# Customs, Excise & Service Tax Appellate Tribunal
# West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

**Excise Appeal No.730 of 2012**

(Arising out OIA-199-202-2012-AHD-II-CE-AK-COMMR-A-AHD passed by Commissioner of Central Excise-AHMEDABAD-II)

**M/s. Zest Packers Pvt. Ltd** ........**Appellant**
Unit-1, Unit-2, Unit-3, At 8th Floor, The Chambers,
Opp : New Gurudwara, Sarkhej Gandhinagar Highway,
AHMEDABAD, GUJARAT-380054.

*VERSUS*

**C.C.E.-Ahmedabad-ii** ........**Respondent**
Custom House... First Floor,
Old High Court Road, Navrangpura,
Ahmedabad, Gujarat-380009

**WITH**

1. **Excise Appeal No. 731 of 2012 (Zest Packers Pvt. Ltd)**
2. **Excise Appeal No. 732 of 2012 (Zest Packers Pvt. Ltd )**
3. **Excise Appeal No. 733 of 2012 (Zest Packers Pvt. Ltd )**
4. **Excise Appeal No. 696 of 2012 (Zest Packers Pvt. Ltd )**

(Arising out of OIO-11-COMMR-AKG-AHD-II-2012 passed by Commissioner of Central Excise and Service Tax-AHMEDABAD-III)

(Arising out OIA-199-202-2012-AHD-II-CE-AK-COMMR-A-AHD passed by Ccommissioner of Central Excise-AHMEDABAD-II)

**APPEARANCE:**
Sh. D.K. Trivedi, Advocate for the Appellant
Sh. K. J. Kinariwala, Authorised representative for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR**
**HON'BLE MEMBER (TECHNICAL), MR. RAJU**

**Final Order No. A/ 11929-11933 /2019**

DATE OF HEARING: 20.08.2019
DATE OF DECISION: 15.10.2019

**RAMESH NAIR**

The present bunch of appeals have been filed by Appellant M/s Zest packers against Order-in-appeal Nos. 199 to 202/2012 (AHD-II)/CE/AK/COMMR(A)AHD dt. 14.08.2012 passed by Commissioner (Appeals-I), Ahmedabad and Order-in-Original No.

11/COMMR/AKG/AHD-II/2012 Dt. 17.07.2012 passed by Commissioner, Central Excise, Ahmedabad – II. The Brief facts of the case are that the Appellant is engaged in the manufacture of Chewing Tobacco and Zarda Scented Tobacco on pouch packing machines. During the impugned period viz. May 2010 to February 2011 they were discharging duty in terms of Section 3A of the Central Excise Act read with the Chewing Tobacco & Unmanufactured Tobacco Packing Machines (Capacity Determination & Collection of Duty) Rules, 2010. They were also filing the declaration in Form – I and Form – II as required under Rule 6 of the Chewing Tobacco Rules and depositing duty in cash as well as from cenvat credit account. Since the final products viz Zarda Scented Tobacco packed in pouches was liable for duty, they were availing cenvat credit of duty paid on Zarda Scented Tobacco purchased in bulk and was utilising the said credit for duty paid on Zarda scented tobacco cleared by them in pouches which was also disclosed by them in Form - II. Initially the capacity determination rules were applicable to Branded/ unbranded tobacco packed in pouches and w.e.f. 13.04.2010 by virtue of notification no. 17/2010 – CE (NT) dt. 13.04.2010 the same was made applicable to Zarda Scented Tobacco. The Appellant vide letter dt. 16.08.2010 were informed by the Range Superintendent that Rule 16 do not provide for taking cenvat credit in case of scented Zarda Tobacco. The Appellant filed reply that they had availed cenvat credit under genuine belief that credit is available as final product is dutiable and the amendment of Rule 16 left to be amended by the govt. inadvertently. The Appellant also made representation to the Commissioner for amending the Rule 16 of Chewing Tobacco rules, 2010 for allowing the cenvat credit of duty paid on Zarda scented tobacco in bulk used in manufacture of Zarda Scented Tobacco pouches. The representation was forwarded by the Commissioner to the Chief Commissioner who finding the representation to be correct forwarded it to the Board for allowing credit. The Chewing Tobacco Rules were amended by Notification No. 10/2012 – CE (NT) dt. 17.03.2012 allowing the credit on Zarda scented Tobacco in Bulk.. Meanwhile the Appellant came to be issued five show cause notices wherein Cenvat demand of Rs. 68,55,021/- was made; also central excise duty paid by utilising the said credit was demanded ; penalty was sought to be imposed. Vide Order-in-original No.11/COMMR/AKG/AHD-II/2012 DT. 17.07.2012 passed by Commissioner, Central Excise, Ahmedabad – II, a demand of Rs.

53,73,727/- was confirmed against Appellant by allowing cenvat credit. The other four show cause notices also came to be decided by the Deputy Commissioner vide Order No. MP/10/OA/2012 dt. 30.03.2012, MP/11/OA/2012 dt. 30.03.2012, MP/12/OA/2012 dt. 30.03.2012, MP/13/OA/2012 dt. 30.03.2012 the proposals as made in show cause notices were confirmed. Both the above authorities held that at the material time Rule 16 of the Chewing Tobacco Rules covered only Chewing Tobacco received in bulk and not Zarda Scented Tobacco in bulk. The Notification No. 10/2012 dt. 17.03.2012 clearly states that amending Rule 16 will come into effect from the date of its publication. There is no room for intendenment and that any law without providing prospectively effect has to apply retrospectively. The Appellant filed appeal before the Commissioner (Appeals) against the orders passed by the Deputy Commissioner but the same were rejected by the Appellate Commissioner. Hence the present appeals against Order-in-appeal Nos. 199 to 202/2012 (AHD-II)/CE/AK/COMMR(A)AHD dt. 14.08.2012 passed by Commissioner (Appeals - I), Ahmedabad and Order-in-Original No.11/COMMR/AKG/AHD-II/2012 DT. 17.07.2012 passed by Commissioner, Central Excise, Ahmedabad – II.

2. Shri Devashish Trivedi, Ld. Advocate submits that they are eligible to avail cenvat credit on Zarda scented tobacco purchased by them in bulk as the same is used in Zarda scented tobacco which is packed in pouches and is cleared on payment of duty. He submits that as a result of their representation, the rule 16 of Chewing Tobacco rules were amended. The legislative interest was to allow the cenvat. When the Chewing Tobacco rules were made applicable to Zarda scented Tobacco, the Rule 16 inadvertently remained to be amended and the said omission was corrected subsequently. That vide notification no. 17/2010 – CE (NT) dt. 13.04.2010 the Zarda scented tobacco was notified manufactured with aid of packing machine and packed in pouches also under section 3A of the Act. Consequently, the chewing tobacco and unmanufactured tobacco packing machine (Capacity Determination and Collection of Duty) rule 201 were amended vide Notification No. 18/2010 – CE (NT) dt. 13.04.2010 making the said rules applicable to Zarda scented tobacco also. It cannot be intention of the government to levy duty on zarda scented tobacco in bulk and then again on packed in pouches. He submits that the substitution of Rule 16 is retrospective in

effect since on the representation of Appellant the Rule 16 was amended. The law maker has remedied the mistake and has made explicit what was implicit that the cenvat credit would be available on bulk Zarda Scented Tobacco used in pouch packed Zarda Scented Tobacco. He relies upon the Apex Court judgment in case of Govt. Of India Vs. Indian Tobacco Association 2005 (187) ELT 162 (SC), WPIL ltd. 2005 (181) ELT 359 (SC), Ralson India Ltd. 2015 (319) ELT 234 (SC), Sujana Metal products Ltd. 2011 (273) ELT 112 (TRI), Forsoc Chemicals (India) Pvt. Ltd 2015 (318) ELT 240 (KAR), Lothe Power Gears (P) Ltd 2017 (346) ELT 347 (KAR), Development Engineers Pvt. Ltd. 2016 (339) ELT 560 (P & H). Steel Authority of India 2013 (297) ELT 166 (CHATTISGARH.), Indo Alusys industries Ltd. 2018 (360) ELT 96 (TRI), Ultra Tech Cement Ltd. 2014 (310) ELT 170.

3. He also submits that on the one hand the demand of cenvat credit has been made and on the other hand central excise duty has also been demanded, thus making the Appellant to pay the amount twice. The Appellant had taken the total CENVAT Credit amounting to Rs. 53,73,730/- during May to August'2010, out of which cenvat amounting to Rs. 43,36,591/- has been used towards payment of duty. Whereas the Appellant has been made to pay both the amounts which is wrong. The Appellants can be asked only to pay back the amount taken by them wrongly. They have already paid an amount of Rs. 27,01,992/- and if all they are required to pay any amount it would be only 26,66,735/-. Once the cenvat amount is reversed it amount to non taking of credit as held in case of Chandrapur magnet Wires (P) Ltd. 1996 (81) ELT 3 (SC), Bombay Dyeing & Mfg. Co. Ltd. 2007 (215) ELT 3 (SC), Hindustan Petroleum Corp. Ltd 2012 (280) ELT 510 (KAR.). He also submits that no penalty is imposable as they acted under bonafide belief that they are eligible for credit and hence there is no reason to impose penalty, when there was no malafide and the facts were apparent from their statutory returns. He relies upon judgments in case of Pushpam Pharmaceuticals Co. ltd. 2005 (184) ELT 117 (SC), Primella Sanitary Products Pvt. Ltd. 2005 (184) ELT 117 (SC) and Bell Granito Ceramica Ltd. 2006 (198) ELT 161 (SC).

4. Shri K.J. Kinariwala, Ld. AC (AR) appearing for revenue supports the findings of the adjudicating authority and Appellate Authority.

Heard both the sides and perused the case records. We find that vide Notification No. 17/2010 – CE (NT) dt. 13.04.2010, the Chewing Tobacco and Unmanufactured Tobacco Packaging Machines (Capacity Determination & Collection of Duty) Rules which came into effect from 08.03.2010 were made applicable to Zarda scented Tobacco also. The chewing tobacco rules provided for availment of cenvat credit on chewing tobacco procured in bulk and used in packing of Tobacco pouches with the aid of packaging machines. When the Chewing Tobacco and Unmanufactured Tobacco Packaging Machines (Capacity Determination & Collection of Duty) Rules also become applicable to Zarda scented tobacco, it was just obvious that the Zarda scented tobacco came at par with chewing tobacco in terms of levy of duty as well as availment of cenvat credit. The Appellant availed credit of duty paid on bulk on Zarda Scented Tobacco just like chewing tobacco and discharged duty on pouches manufactured from Bulk Zarda Scented Tobacco. The Appellant's representation to the authorities led to explicit mention of Zarda Scented Tobacco in Rule 16 so as to make it eligible for availing cenvat credit. In our view when the Chewing tobacco rules were made applicable to the Zarda Scented Tobacco, it explicitly meant that whatever duty liability and manner of levy alongwith facility of credit was applicable on chewing tobacco was also applicable to Zarda scented tobacco. Pertinently when the legislation wanted to keep Zarda scented tobacco in same category as chewing tobacco, it also meant that the cenvat credit as available to chewing tobacco would also be available to Zarda scented Tobacco. It was only a minor error that Rule 16 left to be amended to include Zarda scented tobacco which was later amended on the representation made by the Appellant to give explicit benefit to Zarda scented Tobacco. Even otherwise also the Zarda scented tobacco is also a tobacco and for same use and the credit was available to the Appellant. We find that in such case, it has to be construed that the substitution of Rule 16 was meant to be retrospective. In case of Govt. of India Vs. Indian Tobacco Association 2005 (187) ELT 162 (SC), the Apex Court held as under :

> *27. There is another aspect of the matter which may not be lost sight of. Where a statute is passed for the purpose of supplying an obvious omission in a former statute, the subsequent statute relates back to the time when the*

*prior Act was passed [See Attorney General v. Pougette (1816) 2 Price 381 : 146 ER 130].*

*28. The doctrine of fairness also is now considered to be a relevant factor for construing a statute. In a case of this nature where the effect of a beneficent statute was sought to be extended keeping in view the fact that the benefit was already availed of by the agriculturalists of tobacco in Guntur, it would be highly unfair if the benefit granted to them is taken away, although the same was meant to be extended to them also. For such purposes the statute need not be given retrospective effect by express words but the intent and object of the legislature in relation thereto can be culled out from the background facts.*

In the present case also it has to be followed that the amendment made by way of substitution has to be given retrospective effect as the same was intended by the legislature. Further in case of Fosroc Chemicals (India) Pvt Ltd., 2015 (318) ELT 240 (KAR) the Hon'ble High Court of Karnataka held as under :

***9.*** *What is the effect of "substitution" of a provision in the place of an existing one is no more res-integra. The Constitution Bench of the Hon'ble Apex Court in the case of Shamarao V. Parulekar v. The District Magistrate, Thana, Bombay & Others reported in AIR 1952 SC page 324, dealing with the scope of substitution of a provision by way of amendment held as under :-*

*"When a subsequent Act amends an earlier one in such a way as to incorporate itself or a part of itself into the earlier, then the earlier Act must thereafter be read and construed (except where that would lead to a repugnancy, inconsistency or absurdity) as if the altered words had been written into the earlier Act with pen and ink and the old words scored out so that there is no need to refer to the amending Act at all."*

***10.*** *Yet another Constitution Bench of the Hon'ble Supreme Court in the case of Shyam Sunder & Others v. Ram Kumar & Another reported in AIR 2001 SC page 2472, while dealing with the question whether a substituted provision necessarily means the amended provision is retrospective in nature has held as under :*

*"A substituted section in an Act is the product of an amending Act and all the effects and consequences that follow in the case of an amending Act the same would also follow in the case of a substituted section in an Act."*

***11.*** *In fact,, the Division Bench of this Court in the case of SHA Chunnilal Sohanraj v. T. Gurushantappa reported in 1972 (1) MYS. L.J. PAGE 327 DB has held as under :*

*"When an amending Act has stated that the old sub-section has been substituted by the new sub-section the inference is that the Legislature intended that the substituted provision should be deemed to have been part of the Act from the very inception."*

***12.*** *Recently, the Hon'ble Apex Court in the case of Government of India v. Indian Tobacco Association reported in 2005 (187) E.L.T. PAGE 162 (S.C.), while dealing with the exemption notification which was issued by way of substitution., held as under :*

*"15. The word 'substitute' ordinarily would mean 'to put (one) in place of another', or 'to replace'. In Black's Law Dictionary, Fifth Edition, at page 1281, the word 'substitute' has been defined to mean 'To put in the place of another person or thing' or 'to exchange'. In Collins English Dictionary, the word 'substitute' has been defined to mean 'to serve or cause to serve in place of another person or thing; 'to replace (an atom or group in a molecule) with (another atom or group)'; or 'a person or thing that serves in place of another, such as a player in a game who takes the place of an injured colleague'.*

*16. By reason of the aforementioned amendment no substantive right has been taken away nor any penal consequence has been imposed. Only an obvious mistake was sought to be removed thereby.*

*17. There cannot furthermore be any doubt whatsoever that when a person is held to be eligible to obtain the benefits of an exemption notification, the same should be liberally consumed."*

***13.*** *The Parliament has enacted the Special Economic Zones Act, 2005 (The SEZ Act for short) to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto. Section 53 of the Act declares that a special economic zone shall, on and from the appointed day, be deemed to be a territory outside the Customs territory of India for the purposes of undertaking the authorized operations. The word "export" has been defined under Act at Section 2(m). According to the definition of the word export, vide Section 2(m)(ii) "export" means supplying goods or providing services, from the Domestic Tariff Area to a Unit or Developer. Such exports were exempted from duty of Central Excise under Section 26 of the SEZ Act, 2005 and consequently application of Cenvat Credit Rules. Section 151 of the Special Economic Zones Act, 2005, overrides the provision of all other laws for the time being in force, notwithstanding anything inconsistent therein with the provision of the Special Economic Zones Act, 2005. This section therefore overreaches and eclipses the provisions of any other law containing provisions contrary to the SEZ Act, 2005. Though the definition of the word "export" in* *the SEZ Act, in Sec. 2(m) included supply of goods to a "Unit" or "Developer", in clause (i) of sub-rule (6) of Rule 6 of the Cenvat Credit Rules, 2004 the word "Developer" was conspicuously missing and only "unit" was included before the 2008 amendment. It is in that context the aforesaid amendment by Notification No. 50/2008 C.E. (N.T), dated 31-12-2008 was brought in, to clarify the doubt. As the said amendment is clarificatory in nature, that is the reason why it was brought by way of "substitution". The effect of the said "substitution" is that the Cenvat Rules 2004 are to be read and construed as if the altered words had been written into the Rules of 2004 with pen and ink and the words "to a developer of the SEZ for their authorized operation" was there from the inception. This is the understanding of the Government as is also clear from the circular issued by the C.B.E.&C. bearing No. 29/2006-Cus., dated 27-12-2006 wherein clause 4 reads as under :-*

*"4. In the light of the aforesaid provisions, with effect from 14-3-2006, Chapter XA of the Customs Act, 1962, the SEZ Rules, 2003, the SEZ (Customs Procedure) Regulations, 2003, and the exemption Notification No. 58/2003-C.E., dated 22-7-2003 regarding the supply of goods to SEZ units & SEZ developers have become redundant. Consequently the supplies from DTA to a SEZ unit, or to SEZ developers for their authorized operations inside a SEZ notified under sub-section (1) of Section 4 of the Act, may be treated as in the nature of exports."*

***14.*** *Therefore, it is clear, the said amendment has to be construed as retrospective in nature and the benefit of Rule 6(6)(i) as amended in 2008 has to be extended to the goods cleared to a "developer" of a Special Economic Zone for their authorized operations. Therefore, we do no see any merit in these appeals.*

***15.*** *The substantial question of law is answered in favour of the assessees and against the Revenue.*

5. Applying the ratio of Apex Court and above judgments, we are thus of the view that the substitution of Rule 16 was intended and to be understood as being retrospective in effect i.e when the Zarda Scented Tobacco was brought into the ambit of Chewing Tobacco and Unmanufactured Tobacco Packaging Machines (Capacity Determination & Collection of Duty) Rules. Our views are also fortified by the judgments in case of WPIL ltd. 2005 (181) ELT 359 (SC), Ralson India Ltd. 2015 (319) ELT 234 (SC), Sujana Metal products Ltd. 2011 (273) ELT 112 (TRI), Forsoc Chemicals (India) Pvt. Ltd 2015 (318) ELT 240 (KAR), Lothe Power Gears (P) Ltd 2017 (346) ELT 347 (KAR), Development

Engineers Pvt. Ltd. 2016 (339) ELT 560 (P & H). Steel Authority of India 2013 (297) ELT 166 (CHATTISGARH.), Indo Alusys industries Ltd. 2018 (360) ELT 96 (TRI), Ultra Tech Cement Ltd. 2014 (310) ELT 170. We thus hold that the demands made against the Appellant are not sustainable.

6. Nevertheless, we also find that vide the impugned order for the period may to August'2010, on the one hand the cenvat credit availed by the Appellant is sought to be reversed and on the other hand the central excise duty paid from such cenvat is also ordered to be recovered. We fail to understand the rationale of such way of demand. The moment cenvat credit stands reversed by an assessee, the duty paid from such cenvat amount also stands legalised. In our view the demands made in this manner is absolutely illegal and not sustainable. Further we also find that some amount of cenvat credit viz. 27,06,992/- stands paid or reversed by the Appellant. Hence even otherwise there is no reason to demand cenvat or central excise duty to the said extent.

7. Though we have held that on merits the Appellant has rightly availed the cenvat credit, but we also find that there is no reason to allege malafide intention/ suppression or deliberate action on the part of Appellant to avail alleged ineligible cenvat credit. From the facts it is apparent that the Appellant were under bonafide belief that being their goods at par with the chewing tobacco, the cenvat credit is available to them. They even made representation with the department and ultimately the goods become eligible for cenvat credit. Therefore there is no reason to hold the Appellant responsible of any deliberate act to evade duty or avail ineligible cenvat credit. Further they have disclosed availment of cenvat credit in their monthly excise return and did not hide anything. In view of such position even if it was assumed that the Appellant are not eligible for credit than too, there was no reason to impose penalty upon them. Our views are also based upon judgment in case of in case of Pushpam Pharmaceuticals Co. ltd. 2005 (184) ELT 117 (SC), Primella Sanitary Products Pvt. Ltd. 2005 (184) ELT 117 (SC) AND Bell Granito Ceramica Ltd. 2006 (198) ELT 161 (SC).

8. Thus in view of our above findings and discussion we hold that the impugned orders are not sustainable and we accordingly set aside the same. All the Appeals are allowed with consequential reliefs, if any.

(Pronounced in the open court on 15.10.2019)

**(RAMESH NAIR)**
**MEMBER (JUDICIAL)**

**(RAJU)**
**MEMBER (TECHNICAL)**

Neha