemption or in cases where goods are not exempted, the quantum of duty has got to be recomputed on the basis of "cum-duty price". According to the Department, the reasoning behind recomputation based on cum-duty price is that ordinarily the basis for levy of excise duty is the normal price. That normal price includes the duty element. Such price is called cum-duty price. Therefore, in such cases, when the quantum of duty is required to be recomputed it has to be done on the basis of cum-duty price. In this connection, the law is well settled as held by this Court in Commissioner of Central Excise, Delhi v. Maruti Udyog Ltd. reported in 2002 (141) E.L.T. 3. In the said judgment, it has been held that the sale price realised by the assessee is the entire price inclusive of excise duty, when the assessee has by necessary implication, taken on the liability to pay all taxes on the goods sold and has not sought to realise any some in addition to the price obtained by it from the buyer. In the said case, it has been held that when the assessee has charged cum-duty price, then in arriving at the assessable value of the goods, the element of duty payable has to be excluded. To this extent, there is no difficulty. However, in the present case, the Department contends that there is no question of implication when throughout the relevant years the assessee has been clearing the goods on the basis of the exemption notification of 1997, referred to above, which is not applicable to roasted peanuts, and, therefore, according to the Department, the above judgment of this Court in the case of Maruti Udyog Ltd. has no application to the facts of the present case.

On the other hand, it is urged on behalf of the assessee that the basis for levy of excise duty under section 4(4)(d)(ii) of Central Excises & Salt Act, 1944 is the wholesale price. According to the assessee, that price will include the element of duty payable because such duty forms part of the consideration for sale of the goods according to the terms and conditions of sale of such goods and, therefore, whenever a further demand of duty is created against the assessee and such further demand of duty cannot be passed on to a customer in view of the stipulations of the terms and conditions of sale between the assessee and his customer, the original consideration (including duty, if any) received by the assessee for sale in wholesale trade has to be taken as cum-duty price. In this connection, reliance is placed by the assessee on the judgment of the Tribunal in Srichakra Tyres Ltd. v. Collector of Central Excise, Madras reported in 1999 (108) E.L.T. 361.

In our view, the above judgments in the case of Maruti Udyog Ltd. and Srichakra Tyres Ltd. have no application in the facts of the present case. In the case of Asstt. Collector of Central Excise v. Bata India Ltd. reported in 1996 (84) E.L.T. 164 this Court held that under section 4(4)(d)(ii) of Central Excises and Salt Act, 1994 the normal wholesale price is the cum-duty price which the wholeseller has to pay to the manufacturer-assessee. The cost of production, estimated profit and taxes on manufacture and sale of goods are usually included in the wholesale price. Because the wholesale price is usually the cum-duty price, the above section 4(4)(d)(ii) lays down that the "value" will not include duty of excise, sales tax and other taxes, if any, payable on the goods. It was further held that if, however, a manufacturer includes in the wholesale price any amount by way of tax, even when no such tax is payable, then he is really including something in the price which is not payable as duty. He is really increasing the

profit element in another guise and in such a case there cannot be any question of deduction of duty from the wholesale price because as a matter of fact, no duty has actually been included in the wholesale price. It was further held that the manufacturer has to calculate the value on which the duty would be payable and it is on that value and not the cum-duty price that the duty of excise is paid. Therefore, unless it is shown by the manufacturer that the price of the goods includes excise duty payable by him, no question of exclusion of duty element from the price for determination of value under section 4(4)(d)(ii) will arise.

In our view, in the facts and circumstances of the case the judgment of this Court in the case of Bata India Ltd. (supra) on principle would apply. Therefore, in the present case, the assessee will have to show as to how he has determined the value. What the appellant has really done in the instant case has to be examined. Whether the price charged by him to his customers contains profit element or duty element will have to be examined. As stated above, this examination is warranted because, in the present case, one cannot go by general implication that the wholesale price would always mean cum-duty price, particularly when the assessee had cleared the goods during the relevant years on the basis of the above exemption notification dated 1.3.1997.

Accordingly, the appeals are allowed and the matter is remitted to the adjudicating authority for recomputation of duty on the principles enumerated hereinabove. There will be no order as to costs.