

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

REGIONAL BENCH-COURT NO. 3

Excise Appeal No. 12112 of 2013- DB

(Arising out of OIO-21/COMMR/AKG/AHD-II/2013 dated 31/03/2013 passed by Commissioner of Central Excise-AHMEDABAD-II)

C.C.E.-Ahmedabad-ii

.....Appellant

Custom House... First Floor,
Old High Court Road, Navrangpura,
Ahmedabad,Gujarat-380009

VERSUS

Zest Packers Pvt Ltd

.....Respondent

55b, Meldi Estate,
Gota Railway Crossing, Gota,
Ahmedabad,Gujarat

APPEARANCE:

Shri R. K. Agarwal, Superintendent (AR) for the Appellant

Shri Devashish K Trivedi, Advocate for the Respondent

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

Final Order No. 11908/2023

DATE OF HEARING: 18.08.2023

DATE OF DECISION: 11.09.2023

RAMESH NAIR

The issue involved in present appeal filed by the revenue is that in the fact that in the month of December 2011 the production of a new retail sale price was done from 28.12.2011 to 31.12.2011, whether the duty for the entire month has to be paid or duty on *pro-rata* basis only for four days, when the production has taken place.

2. Shri R.K Agrawal, learned Superintendent (AR) appearing on behalf of the revenue Appellant, reiterates the ground of appeal. He further submits that as per the provision of Chewing Tobacco and Un-manufactured Tobacco Packing Machines (capacity of determination and collection of duty) Rules, 2010 the respondent was required to pay the duty for the entire month in advance and thereafter should have claimed the abatement for the days when

the production was closed. Therefore, the learned Commissioner has wrongly dropped the demand.

3. Shri Devashish K Trivedi, Learned Counsel, appearing on behalf of the respondent submits that this issue is no longer res-Integra as the identical issue even against the same impugned order, this Tribunal has set aside the demand and allowed the appeal in Order No. A/11068-11702/2015 dated 22.07.2015 which has been accepted by the department as no further appeal was filed either in the High Court or the Supreme Court. Therefore, following the said Tribunal order the Revenue's appeal is not maintainable.

4. We have carefully considered the submission made by both the sides and perused the record. We find that it is not the case of the department that the appellant is liable to pay duty for the days, when the production was not taking place. But the contention of the department is that appellant was supposed to pay duty for the entire month of December 2011. Thereafter, they should have claimed abatement by filing a refund claim. This shows that department is in agreement that for the closer days of the production duty per se is not payable. Therefore, it is a Revenue neutral situation, even if the appellant pay the duty and undisputedly entitled for claim of abatement or pay the duty only for the production days, in the present case four days. The identical issue has been considered by this Tribunal even against the impugned order and the demand was set aside. The relevant order of this Tribunal is reproduced below:

5. *After hearing both the sides and on perusal of the records, we find that the Central Government framed the Rules 2010 in exercise of the powers conferred by sub-sections (2) and (3) of Section 3A of the Act, 1944. It is a self-contained and independent Rule for determination of capacity of production and collection of duty on un-manufactured Tobacco, bearing a brand name and Chewing Tobacco. The dispute relates to whether a manufacturer has option to suo motu avail the benefit of abatement of duty in respect of non-production of the notified goods for a continuous period of 15 days or more under Rule 10 of the said Rules 2010 as contended by the Appellants or the manufacturer is required to file application for seeking abatement, subject to the procedure of grant of refund as per provision of Section 11B of the Act, 1944 as held by the Adjudicating authority.*

6. The learned Special Counsel fairly submitted that even the issue is covered in favour of the Appellants in the case of *Thakkar Tobacco Products Pvt. Ltd. & Others (supra)*, but, the Bench has not considered certain legal provisions in proper manner and the impugned orders are liable to be upheld. For the purpose of proper appreciation of the case, the relevant portion of the decision of the Tribunal in the case of *Thakkar Tobacco Products Pvt. Ltd. & Others (supra)* are reproduced below:-

"5. Extensively heard the arguments and contentions of both sides. At the very outset, it needs to be recorded that in none of the impugned orders, it in dispute that there was a closure of factory for more than 15 days and the required procedure of due intimation of closure, sealing and due intimation of re-opening was followed. In other words, it is not in dispute that the requirements stipulated in Rule 10 of the said Rules were fulfilled. It is also not disputed that the adjustments made were not more than the amounts of duties mandated to be abated as per the said Rule 10.

6. We find that the said Rule 10 does not make any stipulation about the abatement having to be claimed by filing an application therefore although it does not imply anything to be contrary either. We find the Rule 9 of the said Rules in one of its provisos stipulates that "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 20th day of the following month." When seen in the light of this proviso, there is force in the argument of the appellants that when the intention of the Government was that the amount should be refunded, an express provision was made therefore; in the said Rule 10, there is no such provision.

In this regard, it is seen that in the case of Sri Padma Balaji Steels (P) Ltd Vs CCE Coimbatore - 2009 (246) ELT 255 (Tri-Chennai), the Tribunal held as under:-

"The claim of the assessee for abatement on the ground that the factory was closed for 9 days and 10 days respectively during the period 18-5-98 to 27-5-98 and 17-6-98 to 27-6-98 has been rejected by the Commissioner on the ground that since closure was for a period of less than one month, the assessee ought to have paid duty liability and then sought abatement, in terms of Rule 96ZO of the Central Excise Rules, 1944.

2. We have heard both sides and perused the rule in question and find that there is no such stipulation contained therein. Even in case of Rule 96ZO, where there is such a condition prescribed, the Tribunal has held in the case of Varun Silk Mills P. Ltd. v. CCE, Surat, 2007 (214) E.L.T. 227 (Tri.-Ahmd.) that abatement benefit is a substantial benefit which cannot be denied only on the ground that the assessee did not pay duty first and then claim abatement. In the absence of any such condition in Rule 96ZO, which is relevant rule in the present case, the benefit of abatement should have been extended. The Commissioner has read into a rule something does not exist thereunder. We, therefore, set aside the impugned order and allow the appeal. "

7. We find that the Board vide Circular No.331/47/97-CX, dt.30.08.1997, in Para 4(e) observed as under:-

"Rule 96ZO has been amended to allow abatement of duty, under?(e) sub-Section (3) of Section 3A of the Central Excise Act, 1944, for the induction furnace units which remain closed for seven or more days. If an induction furnace unit operating under section 3A is continuously closed for not less than 15 days, then pre-payment of duty for the closure period is not to be insisted upon provided the unit has fulfilled all the conditions stated in sub-

rule 2 of rule 96ZO. However, the above claim should be subject to verification by the jurisdictional Assistant Commissioner of Central Excise. If such a closure is for a reasonably long period, periodic verification about the continued closure should be done by the jurisdictional Assistant Commissioner of Central Excise. ”

Our attention was also drawn to CBEC Circular No.485/51/, d.15.09.1999, which was issued in relation to Rule 96ZQ as it existed prior to 28.02.1999.

"2. The Board has examined the matter. Under rule 96ZQ as it existed prior to 28-2-1999, the prerequisites for grant of abatement on closure of stenter were the stenter should have been completely closed for a continuous period of not less than 7 days and the processor should give at least 3 days notice, before closure, to the Jurisdictional Deputy/Assistant Commissioner. On receipt of the notice, the stenter was required to be sealed in such a manner as prescribed by the Commissioner. If these conditions were satisfied, then the processor was eligible for abatement. Where the stenter was closed as on 16-12-1998 itself, the question of 3 days advance notice for closure did not arise. In that case, the stenter should have been sealed in the aforesaid manner for the purpose of claiming abatement. It would be proper, therefore, that where independent processor is eligible for abatement, it should be granted to him whether he has paid the duty first or did not pay the duty in anticipation of obtaining the order of abatement. Though rule 96ZQ did not contain any specific provision in this regard, there was no specific provision to deny it either.

3. Accordingly, the Board has decided that the Commissioners should decide first whether the processor was otherwise eligible for abatement or not. In case he is eligible and he had not paid the duty, the abatement should be granted without asking him to pay duty first or where he had paid the duty, he should be reimbursed the amount of duty paid, in terms of the order of abatement issued by the Commissioner. ”

It is seen that the situation obtaining in the present appeals is quite akin to situation dealt with in the above circular dt.28.02.1999. The Adjudicating authority has refused to follow the ratio of the said circular on the ground that the said circular was issued only for the period 16.12.1998 to 27.02.1999. While the Commissioner is technically right in his observation, it needs to be pointed out that the period (upto 27.02.1999) was mentioned in the said circular only because the said Rule was amended w.e.f. 28.02.1999. In the case of Steel Industries of Hindustan Industrial Area Vs CCE Ghaziabad - 2013 (293) ELT 191 (All.) while interpreting Rule 96ZP of the erstwhile Central Excise Rules, the Allahabad High Court observed that there is no pre-condition for depositing of duty for claiming abatement under Rule. Earlier, in the case of Varun Silk Mills Pvt. Ltd Vs CCE Surat-I - 2007 (214) ELT 227 (Tri-Ahmd.) involving a similar situation, the Tribunal held as under:-

"4. I have? carefully considered the facts of the case. There is no dispute on the facts that during the period from 1-8-2000 to 15-8-2000. Stenter with 4 chambers remained closed and appellants were eligible for abatement. The question whether they should have paid Rs. 7 lakhs and taken refund thereafter is basically a question of procedure. I do not think that the substantial benefit should be denied on this ground. ”

It needs to be pointed out that the CESTAT held this view inspite of the fact that the Rule 96ZQ (7)(e) specifically required the payment of duty for the entire period of the month as is evident from the language of that Rule [96ZQ(7)(e)], which is reproduced below:-

"When the claim for abatement by the independent processor is for a period of less than one month, he shall be required to pay the duty, as applicable, for the entire period of the month and may subsequently seek such claim after payment of such duty".

Needless to say that such a requirement is conspicuous by its absence in Rule 10 of the said Rules.

Earlier also, the Tribunal in the case of Balkrishna Textile Ltd Vs CCE Ahmedabad - 2003 (161) ELT 740 (Tri-Del), in effect held as under:-

"It is clarified in the circular that 'where independent processor was eligible for abatement, it should be granted to him whether he has paid the duty first or did not pay the duty in anticipation of the order of abatement. Though Rule 96ZQ did not contain any specific provision in this regard, there was no specific provision to deny it either'. The Board, therefore, 'decided that the Commissioner should decide first whether the processor was otherwise eligible for abatement or not. In case he is eligible and he had not paid the duty, the abatement should be granted without asking him to pay the duty first or where he had paid the duty, he should be reimbursed the amount of duty paid, in terms of order of abatement issued by the Commissioner'. Therefore, the appellants are eligible to the abatement of duty for the period 1-2-99 to 28-2-99."

As regards the Id.D.R.'s reference to the judgment in the case of Shivshakti Agrifoods Pvt. Ltd. (supra), the issue there was abatement of duty on some machines which were in sealed condition during the month and the Tribunal held that the abatement under said Rule 10 cannot be given in respect of individual machines. Thus, this judgment is not relevant to the present appeals.

The reference was also made by Id.D.R. to the case of K.P. Pan Products Pvt. Ltd (supra) but the issue there was whether the continuous period of 15 days of closure of the factory should necessarily fall during a particular calendar month and the Tribunal held that the said period of 15 days of continuous closure could fall in the two adjacent months also. Thus, this judgment is of no avail to the Revenue. As regards the Board's circular dt. 12.03.2009 stating that the abatements are subject to pre/post-audit, we do not necessarily see any fatally irreconcilable contradiction between the Board's circulars dt. 15.09.1999 & 30.08.1997 on the one hand and the one dt. 12.03.2009 on the other in as much as when the adjustment of abatement has been made, nothing prevents Revenue from auditing the correctness thereof. More importantly, the Board's circulars have no statutory force and have to be ignored to the extent they are in conflict with the judicial pronouncements.

9. *It is quite evident from the foregoing that apart from the Board's circulars dt.30.08.1997 and 15.09.1999 referred to earlier, in a series of judicial pronouncements, a consistent approach has been taken to the effect that in case of such adjustment of duty which is mandatorily required to be abated (as has been done in these cases), Revenue cannot insist upon recovery of the amount so adjusted."*

7. *Now, we have to examine the submission of the learned Special Counsel for the Revenue in detail. The scheme of Rules 2010, in brief, is that in terms of sub-rule (1) of Rule 6 of Rules 2010, the manufacturer shall file declaration with details as specified*

therein to the Department. Sub-rule (2) of Rule 6 provides that the Deputy Commissioner or the Assistant Commissioner of Central Excise, shall after making such enquiry, approve the declaration and pass an order concerning annual capacity of production of the factory. Rule 7 of the Rules 2010, provides that the duty payable for a particular month shall be calculated by application of the proper rate of duty specified in the notification of the Government of India, in the Ministry of Finance, No.16/2010-CE, dt.27.02.2010 to the number of packing machines in the factory during the month. Rule 9 of the said Rules 2010, provides the manner and the payment of duty and interest. The monthly duty payable on notified goods shall be paid by the 5th day of the same month and intimation shall be filed with the jurisdictional Superintendent of Central Excise before the 10th of the same month. 4th Proviso to Rule 9 provides that in case a manufacturer permanently discontinues manufacture of goods of existing retail sale price or commences manufacture of goods of a new retail sale price during the month, the monthly duty payable shall be recalculated on the pro rata basis of the total number of days 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.

8. To sum up, the manufacturers shall file declaration of the production capacity with details of packing machines to the Deputy/Assistant Commissioner of Central Excise, who shall, after enquiry including physical verification, approve the declaration and determine and pass order considering the annual capacity of production. As per Rule 7, the duty shall be calculated by the manufacturer for a month as per rate of duty specified in the notification, to the number of operating packing machines in the factory during the month. In case a manufacturer permanently discontinues manufacture of existing retail price or commences manufacture of goods of new retail price, the duty will be recalculated, and, if the duty is paid more than the amount so recalculated, the balance shall be refunded to the manufacturer by the 20th day of the following month.

9. In the above legal position of Rule 2010, it is seen that the proviso to Section 3A(3) of the Act, 1944 extended benefit to abate the duty calculated on a proportionate basis for non-production of goods during any continuous period of 15 days or more. The relevant portion of the said proviso to Section 3A (3) is reproduced below:-

"Provided that where a factory producing notified goods did not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfils such conditions as may be prescribed. "

10. Rule 10 of Rules 2010, which is the subject matter of the present appeals, is reproduced below:

"Abatement in?case of non-production of goods. "

In case a factory did not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period provided the manufacturer of such goods files an intimation to this effect with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, with a copy to the Superintendent of Central Excise, at least three working days prior to the commencement of said period, who on receipt of such intimation shall direct for sealing of all the packing machines available in the factory for the said period

under the physical supervision of Superintendent of Central Excise, in the manner that the packing machines so sealed cannot be operated during the said period.

Provided that during such period, no manufacturing activity, whatsoever, in respect of notified goods shall be undertaken and no removal of notified goods shall be effected by the manufacturer except that notified goods already produced before the commencement of said period may be removed within first two days of the said period:

Provided further that when the manufacturer intends to restart his production of notified goods, he shall inform to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, of the date from which he would restart production, whereupon the seal fixed on packing machines would be opened under the physical supervision of Superintendent of Central Excise."

11. The word "abate" as per the Concise Oxford English Dictionary means "1. (of something bad) becomes less intense or widespread. 2. law reduce or remove (a nuisance)". "Abate" is to put an end to; nullify (as a nuisance); to reduce in degree or intensity; diminish; to reduce in value; deduct, omit. Webster's Seventh New Collegiate Dictionary.

12. The learned Special Counsel referred the expression "shall be abated" in Rule 10 would indicate that it is mandate of Revenue to grant abatement to the manufacturer and they cannot avail suo motu. On close reading of the provision of Rule 10 of the Rules 2010 read with proviso to Section 3A(3) of the Act, 1944, we are unable to accept the submission of the learned Special Counsel. The words "the duty calculated on a proportionate basis shall be abated", in Rule 10, if read with prefix words "in case a factory did not produce the notified goods during any continuous period of fifteen days or more" would make it clear that the duty calculated by the manufacturer as per Rule 7 of the Rules 2010, shall be reduced on a proportionate basis in case of non-production of goods for the period as specified therein. The Rule 10 of the said Rules 2010 further makes it clear that the duty calculated by the manufacturer shall be reduced on a pro-rata basis in case of non-production of goods "provided the manufacturer of such goods files an intimation to this effect to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be". The learned Counsels for the Appellants categorically stated that they have filed an intimation as required under the Rule and declared the availment of the abatement of duty in their monthly returns ER-1 from time to time. It is further contended that the Show Cause Notices were issued on the basis of scrutiny of the ER-1 returns. On a query from the Bench, the learned Advocates submit that the availment of abatement was not disputed till date as the Appellants had fulfilled the conditions as stipulated in Rule 10 of the Rules 2010. In our considered view, the language of Rule 10, being clear and unambiguous, that the manufacturer is entitled to calculate the duty by reducing the amount on proportionate basis in case the factory did not produce the goods during any continuous period of 15 days or more, provided an intimation was filed to the Assistant Commissioner/ Deputy Commissioner of Central Excise. It is noticed that the Hon'ble Allahabad High Court in the case of Steel Industries of Hindustan Industrial Area (*supra*) held that the abatement of the closure period, depositing of duty was not a pre-condition for claiming it under Rule 96ZQ of the erstwhile Central Excise Rules, 1944, which was discussed by the Tribunal in the case of Thakkar Tobacco Products Pvt.Ltd. & Others (*supra*).

13. The learned Special Counsel further submits that it is not the case of self-assessment procedure. In other words, in terms of Rule 6(2), the Deputy Commissioner or the Assistant Commissioner of Central Excise shall pass an order determining the Annual Capacity of Production for payment of duty on monthly basis, which may be treated as an assessment order, and therefore, unless it is challenged, the Appellants have no right to avail the abatement. We do not find force in the submission of the learned Special Counsel. It is pertinent to note that Rule 6 of Central Excise Rules, 2002 provides "Assessment of duty." In terms of Rule 6 of Rules 2002, the Assessee shall himself assess the duty payable on any excisable goods except in the case on Cigarettes. In the case of Dhariwal Industries Ltd [2013 (289) ELT 227 (G.O.I.), Govt. of India observed that "Pan Masala Packing (Capacity Determination and Collection of Duty) Rules 2008, (similar to Rules 2010 herein), provides self-assessment procedure/self-sealing. The Hon'ble Madras High Court in the case of Kalai Magal Alloys Steel Pvt. Ltd. Vs CESTAT 2014 (303) ELT 44 (Mad.), while dealing with Rule 96ZP of the erstwhile Rules, 1944 read with Section 3A of the Act, 1944, observed that "on a perusal of Rule 96ZP of the Rules, it is evidently clear that it is a procedure of self-assessment where the manufacturers of hot re-rolled products falling under the different sub-headings in the Central Excise Tariff Act, are bound to debit the amount calculated at the rate of Rs.400/- per metric tonne at the time of clearance from the factory in the account-current maintained under Rule 173G(1) of the Central Excise Rules, 1944, and the duty liability is to be complied as detailed in Clauses I and II under Rule 96ZP of the Rules. "

13.1 The learned Special Counsel strongly relied upon the decision of Hon'ble Supreme Court in the case of Priya Blue Industries (supra) and Flock (India) Pvt. Ltd (supra). In the case of Flock (India) Pvt. Ltd (supra), the Hon'ble Supreme Court observed that the earlier adjudication order, determining classification of goods was not challenged despite it is appealable. Such order cannot be questioned by filing refund claim on the ground that the Adjudicating authority has committed an error in passing earlier order under the provisions of Rule 173(B) of erstwhile Rules, 1944. In the case of Priya Blue Industries (supra), the Hon'ble Supreme Court in the context of refund claim under the Customs Act, observed that once an assessment order is passed, for clearance of the goods, the duty would be payable as per that order, unless that order has been reviewed under Section 28 of Customs Act, 1962 and so modified in an appeal. In the present case, we find that the claim of abatement under Rule 10 has no relation to determination of Annual Capacity of Production under Rule 6(2) of the said Rules 2010 and therefore, there is no question of challenging of order issued under Rule 6(2) of the said Rules 2010, while availing abatement under Rule 10. It is already observed that the expression in Rule 10 are clear that the manufacturer shall calculate the duty by reducing amount on a proportionate basis in respect of non-production of goods. Hence, the said case laws relied by the learned Special Counsel would not be applicable in the present case.

14. The other contention of the learned Special Counsel is that Rule 2010 was framed by the Central Government to safeguard the interest of the Revenue in respect of the evasion of duty. The Hon'ble Supreme Court in the case of Doaba Steel Rolling Mills (supra) observed that the provisions authorized the Central Government to notify certain goods for levy and collection of duty of excise in such goods, in accordance with the provisions of the said Section, having regard to the extent of evasion of duty as also other relevant factors. In that case, the question for consideration was whether Rule 5 of Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 will apply in a case where a manufacturer proposes to make some change in installed machinery or any part

thereof and seek the approval of Commissioner of Excise terms of Rule 4(2) of the said Rules. The Hon'ble Supreme Court observed that Rule 5 of the 1997 Rules will be attracted for determination of the annual capacity of production of the factory when any change in the installed machinery or any part thereof is intimated to the Commissioner of Central Excise in terms of Rule 4(2) of the said Rules. Thus, the observation of Hon'ble Court was in the context of determination of annual capacity of production and change in the installed machinery. In the present case, Rule 6(2) of the Rules 2010 provides determination and pass order concerning annual capacity of production of the factory. It is already stated that Rule 10 of the Rules 2010 for abatement in case of production of goods has no relation to determination of annual capacity of production. So, the facts of the present case are different from the said case law as relied by the learned Special Counsel.

15. *In view of the above discussion, we agree with the decision of the Tribunal in the case of Thakkar Tobacco Products Pvt .Ltd (supra). It is noticed that the same view was taken by the Tribunal in the case of Trimurti Fragrances Pvt. Ltd & others (supra) and Godfrey Philips India Ltd (supra). Hence, the impugned orders cannot be sustained. Accordingly, the impugned orders are set aside. All the appeals filed by the Appellants are allowed with consequential relief.*

From the above Tribunal's order, it can be seen that the Tribunal dealing with the same issue even against the impugned order for the portion of demand confirmed, the Tribunal has set aside the demand and allowed the appeal of the respondent. Therefore, there is no substance in the revenue's appeal.

5. Hence, we uphold the order to the extent of demand involved in the present revenue's appeal. The revenue's appeal is dismissed accordingly.

(Pronounced in the open court on 11.09.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)