

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 13432 of 2013-DB

[Arising out of Order-in-Original/Appeal No 79-COMMR-2013 dated 18.07.2013 passed by Commissioner of Central Excise and Service Tax-RAJKOT]

Sanjay Products

32/33 Shreeji Industrial Estate
Rajkot Highway, MORBI, GUJARAT

.... Appellant

VERSUS

Commissioner of Central Excise & ST, Rajkot

Central Excise Bhavan, Race Course Ring Road
Income Tax Office, Rajkot,
Gujarat - 360001

.... Respondent

AND

EXCISE Appeal No. 13675 of 2013-DB

[Arising out of Order-in-Original/Appeal No 79-COMMR-2013 dated 18.07.2013 passed by Commissioner of Central Excise and Service Tax-RAJKOT]

Commissioner of Central Excise & ST, Rajkot

Central Excise Bhavan, Race Course Ring Road Income
Tax Office, Rajkot, Gujarat – 360001

.... Appellant

VERSUS

Sanjay Products

32/33 Shreeji Industrial Estate
Rajkot Highway, MORBI, GUJARAT

.... Respondent

APPEARANCE :

Shri Hardik Modh, Advocate for the Appellant
Shri Tara Prakash, Deputy Commissioner (AR) for the Respondent

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

DATE OF HEARING : 15.03.2023

DATE OF DECISION: 27.04.2023

FINAL ORDER NO. A/11029-11030 / 2023

RAMESH NAIR :

The brief facts of the case are that the appellant is a proprietary concern and was engaged in the manufacture of Pan Masala falling under Chapter heading 2403 99 90 of the first schedule of Central Excise Tariff Act, 1985 since 2001. On 02.01.2012, the appellant filed declaration seeking

introduction of new retail sale price of Rs.1.00/- and Rs.2.00/- with effect from 08.01.2012 with respect to manufacturing of goods. The appellant stated that out of four pouch packing machines, one machine was sealed and uninstalled. In respect of balance three pouch packing machines, two machines would be used for manufacture of pan masala having Retail Sale Price of Rs.1.00 and one packing machine would be used for manufacture of pan masala having RSP of Rs.2.00. The appellant also stated that they would discontinue to manufacture pan masala having RSP of Rs. 1.50 along with the letter, the appellant submitted the declaration in prescribed Form-1 in terms of Rule 6 of the said Pan Masala Rules. The appellant accordingly paid Central Excise duty on pro-rata basis as per number of days the pouch packing machines operated for manufacture of particular RSP in terms of third proviso to Rule 9 of the said Pan Masala Rules. Due to market recession and having cut-throat competition in the market, the appellant has discontinued existing retail sale price of Rs. 2.00 permanently and restored sales price of Rs. 1.50 with effect from 08.04.2012. Accordingly, the appellant in advance intimated to the Assistant Commissioner having jurisdiction over his factory for change of retail sales price as per Rule 6 (6) of the said Pan Masala Rules. The appellant was issued show cause notice and called upon to show cause to as to why Central Excise duty should not be demanded and recovered under Section 11A of the Central Excise Act, 1944 read with Rule 9 of Pan Masala Rules along with interest and penalty. It was alleged that the appellant did not permanently discontinue RSP for manufacture of the notified goods using pouch packing machines. The appellant filed detailed reply denying the charges and allegations leveled in the show cause notice. The Revenue vide order-in-original confirmed the charges of the show cause notice and demanded Central Excise duty by considering that the said three machines operated for manufacture of goods

having RSP of Rs. 1.00, Rs. 1.50 and Rs. 2.00 in the month of January 2012 and April 2012. The Revenue held that the appellant did not file declaration showing balance stock lying in the factory for the discontinued retail sale price hence, it was not considered as permanent discontinuation of existing retail sale price. Being aggrieved by the order-in-original, the present appeal was filed by the appellant. The Revenue has also filed appeal for non-imposition of penalty under Section 11AC of the Central Excise Act, 1944.

2. Shri Hardik Modh, learned Counsel appearing on behalf of the appellant submits that the appellant filed letter dated 02.01.2012 intimating to the Deputy Commissioner having jurisdiction over the factory that they decided to discontinue the existing retail sale price of Rs. 1.50 for the goods manufactured through three pouch packing machines and decided to manufacture Pan Masala having retail sale price of Rs. 1.00 through two pouch packing machines with effect from 08.01.2012 and introduced retail sale price of Rs. 1.00 for manufacture of Pan Masala through two pouch packing machines and sought benefit of reduction of Central Excise duty in terms of 3rd proviso to Rule 9 of said Pan Masala Rules. The appellant correctly paid pro-rata duty on the basis of total number of days in the month pouch packing machines operated for manufacture of Pan Masala having retail sale price Rs. 1.00. He submits that the Revenue discarded the submission and sought duty for the entire month on the following two grounds:-

- (a) The appellant earlier manufactured Pan Masala having retail sale price of Rs. 1.00 till February 2011 therefore, it could not be said that the appellant introduced new retail sales price.

(b) Since the appellant manufactured Pan Masala having retail sale price of Rs. 1.00 in past and re-introduced retail sale price Rs. 1.00, it could not be said that the appellant permanently discontinued manufacture of goods of retail sale price of Rs. 1.00 in past.

He submits that appellant did not manufacture the goods of retail sale price of Rs. 1.00 since February 2011 to December 2011. The appellant discontinued retail sale price Rs. 1.00 permanently in the month of March 2011 and therefore, they did not manufacture goods of Rs. 1.00 during interregnum period. The appellant re-introduced retail sale price Rs. 1.00 to capture the market and compete with competitors.

2.1. It is his submission that appellant permanently discontinued manufacturing of goods of retail sale price of Rs. 1.00, the officers did not raise any issue and permit to manufacture notified goods of new introduced price of Rs. 1.50 hence, finding of the Revenue is that the appellant manufactured the notified goods of retail sale price of Rs. 1.00 in past prior to February 2011 and therefore, benefit of pro-rata duty to the extent of use of operating machines in a month is not permissible, is miscarriage of justice. He submits that it is appreciated that appellant filed declaration in prescribed Form No.1 under Rule 6 on 02.01.2012 showing their intention. While accepting the declaration, the Revenue extended the benefit of pro-rata duty for manufacture of notified goods of having retail sale price Rs. 2.00 and accepted the duty on pro-rata basis based on 24 days for which the operating machines used for manufacture of retail sale price of Rs. 2.00. The Revenue ought to have extended the said benefit to the appellant for manufacture of the notified goods having retail sale price Rs. 1.00.

2.2 As regards the retail sale price of Rs. 1.50 used for manufacture on three machines, he submits that Revenue erred in demanding duty by considering all the three machines operated by the appellant for manufacture of the notified goods of having retail sale price of Rs. 1.50 in the month of January 2012 and one machine in the month of April 2012 on the following premises:-

(i) The appellant did not have intention to discontinue retail sale price of Rs. 1.50 permanently since the appellant re-introduced the said price in the month of April 2012;

(ii) The appellant failed to file declaration as provided under Rule 13(5) for the balance stock of notified goods retail sale price Rs.1.50/- and their packing material on the day when they discontinued manufacture of goods of retail sale price Rs. 1.50 ps.

He submits that vide letter dated 02.01.2012 they clearly mentioned about discontinuation of retail sale price Rs. 1.50/- and introduction of new retail sale price Rs. 1/- and Rs. 2/- for manufacture of notified goods. The appellant did not manufacture single quantity of notified goods of retail sale price Rs. 1.00 and Rs. 1.50 during the month of April 2012 and March 2012. The department accepted the said submission and did not demand duty. He submits that since the appellant re-introduced retail sale price of Rs. 1.50 in the month of April 2012, it does not mean that the appellant did not have any intention to discontinue retail sale price of Rs. 1.50 permanently in the month of January 2012. Due to unavoidable circumstances on account of market recession and no acceptance of new price by the customers, the appellant re-introduced retail sale price of Rs. 1.50 for notified goods. He submits that Revenue erred in not appreciating that merely because the appellant failed to file the declaration as mentioned in Rule 13(5) showing

the closing stock of notified goods, it does not mean that the appellant had no intention to discontinue retail sale price of Rs. 1.50 permanently. Third proviso to Rule 9 puts the condition that the manufacture should permanently discontinue manufacture of notified goods with existing retail sale price for payment of duty on pro-rata basis. Since the appellant discontinued retail sale price of Rs. 1.50 since January 2012 which have been accepted by the Revenue for the month of February 2012 and March 2012, finding of the respondent that there was no intention on the part of the appellant to discontinue permanently is factually incorrect.

2.3 As regards the retail sale price of Rs. 2.00 for manufacture of the notified goods through one operating machine, he submits that Revenue accepted the declaration filed on 02.01.2012 for allowing payment of duty on pro-rata basis based on the days of which the operating machines used for manufacture of notified goods. However, the said benefit was not extended in the month of April 2012 when the appellant decided to discontinue retail sale price of Rs. 2.00 for manufacture of notified goods permanently. He submits that due to cut-throat competition and non acceptance of higher price by the customers, the appellant permanently discontinued retail sale price Rs. 2.00 with effect from 08.04.2012. The appellant thereafter did not manufacture the notified goods having retail sale price of Rs. 2.00, it demonstrate that the appellant permanently discontinued retail sale price of Rs. 2.00 and therefore, the Revenue ought to have demanded the duty on pro-rata basis in terms of third proviso to Rule 9. He further submits that there was amendment in proviso to Rule 8 retrospectively under Section 11(109) of Finance Act, 2014 read with schedule of the Finance Act, 2014. It is undisputed fact that the appellant had three operating machines during the period. The Revenue demanded duty by considering all the three machines used for manufacture of retail

sale price of Rs. 1.00, Rs. 1.50 and Rs. 2.00. Accordingly the department considered as six operating machines and demanding the duty in terms of un-amended proviso to Rule 8. The government by Section 109 read with the fourth schedule of the Finance Act, 2014 amended the proviso with effect from 13.04.2010 and the department could demand duty only on three operating machines and not on six operating machines as held in the present case. In the case of Trimurti Fragrance (P) Limited vs. Commissioner of Central Excise – 2015 (329) 680 (Tri.), the Tribunal extended benefit of the amended proviso to Rule 8 was even to the past period.

2.4 As regards the penalty under Section 11AC and Rule 17 of the said Pan Masala Rules, he without prejudice to the aforesaid submissions, submits that there was no ill intention on the part of the appellant to evade duty. Hence penalty should not be imposed under Rule 17 of the said Pan Masala Rules or under Section 11AC of the said Act as proposed by the department in the cross-objections. He submits that it is a pure interpretation issue and even the government amended proviso to Rule 8 retrospectively and clarified that in case of one packing machine is used for more than one retail sale prices, duty should be considered as highest retail sale price. The appellant had not paid duty by considering the fact that earlier retail sale price of Rs. 1 and Rs. 1.50 was permanently discontinued.

3. Shri Tara Prakash, learned Deputy Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. We have carefully considered the submissions made by both the sides and perused the record. We find that the appellant proposed to avail the

option of 4th proviso to Rule 9 of Pan Masala Packing Machines (Capacity Determination and Collection of duty) Rules 2008. The Rule 9 is reproduced below:-

Rule 9. Manner of payment of duty and interest. The monthly duty payable on notified goods shall be paid by the 5th day of the same month and an intimation in form 2 shall be filed with the jurisdictional superintendent of central excise before the 10th day of the same month:

Provided that monthly duty payable for the month of July, 2008 shall be paid on or before 15th day of July, 2008 :

Provided further that if the manufacturer falls to pay the amount of duty by due date he shall be liable to pay the outstanding amount along with the interest at the rate specified by the central government vide notification under [section 11AA] of the Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount:

Provided also that in case of increase in the number of operating packing machines in the factory during the month on account of addition or installation of packing machines, the differential duty amount, if any, shall be paid by the 5th day of the following month:

Provided also that in case a manufacturer permanently discontinues manufacturing of goods of existing retail sale price or commences manufacturing of goods of a new retail sale price during the month, the monthly duty payable shall be recalculated pro-rata on the basis of the total number of days in that month and the number of days remaining in that month counting from the date of such discontinuation or commencement and the duty liability for the month shall not be discharged unless the differential duty is paid by the 5th day of the following month and in case the amount of duty so recalculated is less than the duty paid for the month, the balance shall be refunded to the manufacturer by the 20th day of the following month:

Provided also that if there is revision in the rate of duty, the monthly duty payable shall be recalculated pro- rata on the basis of the total number of days in that month and the number of days remaining in that month counting from the date of such revision and the duty liability for the month shall not be discharged unless the differential duty is paid by the 5th day of the following month and in case the amount of duty so recalculated is less than the duty paid for the month, the balance shall be refunded to the manufacturer by the 20th day of the following month:

Provided also that in case it is found that a manufacturer has manufactured goods of those retail sale prices, which have not been declared by him in accordance with provisions of these rules or has manufactured goods in contravention of his declaration regarding the plan or details of the part or section of the factory premises intended to be used by him for manufacture of notified goods of different retail sale prices and the number of machines intended to be used by him in each of such part or section, the rate of duty applicable to goods of highest retail sale price so manufactured by him shall be payable in respect of all the packing machines operated by him for the period during which such manufacturing took place:

[Provided also that in case a manufacturer does not pay the duty payable by the due date, and continues to operate any packing machine, then till the time such non-payment continues, he shall be liable to pay the monthly duty based on the number of operating packing machines declared in the month for which duty was last paid by him

or the total number of packing machines found available in his premises at any time thereafter, whichever is higher:

Provided also that in case a new manufacturer commences production of notified goods in a particular month, his monthly duty payable for that month shall be calculated pro-rata on the basis of the total number of days in the month and the number of days remaining in that month starting from the date of commencement of the production of such notified goods and shall be paid within five days of such commencement.]

From 4th proviso to Rule 9, the manufacturer is allowed to permanently discontinue the goods of existing retail sale price or commence a new retail sale price during the month. In such case, monthly duty payable shall be re-calculated pro-rata on the basis of total number of days in that month and the number of days remaining in that month counting from the date of such discontinuation or commencement and the duty liability for the month shall not be discharged. As per the facts of the present case, the appellant filed letter dated 10.01.2012 and submitted intimation of duty payment in prescribed Form-2 for the month of January 2012 as required under Rule 9 of the said Rules and submitted duty calculation as under:-

Number of machines	Retail Sale Price (Rs.)	Days	Duty(Rs.)	Challan No./ Date
3	1.50	7	12,87,100/-	00354 dtd. 06.01.2012
2	1.00	24	19,35,488/-	00360 dtd. 06.01.2012
1	2.00	24	18,58,068/-	00346 dtd. 06.01.2012

The appellant also submitted intimation of duty payment in prescribed Form-2 for the month of April 2012 on 10.04.2012 showing the payment of duty as under:-

Number of machines	Retail Sale Price (Rs.)	Days	Duty(Rs.)	Challan No./ Date
1	1.50	23	22,23,335/-	00063 dtd. 07.04.2012
2	1.00	30	38,00,000/-	00058 dtd. 07.04.2012
1	2.00	7	8,40,000/-	00114 dtd. 07.04.2012

From the above tables, it can be seen that on pro-rata basis i.e. for the days the machines operated during January 2012 and April 2012, due to change in retail sale price, the appellant have paid duty considering the change in retail sale price in the month of January 2012 and April 2012 and for the number of days in that month. The entire case of the department is that since the appellant have changed the retail sale price twice i.e. one in January, 2012 and second in April, 2012, the appellant has not permanently discontinued the manufacturing of goods of existing retail sale price. As per the Adjudicating Authority, only when the retail sale price is changed permanently, the appellant can be eligible for pro-rata duty on the reduced retail sale price whereas in the present case, since the retail sale price was reintroduced, the change in retail sale price was not permanently made. Hence, the 4th proviso to Rule 9 is not applicable in the appellant's case.

5. The 4th proviso to Rule 9 is once again reproduced below:-

“Provided also that in case a manufacturer **permanently discontinues** manufacturing of goods of existing retail sale price or **commences manufacturing of goods of a new retail sale price during the month**, the monthly duty payable shall be recalculated pro-rata on the basis of the **total number of days in that month** and the number of days remaining **in that month** counting from the date of such discontinuation or commencement and the duty liability **for the month** shall not be discharged unless the differential duty is paid by the 5th day of the following month and in case the amount of duty so recalculated is less than the duty **paid for the month**, the balance shall be refunded to the manufacturer by the 20th day of the following month:”

From the careful reading of above 4th proviso to Rule 9 of Pan Masala Packing Machine Rules, it is observed that the term ‘permanently’ ‘discontinues’ or ‘commences’ is in respect of a particular month wherein the new retail sale price is discontinued or commenced, from which it is clearly inferred that the term ‘permanently’ does not mean that the discontinuation or commencement of new retail sale price should be once forever. It is clear that the discontinuation or commencement of new retail sale price should be once in a month and in the said month the retail sale price should not be

changed again in the same month, connotes to the term 'permanently'. In the present case either commencement or discontinuation of a particular retail sale price was made only once in particular month i.e. in the month of January, 2012 or in April 2012. The Adjudicating Authority has wrongly interpreted the 4th proviso to construe that 'permanently' discontinuation or commencement of retail sale price means once a new retail sale price is commenced or discontinued the same cannot be re-introduced or discontinued ever in future. This interpretation leads to absurdity for the simple reason that the change in retail sale price is on the basis of market demand of a particular product. And, if interpretation of the Adjudicating Authority is accepted then no business person can change their commercial needs as per the demand in the market. This cannot be an intention of the legislature by framing provision in 4th proviso to Rule 9 of Pan Masala Packing Machine Rules. It further find force in the contention of the appellant that the duty payment under Pan Masala Packing Machine Rules is on monthly basis therefore, provision for change of duty structure must be related to a particular month only and will not have any effect on subsequent month. The proviso clearly suggests that the action of permanent discontinuation or commencement of new retail sale price during the month is for the purpose of calculation of pro-rata duty for that particular month. Therefore, the term permanently is clearly related to a particular month and not forever as contemplated by the Adjudicating Authority in his adjudication order. Therefore, we are of the clear view that since in the present case appellant have changed retail sale price either by commencement or discontinuation only once in the month of January, 2012 and April, 2012 it cannot be said that the appellant have not discontinued or commenced the new retail sale price permanently in the respective months.

Therefore, on this count the Adjudicating Authority's contention is clearly not acceptable.

6. We find that the Revenue also demanded duty in only one month i.e. January, 2012 and April, 2012 whereas if the Revenue stick to interpretation of term 'permanently' then the differential duty for the months of February, 2012, March, 2012 and even for May, 2012 should have been demanded. This itself establish that permanent discontinuation or commencement of one retail sale price means permanent in a particular month, hence the same was not violated in the present case for the reason that in the month of January, 2012 or April, 2012 the retail sale price was changed only once in the respective month, hence the said change was permanent in that particular month. Accordingly, the condition of 4th proviso to Rule 9 of PMPM Rules was scrupulously complied with by the appellant.

7. Our above observation gets further reinforced with the amended first proviso to Rule 8 of PMPM Rules, 2008 which is reproduced below:-

"Provided that where a manufacturer uses an operating machine to produce pouches of different retail sale prices during a month, he shall be liable to pay the duty applicable to the pouch bearing the highest retail sale price for the whole month."

From the reading of the above proviso, it can be seen that if in a month different retail price are used on operating machine, in such case the appellant is liable to pay duty applicable to the pouches of the highest retail sale price for the whole month. This also suggest that if the retail sale price is changed more than once which means not permanently then in that particular month the assessee is required to pay duty on the basis of highest retail sale price for the whole month. Therefore, there is no doubt that the

term 'permanently' 'discontinuation' or 'commencement' of retail sale price must be considered in a particular month and not otherwise.

In view of the above discussion, we are of the view that the terms 'permanently' in the 4th proviso to Rule 9 was not violated by the appellant.

8. Third proviso to Rule 9 provides that a manufacturer permanently discontinue manufacturing of goods of existing retail sale price or commence manufacturing of goods of new retail sale price during the month. The appellant had discontinued retail sale price Rs. 1.50 since January 2012 which has been accepted by the Revenue for the month of February and March 2012 therefore, findings of the Revenue that no intimation for discontinuation permanently is factually incorrect. It is also undisputed that the Revenue had accepted the declaration dated 02.01.2012 for allowing duty on pro-rata basis based on the days on which operating machines were used for manufacture of notified goods. However, the said benefit was not extended in the month of April 2012 when the appellant discontinued retail sale price Rs. 1.50 and Rs. 2.00 of the notified goods permanently. Therefore, the double standard of the same authority cannot be accepted. It is also noted that the appellant permanently discontinued retail sale price Rs. 2 with effect from 08.04.2012 thereafter they did not manufacture the notified goods having retail sale price Rs. 2.00 in the same month which demonstrates that the appellant permanently discontinued the retail sale price Rs. 2.00. Therefore, the Revenue ought to have accepted the duty payment on pro-rata basis in terms of 3rd proviso read with 4th proviso to Rule 9.

9. As regards, the contention in the impugned order that the appellant have not filed declaration under Rule 13(5) of Pan Masala Rules, 2008 inasmuch as the non-declaration of closing stock of notified goods, we find

that merely by non-filing of declaration under Rule 13(5) the benefit of pro-rata duty on retail sale price as per 4th proviso to Rule 9 cannot be denied. It is not the case of the department that the appellant have manipulated the stock. The stock of the finished goods was very much recorded in the records of the appellant and the same was neither altered nor manipulated. The Revenue has not disputed the correctness of the stock in the appellant's factory which was recorded in the records. Due to this procedural lapse, the benefit of pro-rata based duty in terms of 4th proviso read with 3rd proviso, cannot be denied.

10. As regards alternate submission made by the appellant that at the most the duty could have been demanded on the basis of highest retail sale price for the entire month, as per Section 101 of Finance Act, 2014. The first proviso to Rule 8 of the Pan Masala Packing Machine Rules has been replaced with effect from 13 April 2010. The said proviso is reproduced below:-

"Provided that where a manufacturer uses an operating machine to produce pouches of different retail sale price during a month, he shall be liable to pay the duty applicable to the pouches of the highest the retail sale price for the whole month."

We find force in the submission of the appellant that in view of the above replaced proviso, the calculation of duty made by the Adjudicating Authority is prima-facie incorrect and at the most duty should have been calculated on the basis of highest retail sale price. However, since we have decided the matter on merits on the basis of 4th proviso to Rule 9 of Pan Masala Packing Machine Rules, we are not giving conclusive findings on the issue of duty calculation as per the first proviso to Rule 8.

11. As per our above discussion and findings, the differential duty confirmed by the lower authority is not sustainable. As regards the

Revenue's appeal which is seeking imposition of penalty under Section 11AC for confirmation of demand of duty, since the duty demand itself is not sustainable, there is no question of any penalty, hence the Revenue's appeal has no substance. Accordingly, the impugned order is set-aside, the appeal of the assessee is allowed and the appeal filed by Revenue is dismissed.

(Pronounced in the open court on 27.04.2023)

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

KL