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Adhunik Food Products Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-10-2002

Reported in : (2002)(82)ECC324

Judge : S T G.R., S Kang

Appellant : Adhunik Food Products

Respondent : Commissioner of Central Excise

Judgement :

1. M/s. Adhunik Food Products and Others had filed two ROMs as there was duplication on certain point, a consolidated ROM has been filed by the applicant now. It has been pointed out that some mistakes are there in the Final Order Nos. 215-219/2001-D, dated 9-11-2001 [2002 (149) E.L.T. 254 (T)]. Request has been made that the mistakes may be corrected. The claimed mistakes are as under: (i) In para 13 of the Tribunal's Order reference has been made to the declaration filed by the appellant on 13-4-1994 in which both the products as well as the processes involved have been clearly indicated leaving no doubt or ambiguity and this aspect was appreciated by the Bench in the course of the hearing as well and the subsequent declarations also contain the same details in regard to the products and the processes involved. However, the assessee's claim for exemption in respect of the products by claiming the Soya Nut as Soya textured protein with 'nil' rate of duty and/or as namkeens, such Bhujiya, Chabena under Tariff Heading 2107.91/2108, had not even been considered. The assessee did not emphasis that the products are 'prasad' or 'prasadam' but edible preparations which were

squarely in the nature of namkeens such as chabena and bhujiya.

This contention had not also been considered and decided as the exemption has been denied only on the ground of the products not being 'prasad' or' 'prasadam'. This mistake also needs to be rectified.

(ii) The Assessee had contended that each one of the respective notifications which had been prevailing, had provided for 'nil' rate of duty for the products by virtue of being either soya textured protein or namkeens such as bhujiya, chabena or sweet meats and snacks and this part of the Assessee's claim for 'nil' rate of duty had not been considered and decided, in the same set of notifications, exemption by giving 'nil' rate of duty is also provided for soya-based food preparations for infant use and the same had also not been considered. These mistakes also need to be rectified.

(iii) The Assessee had relied upon a number of decisions in support of its contentions both on the question of classification and entitlement to 'nil' rate of duty as also on the show cause notice being barred by limitation as the extended period of limitation in any event would not apply. All the cases referred to and relied upon for which detailed list was given to the Bench at the time of hearing, with due respect, had not been considered, followed and applied and this had also led to mistakes apparent from record which would require to be rectified.T.T.K. Pharma Ltd. v. C.C.E.C.C.E. v. Nektar Fruit Products -1996 (88) E.L.T. 421 in both of which the benefit of 'nil' rate of duty was extended by construing the meaning of edible food preparations and also the illustrative nature of the exemptions for products which are in the nature of namkeen, chabena and bhujia, etc. to held that these items are nothing but edible preparations and as such would fall under Chapter 21 with benefit of 'nil' rate of duty and, hence, would fall outside the purview ,pf Chapter 1904.10 of the Tariff. Since the same had not been considered, the mistake needs to be rectified.

(v) The Misc. application filed by the Assessee on 25-6-2001 to raise additional grounds, enclosing the decisions relied upon, has been allowed by the Tribunal in paras 5 and 6 of the order (page 2).

However, the Assessee's submission contained in the application in para (b) in the light of the decision of the Supreme Court in C.C.E. v. Park Exports Pvt. Ltd. - 1988 (38) E.L.T. 741 = 1989 (1) SCC 345 and the need to interpret the meaning of a Hindi term used in the Notification with reference to the meaning of that term in the Hindi dictionary had not been considered and this mistake also needs to be rectified, if one goes by the meaning of 'Chabena' both wheat puffs and soya nuts would squarely be covered therein and hence, exemption would be admissible, (vi) The decision of the Allahabad High Court in School Boys Industries v. CST (1987) UPTC 1145 clearly states in para 3 that "simply because wheat is processed to make it puffed wheat, it cannot be said that the character of wheat..... substantially undergoes change and the processed wheat acquired altogether a different character. Wheat when processed into puffed wheat still remains wheat" and relying on the judgments of the jurisdictional High Court referred to in para 1(a) of the Misc. application filed on 25-6-2001, the plea that wheat when puffed cannot be regarded as having been manufactured so as to attract Central Excise duty liability. The bona fide nature of the Assesses's contention, with respect, had not been appreciated and the judgments had been sought to be distinguished by stating that those decisions did not go into the question of manufacture for excise duty purposes. With respect, it is pointed out that both the decisions of the Allahabad High Court and also the decision of the Supreme Court in CST v. D.S. Bist and Ors. - 1979 UPTC 151 clearly lay down that a mere process would not by itself make the product different from what it was prior to that process and, therefore, the Assessee's bona fide plea of the wheat puffs not being liable to duty of excise on the one hand, and on that score there being no wilful suppression or mis-statement of facts by the Assessee, on the other, ought to have been accepted.

Since this aspect had not been looked into nor considered by the Tribunal, the mistake needs to be rectified not only to hold that there is no manufacture when wheat is puffed but also to hold that the extended period of limitation is not at all applicable in this case. This mistake also needs to be rectified.

(vii) The Assessee had relied upon cases in which the declarations filed by the Assessee had been treated on par with classification lists and, therefore, extended

period of limitation cannot be invoked but all those cases have been not considered and/or followed and this also would require rectification of the order already passed.

(viii) The Tribunal has in para 17 of the order relied upon a decision in SM Confectionary Works v. CCE - 1993 (66) E.L.T. 469 (T) = (1993) 47 ECR 102 to quote para 9 thereof in the context of what an edible preparation is. This case was not referred to nor relied upon by the Assessee or the Revenue and it appears to have been quoted out of context and the reliance thereon appears to be misplaced because in regard to the products, the process had been indicated by the Assessee specifically to state that it is sweetened for 'prasad' or salted for consumption depending upon the choice/taste of the consumer. The language used by the Assessee in the declarations is the same as what is contained in the exemption Notifications read with the Tariff and the change in the interpretation of the same by different authorities at different times cannot in any manner lead to an inference that the Assessee had wilfully mis-stated the facts in regard to this products.

Therefore, extended period of limitation cannot at all be invoked against the Assessee and this mistake also needs to be rectified.

(ix) In para 30 on page 12 of the order, the Tribunal has observed that the goods in question were described in the declaration as prasad, prasadam, chabena and soya textured proteins, whereas for sale to the buyers, the same had been described as wheat puffs and soya nuts. The fact that in all the declarations, the Assessee had specifically stated the goods as 'edible food preparations' and had also given the process of manufacture for both the items, had been ignored and this had led apparently to the erroneous observation and finding against the assessee and this mistake also needs to be rectified.

(x) in para 29 at page 12 of the order and para 32 at page 13 of the order, it has been wrongly stated that the Assessee had admitted that the goods manufactured are excisable and that there is no dispute on this question. With respect, this finding is wrong and that is why additional ground was taken to plead that the goods are not excisable as there is no manufacture in the process involved of

converting wheat into wheat puff and the additional ground was allowed to be taken. Therefore, it is wrong to state that the Assessee had admitted that the wheat puffs are excisable goods. It was specifically pleaded that wheat puffs not being excisable and not having been subjected to the process of any manufacture of new excisable goods, the question of duty liability even under Chapter 1904 of the Tariff did not arise. Even though the Assessee's plea was not accepted by the Tribunal or the Commissioner, it cannot be stated that the Assessee had admitted the goods as excisable and that there was no dispute on the question of excisability. Wrong finding given in this regard needs to be rectified.

(xi) In para 32, the Tribunal had taken note of the decision of the Allahabad High Court in E-Septon and Co. Pvt. Ltd. v. Superintendent of C.E. - 1985 (19) E.L.T. 57 in which goods exempt from duty or qualifying for 'nil' rate of duty have been held to be not requiring any statutory compliance from the side of the Assessee and this view of the jurisdictional High Court was rightly relied upon. However, reference to the decision of the Madras High Court in Tamil Nadu Handloom Weavers' Co-op. Society Ltd. v. ACCE - 1978 (2) E.L.T. 57 and the decision of the Supreme Court in Hico Products Ltd. v. CCE - 1994 (71) E.L.T. 339 have been relied upon by the Bench against the Assessee although none of these cases were cited by the Revenue nor indicated at the time of hearing. The divergence of judicial opinion on the same issue of excisability has been taken note of and the decision in Hico Products Ltd. (supra) of two learned judges of the Hon'ble Supreme Court had been relied upon to draw adverse inference against the Assessee. With respect, this mistake also needs to be rectified in view of the decision of the Supreme Court in Associated Cement Companies Ltd. v. CC - 2001 (128) E.L.T. 21 rendered by a Bench of three learned judges in which in para 79 at page 49 it has been held that when once 'nil' rate of duty is prescribed, the goods cannot be regarded as dutiable. Being a decision of a three-member Bench of the Apex Court the same should be followed and consequently the Assessee's plea based on the decision in Septon's case (supra) of the Allahabad High Court be accepted and as a consequence, the Assessee should be held not to have made any wilful mis-statement of facts and the extended period of limitation cannot, therefore, be invoked.Ashwini Vanaspati Industries Pvt. Ltd. v. CCE - 1991 (56) E.L.T. 214 relied upon by the Assessee has been noted but the ratio thereof

as well as the two judgments relied upon therein had not been followed on the ground that the goods were mis-declared in the declarations and had been removed without approval. With respect, it is pointed out that there is no question of approval in respect of any declaration and the declarations having been accepted by the Revenue from 13-4-1994 till the show cause notice was issued in 1997, on change of opinion, the question of treating the assessee as having wilfully misdeclared the goods does not arise and the findings in this regard being erroneous, the same would require to be rectified.

(xiii) In para 37, the Respondent has been directed to recompute the duty liability and also re-determine the liability to penalty on the Assessee and others except Shri R.N. Goel who has passed away and against whom, the penalty has been held to abate. Directions have also been given in para 40 for the purpose. There is no discussion and/or finding whether any liability to penalty is attracted at all and, if so, for what reasons and by whom. Shri Deepak Garg, one of the Appellants, became a Director in the company only on 20th November, 1996 and the show cause notice was issued on 21-3-1997 pursuant to the visit of the Excise Officers on 22-1-1997 and the demand relates to the period from April, 1992 to January, 1997.

Therefore, the levy of penalty on Shri Deepak Garg is totally unwarranted. Since the dispute is one of classification and entitlement to nil rate of duty arising merely from the change of opinion in the mind of the Revenue, the allegation of wilful misstatement or suppression against the assessee and/or levy of penalty on any of the appellants is totally unwarranted. In the last para No. 40(e), the direction of the Tribunal is confirmed to the penalty on the company as well as Shri A.K. Gupta and Shri K.K. Gupta being reconsidered the Commissioner and this means that Shri Deepak Garg should not be subjected to any penalty even by reconsideration of his case and this may be clarified and the amount already pre-deposited be directed to be refunded in respect of Late Shri R.N. Goel and Shri Deepak Garg.

2. We have perused the mistakes. We have also perused the Final Order dated 9-11-2001. On careful consideration of the two we note that all the points alleged to have not been dealt with in the Final Order, have actually been dealt with as is

evident from para 2 to para 37 of the Final Order : "2. Before taking up the appeals, it was decided to dispose of the Misc. Application first. By Misc. Application No. 218, Revenue has prayed to take on record the penalty amounting to Rs. 2,31,20,970/- in place of Rs. 2,31,970/-and to rectify the mistake in Stay Order dated 24-3-98 in the first line on page 2. There is a prayer also to call for the original copy of Order supplied by the Department to the party for verification. We have seen the Order received by M/s.

Adhunik Food Products. We note that in that Order the penalty has been shown as Rs. 2,31,970 and not Rs. 2,31,20,970/-. In the circumstances, we do not find any error in the Stay order. If there was any mistake in the copy of the Order served on M/s. Adhunik Food Products, the mistake should have been rectified by filing an application before the adjudicating authority. Since no mistake is found in the copy of the Order-in-original served on M/s. Adhunik Food Products, Misc. application No. E/Misc/218 is rejected.

3. Misc. application No. E/Misc/30 is the same as the Misc.

application No. E/Misc/218.

4. Misc. application No. E/Misc/719 filed by the Commissioner of Central Excise, Meerut prays for early hearing of the case. The case is already listed for hearing today and therefore, this prayer of the Commissioner has been allowed. The Misc. application is accordingly disposed of in the above terms.

5. Misc. application No. E/Misc/241 has been filed by M/s. Adhunik Food Products Pvt. Ltd. with prayer for permission to raise additional grounds of appeals.

6. We have perused the record. These grounds are for taking on records, the decision of the Hon'ble Allahabad High Court in the case of M/s. School Boys Industries, Roorkee v. CST reported in 1987 UPTC-1145 and in the case of CTT v. National Cereal Products Ltd. reported in 1998 STC (111) 241 stating that these two decisions are applicable and binding on the authorities as the factory is within the jurisdiction of Allahabad High Court. The request for considering these judgments is allowed. The Misc. application is accordingly disposed of.

7. Misc. application No. E/Misc/523 is also for raising additional grounds. On perusal of this Misc. application, we note that there is nothing new in it but only a contention that there was discrimination between the appellant and other manufacturer of similar goods. The other manufacturer has been named as M/s. School Boys Industries, Roorkee and Shri Brij Bhushan Kesarganj, Meerut producing similar goods. This is a general point which will be considered while considering the merits of the case. The Misc.

application is, therefore, partly allowed.

8. After disposing of the Misc. applications let us proceed with the facts of the case. The facts of the case in brief are that the appellants are engaged in the manufacture and clearance of goods described as 'wheat puffs' and 'soya nuts' in the main supply orders. The appellants claimed classification of the goods under Tariff Heading 2107.91 and subsequently when the Tariff entry was remoulded under Chapter sub-heading 2108.39. The appellants also claimed that the goods were wholly exempt from CED under Notifications No. 12/90, dt. 20-3-90, 4/93, dt. 28-2-93, 2/94, dt.

1-3-94, 70/95, dt. 16-3-95 and 8/96, dt. 23-7-96. The appellant stated that they had filed declarations before Central Excise Authority claiming the benefit of the aforesaid exemption notifications. Supdt. Central Excise asked the appellant to give details of the process of manufacture and furnish declaration in terms of Rule 174 of the Central Excise Rules. The appellants filed a declaration on 13-4-94 declaring the goods as Edible preparations not elsewhere specified (chabena) (a) Prasad/Prasadam and (b) put up in unit container. It was claimed by the appellant that the declaration was acknowledged by the Office of the Asstt.

Commissioner of Central Excise, Saharanpur. When the Supdt. of Central Excise, Dehradun asked the appellant to file a declaration, the appellant stated that they had already filed a declaration and a copy was enclosed on 19-6-95 declaring the goods as - A SCN was issued to the appellants on 21-3-97 asking them to explain as to why duty amounting to Rs. 2,31,20,970/- should not be demanded from them, why interest should not be recovered and why penalty should not be imposed. The grounds set out for the above action were that 'wheat puffs' was

classifiable under Chapter sub-heading 1904.10 and soya nuts were classifiable under Chapter sub-heading 2107.91/2108.99; that the appellants had not obtained Central Excise Licence and had not been observing Central Excise formalities and maintaining Central Excise records. It was also alleged that the assessee had not declared that they were manufacturing excisable goods nor had they sought any clarification about the applicability of the exemption notifications. Longer period of demand was also invoked on the ground that there was mis-declaration by suppressing facts.

9. The assessee replying to the SCN submitted that there was no mis-statement or misdeclaration nor any suppression of fact; that they had filed the declaration under Rule 174A on 13-4-94 with the Asstt. Commissioner, Saharanpur; that similar declarations were filed for the year 1995-96 and 1996-97; that they had the bona fide belief that the declaration had been accepted by the Department inasmuch as no communication was received as an objection; that reopening of classification was not justified. In support of this contention, they cited a number of decisions. They contended that they had given the process of manufacture and therefore, suppression and mis-statement cannot be alleged. It was, therefore, contended by them that the demand was time barred. Ld. Commissioner confirmed the demand of Rs. 2,31,20,970/-. He imposed a penalty of Rs. 2,31,970/- as indicated in the copy served on the assessee and held that interest was chargeable. He also confiscated the goods seized and imposed different penalties on the company, its employees and Directors.

10. Arguing the case for the appellant Shri R. Santhanam, Id.

Counsel submits that no process of manufacture was involved in making of the 'Puffed wheat' and 'Soya nuts'. He referred to the decision of the Hon'ble Allahabad High Court in the case of School Boys Industries, Roorkee v. CST reported in 1987 UPTC-1145 stating that the High Court held : "Simply because the wheat is processed to make it puffed wheat, it cannot be said that character of wheat grown by the assessee substantially undergoes change and the processed wheat acquired altogether a different character. Wheat when processed into puffed wheat still remains wheat".

He also referred to another decision in the case of CIT v. National Cereal Products Ltd. reported in 1998 STC (111)-241 holding that the process like heating, sprouting, germination for conversion of malt into barley were processes which did not amount to manufacture. Ld.

Counsel, therefore, submitted that 'puffed wheat' and 'puffed soya nuts' do not undergo a process amounting to manufacture. Revenue argued that the process undertaken by the assessee in producing 'puffed wheat' and 'puffed soya nuts' were a process of manufacture.

It was contended for Revenue that the decisions relied upon by the assessee were in Sales Tax and Commercial Tax cases. The provisions in the two Acts were different. It was contended by Revenue that the process undertaken by the assessee was a process amounting to manufacture. It was, therefore, submitted that 'Puffed wheat' and 'puffed soya nuts' are manufactured products.

11. We note that in the case of School Boys Industry, Roorkee the issue before the Hon'ble Allahabad High Court was the ambit and scope of the word "Agricultural Produce" and the Hon'ble High Court held that wheat processed into puffed wheat still remains wheat.

Thus we find that the question of defining manufacture was not before the Hon'ble High Court in the case Commissioner of Trade Tax U.P. v. National Cereal Products Ltd., the question before the Hon'ble High Court was to examine the definition of food grains/cereals and the Hon'ble High Court held that admittedly barley is a food grain, so is malt, malt or malted barley is barley which has been germinated or sprouted. It s a food grain and the same is used as a food grain even after being melted.

12. In the above two decisions the question whether a particular process amounts to manufacture or not was not the question before the Hon'ble High Court and the cases are different and distinguishable.

13. Let us now examine the contention of the appellant. In the declaration filed on 13-4-94, the process of manufacture has been set out as 'Cereals like wheat, soya

are first roasted/puffed in puffing machine'. The chabena/soya textured protein is then sweatened for prasad or salted, sold in unit containers or sold loose.

14. The goods have been described as "Edible Food" preparation (chabena) Prasad, Prasadam and classification has been claimed under Chapter heading 2107.91/2108.90 of the CETA, 85 claiming exemption under Notification No. 2/94-C.E., dt. 1-3-94 read with Notification No. 12/90-CE., dt. 20-3-90.

"19.04 - Prepared foods obtained by the swelling or resting of cereals or cereal products (for example, corn flakes); cereals other than maize (corn), in grain form or in the form of flakes or other worked grains.....".

"This heading covers a range of food preparations made from cereal grains (maize, wheat, rice, barley etc.) which had been made crisp by swelling and roasting. They are mainly used with or without milk as break fast foods.....".

17. By no stretch of imagination Puffed wheat could be called a Prasad/Prasadam. No religious sentiments were attached with the goods in question. In the case of SM Confectionary Works v. Collector of Central Excise, Nagpur - 1993 (66) E.L.T. 469 = 1993 (47) ECR 102 (Tribunal), the Tribunal had observed that Prasad or Prasadam is by concept an edible preparation prepared in the temple or religious place and distributed therefrom to the devotees. Para 9 from that decision is extracted below : "9. From the process of manufacture of the products, in question, as described in the order of the Collector (Appeals) and the Asstt.

Collector, all of them are boiled and as such this would be covered by the scope of Heading 19.04 of the Tariff goes by the guideline available in the HSN Explanatory Note as above. It may also be noted that even in the erstwhile CET, boiled sweets were covered under Item 1A(i) of CET. The Asstt. Collector in his order has also noted this aspect and also observed that such goods under the old Tariff are entitled for exemption under Notification 4/68, dt. 30-4-68. In such a view of the matter, the classification of these goods under sub-heading 1704.90 would be more appropriate. The contention that these goods should be considered as 'Prasad' or Trasadam' or as 'other' edible preparations' under Heading 21.07 and under sub-heading 2107.10 and Heading 2107.99 is not acceptable for the reason

that 'prasad' or 'prasadam' is by concept an edible preparation prepared in the temple/religious place and distributed therefrom to the devotee. Such is not the case here. The goods are freely available in places other than temples. It is also not the case of the assessee/appellant that all their production of these products are sold only to temples by the assessee because there is no direct sales shown to only temples from the assessee/appellant.

The argument that in any case such products are predominantly used as 'prasad' or 'prasadam' may not be sufficient for their classification under Heading 21.07 for the reasons already stated above. In this view of the matter, the Collector (Appeals) acceptance of chiranjidana as 'prasad' classifiable under 21.07 is also not sustainable because the Chemical Examiner was not categorical in his opinion and had required the actual practice be ascertained and it is found that these products are commercially manufactured in the factory and the assessee sells them to the dealer and the goods are generally available in shops and are not confined only to temples. Therefore, the Collector's order is not sustainable in regard to classification on chiranjidana. All the product, on the other hand, are classifiable under sub-heading 1704.90 as soya confectionary for the reasons aforesaid. However, the perusal of the classification, be submitted by the assessee, also indicates that they had claimed exemptions under Notification 33/86 for the products. There is no ground given as to why the exemption under Notification was not considered by the Asstt.

Collector. In this context, it is also worth noting that the Chemical Examiner also had indicated that Notification which is similar to Notification 33/86 should also be considered. The notification exempts, among other things, candy sugar under certain conditions. In the interest of justice, it is directed that the eligibility of the products to these notifications should be considered and the duty liability re-determined if any based on the eligibility or otherwise to the notification. In the result, the appeals, by the assessee/appellant are rejected and the appeal by the Department is allowed in the above terms".

18. It is also not a Chabena. Wheat Puffs are standard branded products (Bonton) used as breakfast cereal/food.

19. Wheat Puffs put-up in unit containers were covered under subheading No. 1904.10 of the Central Excise Tariff. The Explanatory Notes to the Harmonised System of Nomenclature (HSN) under Heading No. 19.04 are relevant. This aspect has been discussed in para 16 above.

20. Having regard to the above discussions and findings, we hold the Puffed Wheat is classifiable under Chapter Heading 1904.10. We also hold that Puffed Wheat is not exempted under Notification No. 2/94, dt. 1-3-94 and as amended.

On the question of classification of Puffed Soya nuts, it was argued that the items are edible preparations not elsewhere specified or included classifiable earlier under Chapter heading 21.07 but now chapter heading 21.08. Specifically under Chapter sub-heading 2108.91 carrying Nil rate of duty. It was argued for the assessee that puffed soya nuts are edible preparations and since they were not specified or included elsewhere they will certainly fall either under Chapter heading 2107, 2108 of CETA, 85. Ld. Counsel for the appellant submits that the Chapter Note 9 of Chapter 21 reads heading No. 21.08 inter alia includes : (b) Preparations for use either directly or after processing (such as cooking, dissolving or boiling in water, milk or other liquids) for human consumption.

It was also argued that this is a preparation for use directly for human consumption. It was submitted by them that puffed soya nuts were preparations for infants use and were supplied to State Govt.

or Central Govt. under Integrated Child Development Scheme. It was meant for providing healthy food to children in primary schools. It was also argued for the appellants that it was Prasad/Prasadam. We have examined the contention of the appellant. We note that it cannot be termed Prasad/Prasad am or Chabena as discussed in paras 17 to 19. We note that where the statute does not contain any definition the test commonly applied is how the product is identified by a class or section of the people dealing with it or using it. It is generally by its functional character that the product is identified. Soya bean puffs have been described in the profile as snacks, breakfast food which enhances longevity. In the profile itself it has not been described as infant food. The product is not prasad/prasadam. The product therefore, qualifies for classification under Chapter heading 21.07 or

21.08.

22. In so far as puffed soya nut is concerned, the argument of the appellant was that it is an edible preparation classifiable under Chapter heading 2109.91 as it was salted and bhujiya. The argument of Revenue was that it was neither bhujiya nor namkeen and bhujiya is also a namkeen. It was submitted that it will fall under Chapter sub-heading 2108.91.Collector of Central Excise v. Roha Dye Chem Pvt.

Ltd, - 1989 (41) E.L.T. 667 (Tribunal) the Tribunal had observed with reference to foods colours that broadly speaking edible preparations must find classification under one or the other of the headings in Chapter 21 in preference to Chapter 32. In that case the classification was to be decided of food colours as between Chapter 32 and Chapter 21. Chapter 32 covered the goods such as tanning and dyeing extracts, tannins and their derivatives; dyes colours, paints and varnishes; putty, fillers and other mastics; inks. The Chapter 21 was entitled as miscellaneous edible preparations. It was in such a situation that the Tribunal observed as under : "Broadly speaking, therefore, edible preparations must find classification under one or the other of the Headings in Chapter 21 in preference to Chapter 32", and held that "as between the two Headings No. 2107.99 and 3204.90 we are of the view that the former is more appropriate to cover food colours".

In the present case, the Wheat Puffs were specifically covered by the Heading No. 19.04, and Soya Nuts not covered by any specific heading above were classifiable under Chapter 21 which covered miscellaneous edible preparations. Heading No. 21.07 was the residuary heading under Chapter 21. As the Soya Nuts were not Prasad or Prasadam or sterilized or pasteurised miltone and as they were put up in unit containers and were ordinarily intended for sale they appeared to be correctly classifiable under sub-heading No. 2107.91 of the Tariff and from 23-7-96 under 2108.99.

24. We agree with the findings of the ld. Commissioner that soya nuts are to be categorised under S. No. 26 of Notification No. 02/94, dt. 1-3-94, as all other goods specified at S. No. 25 attracting duty at applicable rates; under S. No. 16 of Notification No. 4/93, dt. 28-4-93; under S. No. 22 of Notification No. 70/95, dt. 16-3-95. From 23-7-96, it is classifiable under Chapter subheading 2108.99 attracting

duty at applicable rate.

25. The present proceedings started with the visit of Central Excise officers to the premises of M/s. Adhunik on 22-1-97. Investigations were made thereafter and the facts as alleged in the show cause notice dt. 21-3-97 came to notice.

26. The main argument of the appellant is with regard to the limitation. A demand of Rs. 2,31,20,970.40 had been made through show cause notice dt. 21-3-97 for the period April, 1992 to Jan., 97. It is an admitted position that no information of any sort had been submitted to the Central Excise Department prior to 13-4-94. It was argued that they had filed a declaration on 13-4-94 for exemption from the requirement of taking Registration Certificate and that it should be deemed to be a declaration for the purposes of classification and exemption from payment of duty. As per allegations in the show cause notices no declaration even for exemption from the Registration Certificate was filed for the years 1992-93, 1993-94, 1995-96 and 1996-97. Even in the declaration said to have been filed on 13-4-94 the goods had been declared to be the Prasad/Prasadam, Chabena and Soya textured protein. These expressions had been taken from the exemption notifications. Nowhere they described their goods correctly as Wheat Puffs and Puffed Soya Nuts. It has been alleged in the show cause notice that "to equate Prasad with breakfast food projected to be superior than corn is a wilful mis-statement and suppression of facts". A declaration for the purposes of rights and obligations had to be a correct declaration. It is on the basis of a declaration that the legal consequences flow. If the declaration is incorrect and misleading then all the rights and obligations flowing from such an incorrect declaration will be vitiated. By filing an incorrect and misleading declaration, the declarant could not take a valid defence that the Government Agencies should have unearthed the true state of affairs which the declarant had sought and designed to hide.

27. In this case, no clarification had been sought about their legal obligations. No classification list had been got approved. The declaration under Rule 174A of the Rules is not a classification list. It is only for the limited purpose of exemption from the operation of Rule 174 which relates to licencing. As no classification list was filed, no classification was got approved and no approval of the classification was

made, it was not a case of re-classification.

28. Under Rule 174 every manufacturer has to get himself registered by applying for such registration to the jurisdictional Range Officer or such Officer in such form as may be specified by the Central Board of Excise & Customs. The Central Board of Excise & Customs may by Notification in the Official Gazette and subject to such conditions or limitation as may be specified in such Notification, specify persons or class of persons from amongst the persons so specified, from getting themselves registered, who need not obtain such registration. Persons, who manufactured goods chargeable to nil rate of duty or which were exempt from the whole of the duty of excise leviable thereon, were exempt from the operation of Rule 174. The manufacturer on his own without any reference to the law and procedure could not exempt himself from the levy, and claim to be exempted from the operation of Rule 174 of the Rules.

29. In reply to the show cause notice, the appellants had admitted that the goods manufactured by them were excisable. They had, however, mentioned that the goods were covered by different exemption notifications. At no stage, they had sought and substantiated any claim for exemption. If an assessee claims exemption from the levy of duty under any exemption notification then it was for him to claim such an exemption and to substantiate the claim for such an exemption.

30. The goods in question were described in the contracts, orders, invoices, etc. not as Prasad/Prasadam, Chebana or Soya Textured Protein, but only for Central Excise purposes they became Prasad, Prasadam, Chabena and Soya Textured Protein, as these were the expressions used in the exemption notifications. In the contracts, orders, invoices, etc. they were described as Wheat Puffs and Soya Nuts. What could be the belief for describing goods differently for duty purposes. No reasonable basis had been given for such a different description, which in the facts and circumstances of the case, is a mis-declaration amounting to suppression of facts, attracting extended period of limitation for raising the demand.Padmini Products v. CCE - 1989 (43) E.L.T. 195 (S.C.) referred to their earlier decision in the case of Collector of Central Excise, Hyderabad v. Chemphar

Drugs and Liniments, Hyderabad - 1989 (40) E.L.T. 276 (S.C.), and affirmed that "something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability beyond the period of six months had to be established". In the present case the Wheat Puffs were mis-declared as Prasad/Prasadam/ Chabena and Soya Nuts were mis-declared as Soya Textured Protein. It was a positive act of mis-declaration. There was no scope for any doubt that the goods were not Prasad/Prasadam, etc. and no case had been made out to justify the above acts of mis-declaration and suppression.E-Septon and Co. Private Ltd. v. Superintendent of Central Excise - 1985 (19) E.L.T. 57 (Allahabad) had held that the excisable goods cease to be excisable after exemption and that if the excisable goods are exempted from payment of duty, the same shall be deemed to have been taken out of the Central Excise Tariff and that taking out of the excise licence by the manufacture of such goods was not required as contemplated under Rule 174 of the Rules. We find that the Madras High Court in the case of Tamil Nadu (Madras State) Handloom Weavers Cooperative Society Ltd. v. Asstt. Collector of Central Excise, Erode - 1978 (2) E.L.T. 57 (Madras) had held that the goods exempted from excise duty do not cease to be excisable goods. The High Court observed that the character of a product as excisable goods does not depend on the actual levy of duty but depends on the description as excisable goods in the Tariff. In the case of Hico Products Ltd. v. CCE - 1994 (71) E.L.T. 339 (S.C.), the Hon'ble Supreme Court had held that the exemption from duty by means of a Notification did not take away the levy or had the effect of erasing the levy of duty. There is no dispute in the present case that the goods in question were excisable goods. Who had to decide whether any particular goods were covered by any exemption from payment of Central Excise Duty or not.

In the case of the self-removal procedure where assessments are made by the assessee themselves, prior approval of classification/price is the corner stone upon which the edifice of Revenue is built. The facts of the present case prima facie demonstrate the mechanism for evading the payment of duty.Ashwini Vanaspati Industries Pvt. Ltd. v. CCE - 1991 (56) E.L.T. 214 (Tribunal), the matter was decided mainly on the plea of the appellant that they had intimated the

authorities about the fact of manufacture of soap without the aid of power, through number of letters written by them, and they had repeatedly invited the Range Superintendent for verification and permission for exemption under Notification No. 28/64-C.E., dt. 1-3-64. In that case the appellants were already manufacturing soap with the aid of power and were paying duty thereon. The Tribunal observed "it would have been and entirely different matter, if the appellants had altogether suppressed from the Department the fact of manufacture of soap without the aid of power or steam and its clearance without payment of duty in terms of the exemption notification". In the present case, the goods were misdeclared even in the declaration for exemption from Registration and the goods had been removed without any approval and the facts on record on which the correct assessments could be made had been suppressed.

34. We, therefore, hold that there is no infirmity in the view taken by the adjudicating authority in regard to limitation.

35. The Counsel for the appellant also submitted that the appellant was entitled to the benefit of SSI exemption, was not extended to the appellant. We note that this contention has force. We, therefore, direct the Commissioner concerned to examine this aspect and extend the benefit to the appellant if they are entitled to it.

36. Another point that was made during the arguments at the time of hearing the appeal was that duty was computed on the sale/contract price. It was argued that for purpose of computing duty the sale price should have been taken as cum-duty price in terms of Srichakra Tyres Ltd. decision of the Larger Bench of this Tribunal reported in 1999 (108) E.L.T. 361.

37. Penalty on the firm and others except Shri R.N. Goel shall have a bearing on the computation of duty, the same is set aside and shall be determined afresh by the Adjudicating Officer to whom the matter is being remanded for computing the duty in terms of the above findings." 3. We note after detailed examination of the Final Order that there is no mistake in the final order of the Tribunal.

4. A small typographical error has crept in inasmuch as the name of Shri D.K. Garg has not been incorporated in para 40(e). Accordingly, para 40(e) is amended

to read as - "Penalty on Shri R.N. Goel abates, penalty on the firm and S/Shri A.K. Gupta, K.K. Gupta and D.K. Garg is set aside and shall be reconsidered".

5. In so far as quoting of certain paragraphs from the Stay Order are concerned we note that those paragraphs deal with judicial pronouncements and definitions etc. of certain terms. Quoting of this type of material cannot be termed as mistakes.

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