

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench AHMEDABAD

COURT NO. I

Appeal No. E/974/2010-DB

[Arising out of Order-in-Original No. 02/Demand/Commr-I/2010 dated 24.02.2010 passed by Commissioner of Central Excise & ST, Vadodara]

M/s. Dhariwal Industries Limited : **Appellant**

vs.

Commissioner of Central Excise & ST, Vadodara : **Respondent**

Appearance:

Shri Mayur Shroff, Advocate for the Appellant

Shri K.J. Kinariwala, Assistant Commissioner (AR) for the Respondent

CORAM:

Hon'ble Mr. Ramesh Nair, Member (Judicial)

Hon'ble Mr. Raju, Member (Technical)

Date of Hearing : 02.11.2018

Date of Decision : 20.12.2018

Final Order No. A/12865 / 2018

Per : Raju

This appeal has been filed by M/s. Dhariwal Industries Limited against the confirmation of demand of Central Excise duty, interest and imposition of penalty under Rule 25 (1)(a) of Central Excise Rules, 2002.

2. Ld. Counsel for the appellant pointed out that they are engaged in the manufacture of Pan Masala Containing Tobacco and Sada Pan Masala. They

were paying duty on the said goods under Notification No. 3/2006-CE (NT) dated 01.03.2006. The duty structure of the said goods was modified vide Notification No. 29/2008-CE (NT) dated 01.07.2008. Consequently, the goods namely Pan Masala (Gutkha) manufactured with the aid of packing machine, as notified goods, the Central Excise duty was proposed to be collected in accordance with the provisions of Section 3A of Central Excise Act, 1944 and the duty with effect from 01.07.2008 was to be levied as per Notification No. 42/2008-CE dated 01.07.2008, and as per the procedure prescribed for the notified goods in Notification No. 30/2008-CE (NT) dated 01.07.2008. The appellant had certain stock of material as opening stock as on 01.07.2008 which was cleared on 01.07.2008. The issue involved in the present case is the leviability of duty on the goods which were manufactured prior to 01.07.2008 and were lying un-cleared in the stock as on 01.07.2008 as opening stock.

2. Ld. Counsel pointed out that in the month of July 2008 the appellant paid a total amount of Rs. 4,66,35,484/- along with interest of Rs. 99,660/- towards the duty liability for the month of July 2008, based on the number of packing machines working during the month for manufacturing the notified goods. The Revenue alleged that the duty payment was only for the goods manufactured in the month of July 2008 and the same does not cover the clearances of the goods which were manufactured in the previous

month although it is cleared in July 2008. Accordingly, the Revenue demanded duty amounting to Rs. 59,91,534/- on the stock of goods which were lying in stock as on 30.06.2008 and the opening balance as on 01.07.2008, and cleared the goods on 01.07.2008 at the rates specified under Notification No. 3/2006-CE (NT) dated 01.03.2006, as amended. The Revenue entertained a view that Notification No. 3/2006-CE (NT) has not descended and is still in operation. Ld. Counsel pointed out that they have paid duty of Rs. 91,93,549/- on 63 machines which were operating on 01.07.2008 and duty amounting to Rs. 3,74,41,935/- has also been paid duty on 22 machines which were in operation from 22.07.2008 to 31.07.2008. He pointed out that in terms of compounded levy scheme effective from 01.07.2008, they have discharged the entire duty liability of Rs. 4,66,35,484/- in respect of all the machines installed and working in their unit in the month of July 2008. He argued that since they have discharged the duty liability on the basis of machines, all clearances made during the month of July 2008 are deemed duty paid. He argued that even the clearance of opening stock as on 01.07.2008, though manufactured in the previous month, they cleared in the month of July 2008, stands covered for the duty paid on the machines installed and working in the month of July 2008. He also argued that duty liability has to be paid as per rates applicable at the time of removal as held by the Hon'ble Supreme Court in the case of *Wallace Flour Mills Company Limited vs. Collector of Central*

Excise – 1989 (44) ELT 598 (SC). He argued that in the said case, it has been held that for excise taxable goods manufactured but rate of duty applicable would be the rate prevalent at the time when the goods are cleared from the factory. He argued that in the instant case, the duty rate applicable to the goods, at the time of clearance i.e. 01.07.2008, was based on the per machine installed and working. He argued that since they had discharged duty as per number of machines as on 01.07.2008 on the clearances made on 01.07.2008 would be covered and no extra duty need to be paid in respect of the goods manufactured prior to 01.07.2008.

3. Ld. Counsel relied on the judgment of Hon'ble Apex Court in the case of *Hans Steel Rolling Mill vs. CCE, Chandigarh – 2011 (265) ELT 321 (SC)* to assert that General Act and Rules are excluded for the goods covered under Compounded Levy Scheme. Ld. Counsel further argued that Hon'ble Apex Court in the case of *Shree Bhagwati Steel Rolling Mills vs. CCE – 2015 (326) ELT 209 (SC)* held that since Rule 96ZQ, Section 3A which provide for compounded levy scheme which provides along with interest, no interest can be levied in the instant case. He further argued that though Notification No. 20/2008-CE (NT), 30/2008-CE (NT) and 42/2008-CE were all dated 01.07.2008 on the same issue were not published on 01.07.2008. He pointed out that at the time of clearance of the goods they were not aware of the liability of Section 3 to 3A. He argued that appellant had paid duty

amounting to Rs. 91,93,549/- for one day i.e. for 01.07.2008 and this amount paid by them was much more than the amount of duty demanded by the Revenue on the clearance under compounded levy scheme as on 01.07.2008. Therefore, they have in fact paid the higher amount of duty for 01.07.2008. Ld. Counsel further argued that in terms of the decision of Hon'ble Apex Court in the case of *UOI vs. Param Industries Limited – 2015 (321) ELT 192 (SC)*, for bringing a notification into force, two conditions are mandatory (1) it should be duly published in official gazette, and (2) it should be offered for sale on date of its issue by Directorate of Publicity and Public Relations Board, New Delhi. He submits that in the present case the notification was sent for publication on 05.07.2008 and thus the notification is only applicable from 05.07.2008. He argued that since the appellant have paid amount of Rs. 91,93,549/- which is for one day i.e. for 01.07.2008 under compounded levy scheme, the same may be adjusted against the present demand.

4. Ld. AR relied on the impugned order. He relying on the decision of the Tribunal in the case of *CCE, Mumbai vs. Dhanesh Textile Indus. Pvt. Limited – 2008 (227) ELT 594 (Tri. Mumbai)* pointed out that in the said case, compounded levy scheme was introduced in 1998 vide Notification No. 36/1998-CE (NT) with effect from 16.12.1998, there was a requirement to declare the stock as on the mid-night of 15.12.1998 and discharged the

duty at ad-valorem at rates prevalent at that time. He argued that in the said case, the Tribunal held that appellant were required to pay Central Excise duty on the stock lying in the factory at mid-night of 1998 at ad-valorem on that date. Ld. AR also relied on the decision of Hon'ble Rajasthan High Court in the case of *Shriganesh Texfab Limited vs. UOI – 2009 (238) ELT 590 (Raj.)*. He argued that in the said case, it was held that duty liability arise on the month of commodity concerned and cleared of Central Excise duty on removal of commodity from the factory as a matter of convenience. It was held that even if it is manufactured and leviable to excise duty and they were not liable to pay Central Excise duty arise.

5. We have gone through the rival submissions. The issue before us is in respect of the goods manufactured but not cleared from the factory and lying as opening stock at the time of introduction of compounded levy scheme, were chargeable to tax on the basis of rates prevalent prior to introduction of compounded levy scheme; or the said clearances would be adjusted against the duty paid on the capacity determined under the compounded levy scheme. The argument of the appellant is that the rate of duty prevalent at the time of clearances would be applicable and he relied on the decision of Hon'ble Apex Court in the case of *Wallace Flour Mills Company Limited (supra)*. In the this case, the dispute was of the goods which were manufactured when the goods were exempted but

exemption was withdrawn later, would be chargeable to duty. In the said case, the facts were that only the rate of duty was challenged. However, the manner in which the duty was collected was not altered. In the instant case the facts are slightly different. In this case the manner of collection was changed from *ad-valorem* duty on each clearance under Section 3 of Central Excise Act, 1944 to compounded levy under Section 3A of Central Excise Act. The charges were enforced by issue of Notification No. 29/2008-CE (NT) dated 01.07.2008. Thus there was no new levy introduced but there were only changes in the manner of collection. In these circumstances the principle laid down in the case of *Wallace Flour Mills Company Limited (supra)* would apply. No cogent reasons to distinguish have been brought up by Revenue. The Hon'ble Supreme Court in the said case observed as follows:-

4. Appearing before us in support of the appeal, Mr. Rajiv Dutta, learned counsel for the appellant contended that in several decisions it has been held, and referred us to the said decisions referred to hereinbefore, that the relevant date would be the date of manufacture and in this case the manufacture was completed before the introduction of the budget. It was submitted that until 28th February, 1987, when, according to Shri Dutta, the goods had been manufactured, the goods in question were unconditionally exempt from the duty. Under the Finance Bill, 1987-88, the said products were made dutiable at the rate of 15% *ad valorem* on or from 1st March, 1987. But the appellant had in their factory, a stock of the said products which were duly manufactured, according to Shri Dutta, packed and ready for sale prior to 28th February, 1987. In those circumstances, the goods in question, according to Shri Dutta, would not be subjected to duty at 15% *ad valorem*. Having considered the facts and the circumstances of the case, we are unable to accept this submission. Excise is a duty on manufacture or production. But the realisation of the duty may be postponed for administrative convenience to the date of removal of goods from the factory. Rule 9A of the said rules merely does that. That is the scheme of the Act. It does not, in our opinion, make removal be the taxable event. The taxable event is the manufacture. But the liability to pay the duty is postponed till the time of removal under Rule 9A of the said Rules. In this connection, reference may be made to the decision of the Karnataka High Court in *Karnataka Cement Pipe Factory v. Supdt. of Central Excise* [[1986 \(23\) E.L.T. 313](#)], where it was

decided that the words `as being subject to a duty of excise' appearing in Section 2(d) of the Act are only descriptive of the goods and not to the actual levy. "Excisable goods", it was held, do not become non-excisable goods merely by the reason of the exemption given under a notification. This view was also taken by the Madras High Court in *Tamil Nadu (Madras State) Handloom Weavers Co-operative Society Ltd. v. Assistant Collector of Central Excise* [1978 (2) E.L.T. (J 57)]. On the basis of Rule 9A of the said rules, the Central Excise authorities were within the competence to apply the rate prevailing on the date of removal. We are of the opinion that even though the taxable event is the manufacture or the production of an excisable article, the duty can be levied and collected at a later date for administrative convenience.

6. Following the ratio of the said decision, the appeal is allowed.

(Order pronounced in the open court 20.12.2018)

Raju
Member (Technical)

Ramesh Nair
Member (Judicial)

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