

Commissioner of Central Excise Vs. A.R.S. Company Ltd. and Azam

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Jun-30-2006

Reported in : (2006)(112)ECC178

Judge : P Chacko, K T P.

Appellant : Commissioner of Central Excise

Respondent : A.R.S. Company Ltd. and Azam

Judgement :

1. Revenue is in appeal before us against a common order passed by the Commissioner of Central Excise (Appeals) disposing appeals against two Orders-in-Original passed by the Assistant Commissioner of Central Excise, Tanjore Division, The issue involved is the correct classification of scented betel nuts manufactured by the respondents.

2. In the impugned order, the Commissioner has vacated the orders of the Assistant Commissioner rejecting the request of the respondents M/s. Azam Laminators Pvt. Ltd. and M/s. A.R.S. Company Pudukottai to revise the classification of the impugned product "Nizam Pakku" from the Chapter Subheading 21062 to 0802 9019. They had made the request in the wake of enactment of CETA (Amendment) Act, 2004 on 28.02.05. CSH 21062 hitherto adopted by the appellants reads as betel nut product known as supari, whereas the new CSH they sought to adopt reads as betel nut 'other', viz betel nuts in forms other than whole, split, powdered and ground. As per the impugned order,

the subject item is classifiable under CSH 08029019.

3. The product, "Nizam Pakku", is manufactured by pulverizing dried betel nuts into pieces and treating those pieces with vanaspathy, sugar, saccharin, glucose syrup, cloves, cardamom, and at times also mixing with borneoflakes. According to the respondents, the broken nuts are mildly roasted with vegetable oil and treated with the other materials to produce "scented supari". In the process, the pieces of nuts mildly heated with vegetable oil are flavoured with spices, sweetened with sugar and saccharin, perfumed with menthol and then packed in small paper pouches in which it is sold. The paper packets bear the name "Nizam Pakku" (pakku is tamil for betel nut and Nizam, the brand name). The packets also carry the description "sugantha supari" in a few vernacular languages and its English version "scented betelnut".

4. In classifying the impugned product under CSH 0802 9019, the Commissioner noted that CSH 0802 90 specifically mentioned "Betel Nuts" and its further subheadings covered "Betel Nuts, Whole", "Betel Nuts, Split", "Betel Nuts, Ground" and subheading 0802 9019, "Betel Nuts, Other". He observed that the tariff heading No. 2106 "covered food preparations not elsewhere specified or included" and, since betel nuts were specified and included in Chapter Heading No. 8, it could not be covered by Chapter Heading No. 2106. The impugned goods were therefore betel nuts falling under subheading 0802 9019 viz; "Betel Nuts, Other".

5. He drew support for the view that the treated betel nuts in question fell under CH No. 8 from Note 3 (b) of Chapter 8. Note 3 reads as follows: 3. Dried fruit or dried nuts of this Chapter may be partially rehydrated, or treated for the following purposes.

(a) for additional preservation or stabilization (e.g., by moderate heat treatment, sulphuring, the addition of sorbic acid or potassium sorbate).

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

6. The treatment of betel nut with vanaspathy, menthol, sugar etc. was seen as conducted to improve or maintain the appearance of betel nuts after which also the betel nuts retained its character. He ignored the judgment of the High Court of Madras in WP No. 18306/96 & 18307/96 dated 19.03.04 which classified the product as pan masala of CSH 2106.90 in a judgment rejecting the claim of the present respondents to classify the same product in the then existing heading for nuts of CH 20.01 as the same had dealt with tariff schedule of 1994-95. Note 3 (b) to Chapter 8 and specific entry for betel nuts under Chapter 8 were introduced only on 28.02.05. He relied on the following explanatory note to Chapter 8 of the HSN: This heading also covers areca (betel) nuts chiefly as a masticatory and cola (kola) nuts used both as a masticatory and as base in the manufacture of beverages.

The subject goods were used chiefly as masticatory. Accordingly, he classified the impugned goods under CSH 0802 9019.

7. Contesting the above decision, the Revenue has made the following arguments to canvass the classification discarded by the lower appellate authority. The subject product was marketed by the respondents as ready to eat food product and they had been classifying the same under the CH 2106 before the CETA (Amendment) Act 2004 was passed. The product was known as scented betel nut or scented supari.

From 28.02.05, the following supplementary note defining betel nut product known as supari was introduced in Chapter 21: In this chapter "Betel nut product known as supari" means any preparation containing betel nuts but not containing any one or more of the following ingredients, namely lime, katha (catechu) and tobacco, whether or not containing any other ingredients, such as cardamom, copra and menthol. CCE v. Crane Betel Nut Powder Works, Bangalore Bench of the Tribunal vide Final Order No. 562/2005 and in appeal against that order, the honourable Andhra Pradesh High Court in their judgment dated 05-09-2005 in Central Excise Appeal No. 20 of 2005 had rejected the claim of M/s Crane Betel Nut Powder Works to classify a similar product produced and marketed by them as unmanufactured betel nuts not exigible to duty. Both the authorities decided the

correct classification of the product as CH 21.07. At the material time, the tariff entry 21.07 read as 'Betel nut powder known as "supari"'.

9. In the subject case, before the original authority, the respondents had sought revision of the classification of the product from CSH 21069030 to Chapter Heading No. 8 wef 28.2.2005. Prior to 28.2.05, and later, Chapter 8 of the CETA Schedule read as follows: 10. After 28.02.2005, the following chapter note was introduced to Chapter 8 which is relevant to decide the issue.

3. Dried fruit or dried nuts of this Chapter may be partially rehydrated, or treated for the following purposes; (a) For additional preservation or stabilization (e.g., by moderate heat treatment, sulphuring, the addition of sorbic acid or Potassium sorbate); (b) To improve or maintain their appearance (e.g. by the addition of vegetable oil or small quantities of glucose syrup) provided that they retain the character of dried fruit or dried nuts.

11. With effect from 28.02.05, schedule to the Central Excise Tariff Act was restructured while assigning eight digit classification to different commodities covered by the tariff. In the statement of objects and reasons to the CETA (Amendment) Bill, 2004, the important objects and reasons for the proposed enactment were indicated, inter alia, to be to accommodate more prominently commodities which were of significance to the country's needs, to facilitate trade in them using a common commodity classification based on HSN, to accommodate a wider range of specific commodities under enlarged tariff headings and compilation of data using computerisation. It was very specifically and categorically stated that the proposed amendments did not make any change in the existing rates of central excise duties and changes did not involve revenue implication. Therefore, the department argued that the changes introduced in the tariff with effect from 28.02.05 did not affect the existing classification of various commodities.

12. With effect from 28.02.05, the erstwhile Chapter 8 was enlarged to cover, inter alia, various edible nuts in various forms such as shelled, whole, split, ground etc. under separate and specific headings. Thus betel nut was covered under Chapter Heading 0802 with sub-headings for betel nuts whole, split, ground etc. The

relevant entries under CSH 0802 90 for betel nuts and other nuts not mentioned by name in the tariff were as follows: 13. Note 3 was introduced to Chapter 8 wef 28.02.05 to the effect that treatment of betel nuts for preservation and to improve appearance did not alter its classification as betel nuts. These notes existed all along in the HSN explanatory notes which governed classification of the impugned goods. Coverage of tariff entries was only enlarged with specific entries as per the objects and reasons to the CETA (Amendment) Bill, 2004.

14. Earlier to 28.02.05, Note 4 to Chapter 21 dealt with 'betel nut powder known as supari' appearing in the heading 21. With effect from 28.02.05 this entry had been replaced by entry 2106 90 30, "betel nut product known as "supari". There had been no development calling for change of classification sought by the respondents. The product was scented betel nut, popularly known and marketed as "Supari". Therefore the item was aptly covered by Heading 2106 90 30 viz; 'betel nut product known as supari' and the above explanation was incorporated under Supplementary Note 2 to Chapter 21.

15. M/S. Crane Betel Nut Powder Works manufactured a similar product and claimed its classification under Chapter Heading 8. The Bangalore Bench of the Tribunal vide their order *ibid* decided that supari powder was different from betel nuts. In view of the Note 4 of Chapter 21, the subject item was decided to be classifiable under Chapter 21. Deciding the assessee's appeal against the above decision, the Hon'ble Andhra Pradesh High Court vide their order *ibid* discussed the elaborate processes involved in the preparation of the subject product and upheld the order of the Tribunal. The product had a distinct name in the market and a distinct clientele. Such clientele were not looking for betel nut when they sought to buy this product.

16. Reiterating the arguments of the revenue, the Ld SDR produced a printout of publicity material from the website maintained by the respondents which claimed that their 'Nizam pakku' was the most popular brand of supari sold in the states of Tamilnadu, Kerala and Karnataka.

This claim had clinched the debate against them.

17. The respondents had argued that as per the ratio of the decision of the Delhi High Court in the case of J.K. Synthetics v. UOI , an established classification could not be changed unless fresh facts were brought on record, a process of manufacture was changed, the relevant entry underwent a change or there was a judicial pronouncement which necessitated change of classification. Various changes were made to the entries in the tariff wef 28.02.05. In their Cross objection, the respondents claimed that Chapter Notes 2 and 3 were introduced in Chapter 8 on 28.2.2005 and the revision of classification was sought owing to changes in the Tariff Act. Since the amendment to the act, betel nuts (in various physical forms) were specifically covered under Heading 0802. As per the ratio of the Gujarat High Court in the case of Darshan Hosiery Works v. UOI such food preparations alone would be covered by Chapter Heading 2106 which were "not elsewhere specified or included", whereas the subject product figured in Chapter 8 as betel nuts. The decisions on the subject product cited by revenue were rendered before the item "betel nuts" was enlisted (by name) in a Tariff heading and therefore, the earlier decisions did not apply in the changed legal context. There was no estoppel against the correct classification as held by the apex Court. They were producing betel nut pieces and not powder and were not marketing the same as ready to eat product. The amendment to the tariff with effect from 28.02.05 also introduced new Chapter Notes relevant to the issue on hand. The betel nuts retained the character of dried betel nuts even after subjecting them to various processes to produce the impugned goods. The Port Health Officer, Tuticorin had given a certificate of analysis to the effect that even after addition of ingredients for preservation/maintenance of appearance, the essential character of the betel nuts did not change.

The betel nuts were specifically covered by a specific entry in Chapter 8. The impugned goods fell under Chapter sub-heading 0802 90 19. That the betel nut remained betel nut even after it was converted into supari powder as observed by the Tribunal's Bangalore Bench and the High Court of Andhra Pradesh justified the classification of the impugned product under Chapter 8 with effect from 28.2.2005. It was incorrect to consign the goods to the residuary entry under Chapter 21 denying its appropriate parentage. They argued that as per the ratio of Western India Plywood Ltd. v. CC 2005 (70) RLT 599 (SC), unless the goods in question

could by no conceivable process of reasoning be brought under the specified description betel nut under Heading 0802, the residuary item could not be resorted to.

18. The commercial parlance test could not be applied in this case as there was a statutory definition given for the term "betel nut product known as supari". It was argued that as per supplementary Note 2 of Chapter 21, any preparation containing betel nuts but not containing any one or more of the ingredients specified in the note was covered by Chapter Heading 2106. The above argument was elaborated to the effect that the product in question was not a preparation containing betel nut. It was only betel nut treated in the manner referred to in Note 3 of Chapter 8. They strenuously argued that the reasoning followed by the Commissioner (Appeals) in the impugned order was correct. Circulars issued by the Board advising classification of flavoured tea prepared with tea as a basis as tea or the Circular advising classification of Dhana Dal/Dhania Ki Dal/Coriander seeds put up for sale in pouches under heading for Dhana Dal (CH2108) or as spices (CH 0903) were relevant and supported their argument that specific entry of Chapter 8 had to be followed in preference to a residuary entry in the subject case also, The appellants produced a shipping bill to show that for assessment of export of the subject product Chapter sub-heading 0802 90 12 was adopted by Tuticorin Customs. This fact was relevant for its classification in the Central Excise Tariff under Chapter 8. In their case, betel nuts were not roasted but mildly heated for mixing with vanaspathy. The HSN covered betel nuts under heading 0802 and described its use as masticatory. Their product betel nuts were also used as masticatory. Therefore, the product fell under Chapter 8. It was also submitted that the judgment in the case of CCE v. Crane Betel Nut Powder Works delivered by the Hon'ble High Court of Andhra Pradesh and the Bangalore Bench of the Tribunal were rendered prior to the introduction of Note 3 to the Chapter 8 and so were not relevant to the issue on hand. Moreover, in the present tariff "betel nuts" was specifically mentioned under Chapter 8. It was to be noted that the heading 2106 covered only food preparations not elsewhere specified or included. The betel nuts purchased by the respondents were used as masticator. Their product was therefore masticator. There was no change in the name, character or use of betel nut purchased by the appellants and the betel nuts made and sold by them.

The processes involved did not therefore amount to manufacture. Since the betel nut was specifically mentioned in Chapter 8 it could not be covered under Heading 2106. The learned consultant for the respondent stressed the point that the treatments that the betel nuts were subjected to did not alter the classification of the goods as betel nuts in view of the Note 3 to Chapter 8 and that the Gujarat High Court judgment cited precluded classification of betel nuts in CH 2106 since it covered food preparations not elsewhere specified or included and as betel nuts figured in CH 0802. He also stated that their product was different from that of M/s Crane Betel Nut Powder Works in that it did not contain dates or melon seeds.

19. We have carefully gone through the records and considered the rival submissions. The issue involved in these appeals is classification of "Scented betel nuts" manufactured and sold by the respondents in paper pouches bearing brand name "Nizam Pakku" and the description "Scented Betel Nuts" in various vernacular languages and English. The item is manufactured by crushing dried betel nuts, which are mildly roasted with vegetable oil to which sweetening agents such as glucose syrup and saccharin and essence of spices such as cardamom and cloves are added as flavoring agents while menthol is added mainly to impart a pleasant smell. The appellants have succeeded in obtaining an order from the lower appellate authority holding that the impugned product fell under Chapter Sub Heading 0802 90 19 as betel nuts other than whole, split and ground. The lower appellate authority has taken the stand that betel nuts were specifically covered under Chapter 8 whereas Chapter Heading 2106 was a residuary heading for "food preparations not elsewhere specified or included." As per supplementary Note 2 to Chapter 21 Betel nut product known as 'Supari' meant any preparation containing betel nut not containing lime, katha and tobacco. In his opinion, the item is betel nut itself used as masticatory and not a preparation containing betel nut. The argument that Heading 2106 excluded the impugned goods since edible nuts of Chapter 8 covered betel nuts and were therefore a food preparation specified or included elsewhere than in 2106 is fallacious as Chapter 8 covers nuts and not food preparations. He has also held that Notes 3(a) and 3(b) to Chapter 8 and specific entry for betel nuts under Chapter 8 came into force only from 28.02.05. This is also not relevant as these guidelines always existed in the explanatory notes to the Chapter 8 in HSN and the present Heading for edible nuts was in

Chapter 8 of the CETA Schedule for a very long time.

20. Classification of excisable goods is governed by the Interpretative Rules. As per Rule 1, classification shall be determined according to the terms of the Heading and any relative Section or Chapter notes and, provided such Headings or Notes do not otherwise require, according to the other Rules. If for any reason the classification of the product appears appropriate under more than one heading, the heading which provides the most specific description has to be preferred to headings providing a more general description.

21. In the subject case the rival headings canvassed for the product are 08029019 and 21069030. Chapter Note 3 to Chapter 8 provides that the dried nuts of that chapter may be treated for additional preservation or stabilisation and/or to improve or maintain their appearance by addition of vegetable oil or small quantity of glucose syrup etc. provided the dried nuts do not lose their character as dried nuts. Chapter sub-heading 08029019 "other" covers betel nuts other than whole, split and ground. From the wording of the entry and the Chapter Note it is obvious that the entry covers only dried betel nuts other than in the forms enumerated in the preceding entries.

22. The subject product is obtained by a process of manufacture involving dried betel nuts as raw material. The ingredients used to treat raw material do not appear to be just for preservation of the raw material or to improve the appearance of the raw material. The respondents have relied on a certificate issued by the Port Health Officer, Tuticorin in support of their claim that the treated product has essential character of betel nuts. The PHO has stated in the certificate that the treated product has the essential character of betel nuts. The PHO is not authorized to test sample of export consignments for giving such opinions for classification of excisable goods and the certificate is not relevant. Also the classification shown in a shipping bill cannot be a safe guide to classify excisable goods as such information in the export bill is usually of no consequence to revenue and is not always scrutinized seriously.

23. The product is marketed as "Nizam Pakku" and carries on the packet the description "Nizam Pakku" and "Nizam betel nut" in various vernacular languages

and also 'scented betel nut'. Therefore the product is scented supari, supari being Hindi for betel nut. We have also seen a sample of the product. This product has a unique taste and it can be eaten without subjecting it to any further process. An individual who wishes to chew pan i.e. betel leaves, katha and betel nuts, will not relish the subject product as a substitute for betel nut. Because, the subject product is a preparation of betel nut having colour, taste and odour different from betel nut. A customer does not associate in his mind Nizam Pakku as supplying the need betel nut used as masticatory supplies in his life. In the production of the material, respondents also use raw materials such as saccharin, which help neither in preservation of the nuts nor in improving its appearance. In the circumstances, the product cannot be classified as dried nuts of Chapter 8.

24. Chapter Heading 21 covers miscellaneous edible preparations.

Chapter Sub Heading 2106 90 30 covers "Betel nut product known as supari". Supplementary Note 2 to Chapter 21 defines this item as "any preparation containing betel nut, but not containing any one or more of the following ingredients, namely, lime, katha (catechu) and tobacco whether or not containing any other ingredients, such as cardamom, copra and menthol." The subject product fully conforms to the description preparation containing betel nut along with several other permitted ingredients. There cannot be any dispute that the impugned item is a product manufactured with betel nuts as the main raw material, sold and known in the market as "Supari". In *G.S. Auto International Ltd. v. CCE, Chandigarh* the apex Court ruled that the goods are to be classified as to how they are referred to in the market by those who dealt with them. Therefore, the impugned goods are correctly classifiable under Chapter Sub Heading 21069030.

25. In the case of *M/s Crane Betel Nut Powder Works*, the Bangalore bench of the Tribunal, while deciding if a similar product manufactured by *M/s Crane Betel Nut Powder Works*, constituted manufacture as defined in the Central Excise Act made the following observations.

In our view, the end product of the above process is surely different from the original material. Definitely a new and distinct product known as "Supari Powder" has emerged. We cannot say that there is no manufacture for the reason that the

'betel nut' remains as 'betel nut'. It may remain so but when other ingredients are added to it how can we say these processes do not bring into existence a new and distinct commodity? If we ask for betel nut, the shop-keeper will not give supari powder. In other words, the betel nut is different from the supari powder. We cannot disregard note 4 of Chapter 21.

26. In arriving at the above decision, the Tribunal, relied on a large number of decisions of various High Courts. While disposing of the party's appeal against the above decision of the Tribunal, the Hon'ble High Court of Andhra Pradesh upheld the above decision, The Hon'ble High Court observed that "the product of the appellants fall within the expression "betel nut powder known as "Supari" as defined in Chapter Note 4 of the Chapter 21 since it is not in dispute that the product is a preparation containing betel nuts." The above decisions were made when the relevant entry used to read as "betel nut powder known as supari". Therefore", the above judgment of the Tribunal and the Hon'ble High Court confirm the finding that the impugned product falls under Heading 2106 90 30 even though the heading was since modified as betelnut product instead of powder. In the impugned goods the main raw material is betel nut and it is a preparation containing betel nuts.

The description 'betel nut product known as supari' is a more specific description of the product than 'betel nuts' as the betel nuts undergo processes of manufacture to become the subject supari. As the subject goods are not in the form of powder but a preparation containing pieces of betel nuts, the above decisions on classification of the product manufactured by M/s Crane Betel Nut Powder Works more aptly apply to the product under discussion manufactured by the present respondents.

The revenue appeals are allowed.

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