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

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 10032 of 2013-DB

[Arising out of Order-in-Original/Appeal No 07-DEMAND-CEX-COMMR-BRC-I-2012 dated 25.09.2012 passed by Commissioner of Central Excise-VADODARA-I]

Maruti Tabacco Products P Limited .... **Appellant**
Survey No. 466, Vsana, Tal-barsad,
ANAND, GUJARAT -388540

VERSUS

Commissioner of Central Excise & ST, Vadodara .... **Respondent**
1ST FLOOR...CENTRAL EXCISE BUILDING,
RACE COURSE CIRCLE,
VADODARA,
GUJARAT
390007

APPEARANCE :

Shri Ankur Upadhyay, Advocate for the Appellant
Shri Rajesh R Kurup, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)
HON'BLE DR. AJAYA KRISHNA VISHVESHA, MEMBER (JUDICIAL)

DATE OF HEARING : 08.01.2025
DATE OF DECISION: 24.01.2025

FINAL ORDER NO. 10044/2025

C.L. MAHAR :

The brief facts of the matter are that the appellant is engaged in the manufacture of Pan Masala and Pan Masala Containing tobacco (Gutka) having retail sale price of Rs. 1.00 and Rs. 1.50 per pouch falling under Chapter sub-Heading No. 21069020 & 24039990 of the Central Excise Tariff Act, 1985. It has been mentioned that the appellant has been working under Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008.

2. The appellant was issued a show cause notice dated 29.11.2011 wherein it was alleged that appellant have made payment of Central Excise duty on proportionate basis for the days when the machines remained in operation for manufacturing of Pan Masala and Pan Masala (Gutka) and the appellant have availed *suo-moto* abatement of duty for the days when the machines were

sealed by the Department and not in operation. The show cause notice has demanded Central Excise duty of Pan Masala for the whole month even when the machines were remained non-operational. The show cause notice was issued demanding Central Excise duty of Rs. 1,46,01,076/- along with penalty provisions etc. The adjudicating authority vide order-in-original dated 25.09.2012 has partly dropped the demand of Rs. 70,45,161/- and confirmed the balance demand of duty amounting to Rs. 75,55,915/- under Section 11A of Central Excise Act, 1944.

3. Shri Ankur Upadhyay, learned Advocate appearing for the appellant has contended that Section 3A (2)(b)(ii) of the Central Excise Act, 1944 specifically mentions that calculation of the annual production capacity shall be determined on proportionate basis. It has further been submitted that the factors relevant to the production is altered or modified at any time during the year and duty has to be redetermined. The learned advocate has further argued that as per Rule 10 of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 the appellant is eligible for abatement of duty for the days for which the machines are not in operation and since the appellant have already deposited proportionate Central Excise duty for the days the machines remained in operation, the entire confirmation of the duty is not sustainable as per law. The appellant in support of their submission have placed reliance on the following Hon'ble High Courts as well as Tribunal's decisions:-

(a) M/s. PM Products vs. CCE, Ahmedabad – (2023) 4 Centax 419 (Tri. Ahmd.)
(b) CCE vs. Thakkar Tobacco Products Pvt. Limited – 2016 (332) ELT 785 (Guj.)
(c) CCE Kanpur vs. Trimurti Fragrance Pvt. Limited - 2019 (370) ELT 257 (All.)

4. We have also heard Shri Rajesh R Kurup, learned Superintendent (AR) appearing for the Revenue who has reiterated the findings as given in the impugned order-in-original dated 25.09.2012.

5. Considering the submissions made by both the sides, we are of the view that it will be proper to have a glance at the findings given in impugned order-

in-original. We reproduced the relevant portion of the impugned order-in-original:-

> "**11.** Regarding differential duty demand of Rs.25,00,000/- for the month of April, 2011, as per the show cause notice, the said assessee had 4 machines already operative as on 01.04.2011 and they got added 4 more machines for manufacturing Gutkha of MRP of Rs.1/- from 16.04.2011 and paid duty proportionately which is contravention of Rule 8 of the said Rules and therefore there is a short payment of duty amounting to Rs.25,00,000/- as monthly duty payable by them for the month of April, 2011 on 4 machines was Rs.50,00,000/-. The said assessee in this regard has contended that on 28.3.2011 they filed letter requesting for sealing of 2 machines out of 6 packing machines operative as per above para. Sealing of these 2 machines was carried out on 01.04.2011. On 12.4.2011 they requested for de-sealing of 4 machines w.e.f. 16.04.2011. The de-sealing was carried out and on the basis of Form-1 filed by the said assessee on 16.04.2011, the JAC passed Order No. Maruti/002/2011-12 dated 25.04.2011. They have also contended that they have paid duty on proportionate basis which is as per the APC re-determined by the proper officer on 25.04.2011. They have referred to the provisions of Section 3A of the said Act to argue that they were required to pay duty on pro-rata basis. This is not the case where the said assessee could have claimed abatement under Rule 10 of the said Rules, as the factory was not closed for a continuous period of 15 days, the four machines were working for the period from 01.04.2011 to 15.04.2011 and from 16.04.2011 another four machines were added, therefore, the show cause notice has rightly invoked Rule 8 as according to this rule the number of operative machines shall be taken is the maximum number of machines installed on any day during the month. As per Rule 9 the said assessee was required to pay differential duty amount arising due to addition of 4 new machines by 5th of the following month. Nevertheless, the duty required to be paid would be for the entire month. Accordingly, the duty demand of Rs.25,00,000/- is sustainable.
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> **12.** Regarding the differential duty demanded for the month of May, 2011 the duty amount of Rs.3,22,581/- has been demanded on 2 working days as the said assessee paid duty from 03.05.2011 whereas they were having 5 machines operative from 01.05.2011. I find that there is clear contravention of Rule 8 of the said Rules. They were required to pay duty for the entire month and payment made by them on pro-rata basis is not permissible. Therefore, demand of Rs.3,22,581/ is sustainable. There is also a duty demand of Rs.22,06,452/- for the month of May, 2011 which is for the reason that the said assessee got de-sealed 4 machines for manufacturing Gutkha of Rs.1.50 on 10.05.2011 and did not pay duty for the entire month. I find that on 09.05.2011 the said assessee filed declaration in Form-1 seeking de-scaling of 4 machines with effect from 10.05.2011 for manufacturing for the first time the product "Gutka" having new retail sale price of Rs.1.50. Since this was a new product having new retail sale price, they paid duty from the date of commencement of production of product of new retail sale price, As per Rule 6(6) of the said Rules, they filed a declaration in Form-1 and in terms of their declaration, the authority fixed the AFC of new product of Rs. 1.50 under sub-rule (2) of Rule 6 of the said Rules. As per proviso 4 to Rule 9 of the said Rules, in case of commencement of 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 total number of days in that month and the number of days remaining in that month counting from the date of such commencement The said further provides that the manufacturer shall not discharge the duty liability unless the differential duty liability is paid by the 5th 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. Reading of this proviso makes it clear that in case of commencement of manufacture of goods having new retail sale price manufacturer has to pay duty on pro-rata basis. This is the substantial portion of the proviso, the procedural part of which is

> about re-calculation of differential duty and refunding the excess duty paid to the manufacturer. The only lapse in this case is that they have paid the duty on pro-rata basis and hence, the question of granting any refund to the said assessee by the department would not arise. Therefore, the duty demand of Rs.22,06,452/- for the month of May, 2011 as discussed above is not sustainable.**"**

From the perusal of the order and facts of the appeal it emerges that demand of Central Excise duty has been confirmed on the machines for the days for which they have remained non-operational. We also find that nowhere in the impugned order-in-original it has been mentioned by the adjudicating authority that appellant has not followed the laid-down procedure in the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008. Whenever the appellant wanted to stop working of a number of machines, due intimation has been given to the Department and the machines were sealed by the jurisdictional Superintendent of the range and whenever the machines were made operational, the appellant have informed the department and they have started operating the machine only after the officers have de-sealed the machines. Before proceeding further in the matter it will be relevant to have a glance of Rule 10 of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 which is reproduced below:-

> **"10. 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 these cannot be operated during the said period:
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> **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:
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> **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.**"**

So, it is apparent from the reading of Rule 10 of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 that abatement for the period of non-working of the machines is provided in Rules with certain conditions. Further, the Hon'ble Gujarat High Court in the case of CCE vs. Thakkar Tobacco Products Pvt. Limited – 2016 (332) ELT 785 (Guj.) has held as follows:-

> **"9.** The facts of the case are required to be examined in the light of the above statutory provisions. From the facts noted hereinabove, it is apparent that the assessee did not produce the notified goods during a continuous period of fifteen days in the month of March and accordingly claimed that it was entitled to abatement of duty on a proportionate basis for the period when the factory was not producing notified goods and accordingly adjusted duty to that extent from the duty payable in the month of April. The contention of the Revenue is that abatement amounts to refund and, therefore, the procedure for availing refund as laid down under Section 11B of the Act is required to be followed. In this regard, it may be noted that the expression "abatement" has not been defined anywhere in the Act or in the PMPM Rules. Therefore, the popular or dictionary meaning of the said expression is required to be looked into. In Black's Law Dictionary, the term "abatement" has been defined as a reduction, a decrease, or a diminution; the suspension or cessation, in whole or in part, of a continuing charge, such as rent. In the context of tax, abatement has been stated to be diminution or decrease in the amount of tax imposed. In the New Oxford Dictionary of English, "abatement" has been defined as the ending, reduction or lessening of something. In the Dictionary of English Language, "abatement" has been defined as an amount abated, a deduction from the full amount of tax. On the other hand, "refund" has been defined as to pay back "money" to give or to put back. Tax abatement is ordinarily known as reduction of or exemption from tax by a Government for a specific period. A tax incentive is also stated to be a form of tax abatement. Thus, the ordinary meaning of abatement is reduction, diminution and, therefore, when an assessee is entitled to abatement of duty, he is entitled to reduction of duty to that extent and not refund thereof as is sought to be contended on behalf of the Revenue. It would have been a different matter if the rules prescribed for the manner in which abatement has to be granted. However, in the absence of any rule in this regard or any specific provision providing for the mode of availing abatement, the course of action adopted by the respondent-assessee cannot be said to be in violation of any rule or any provision of the Act. As can be seen on a plain reading of Rule 10 of the PMPM Rules, the same merely provides that in case of factory which has not produced the notified goods during a continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period. The abatement, however, is subject to the condition stipulated in Rule 10, namely that, the manufacturer of such goods is required to file an intimation to that 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 such period, who on receipt of such information, is required to direct 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 these cannot be operated during the said period. Thus, subject to the fulfilment of such conditions, Rule 10 of the PMPM Rules provides that the duty calculated on a proportionate basis shall be abated.
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> **10.** Since great emphasis has been laid on the circular dated 12th March, 2009 on behalf of the appellant for contending that the principle of *contemporanea expositio* guides that contemporaneous administrative construction should be given considerable weight and should not be lightly overturned, it may be apposite to examine the nature of the said circular. A perusal of the circular dated 12th March, 2009 shows that the subject

of such circular is "Pre- and post-audit of abatement orders in terms of Rule 10 of the Pan Masala Packing Machine Rules, 2008 - clarification regarding". A perusal of the contents of the said circular shows that the same says that in terms of Rule 10 of the PMPM Rules, the abatement of duty is to be given in case the factory did not produce notified goods during any continuous period of fifteen days or more. The JDA/JAC has to pass an abatement order in the case. The circular further says that representations have been received from field formations regarding whether the abatement orders need to be subjected to pre- and post-audit in the same manner as refund/rebate orders. Thus, the subject matter of the said circular is as to whether abatement orders need to be subjected to pre- and post-audit. The circular further says that circulars have been issued in the context of procedure to sanction pre/post-audit of refund/rebate claims and as the abatement order is in the nature of refund, they are required to be subjected to the same administrative procedure of pre- and post-audit as laid down by the Board from time to time regarding refund. Accordingly, it has been provided that all Board circulars issued in the context of pre- and post-audit of refund/rebate claims will apply *mutatis mutandis* to the abatement orders also.

11. Thus, the said circular proceeds on the footing that abatement orders are to be passed by the JDC/JAC and accordingly provides for application of circulars issued in the context of pre- and post-audit in relation to refund/rebate claims to abatement orders. However, the said circular nowhere provides for the procedure to be followed for granting abatement. As noticed earlier, the Act and the PMPM Rules are totally silent as regards the manner in which the abatement is to be granted and do not speak of any order of abatement being passed by the JDC/JAC. In the opinion of this Court, in the absence of the Act or the rules framed thereunder making any such provision, no such provision can be read into the Act and the rules.

12. In the above backdrop, the merits of the impugned order may be examined. The Tribunal, in the impugned order, has recorded that in none of the orders impugned before it, it is in dispute that there was a closure of the factory for more than fifteen days and the required procedure of due intimation of closure, sealing and due intimation or reopening was followed. Thus, there was no dispute that the requirements of Rule 10 of the PMPM Rules had been fulfilled. There was also no dispute that the amount adjusted was not more than the amount of duty mandated to be abated in terms of Rule 10 of the PMPM Rules. The Tribunal has taken note of the fact that Rule 10 of the PMPM Rules does not make any stipulation about abatement having to be claimed by filing an application, though it also does not imply to the contrary. Referring to Rule 9 of the PMPM Rules, it was observed that when the intention of the Government is that the amount is to be refunded and an express provision is provided therefor, whereas Rule 10 does not make any such provision. It may be noted that insofar as Rule 96ZO of the Central Excise Rules is concerned, sub-rule (2) thereof expressly provides for claim of abatement being made under sub-section (3) of Section 3A of the Act, which would be allowed by an order passed by the Commissioner of Central Excise of such amount as may be specified in such order. Similarly, sub-rule (7) of Rule 96ZQ provides for abatement being allowed by an order passed by the Commissioner of Central Excise of such amount as may be specified in such order, subject to the conditions enumerated thereunder. Similarly, sub-rule (2) of Rule 96ZP provides for abatement being allowed by an order passed by a Commissioner of Central Excise of such amount as may be specified in such order subject to the fulfilment of the conditions laid down thereunder. Thus, in relation to independent processors of textile fabrics, manufacturers of non-alloy steel hot re-rolled products and manufacturers of non-alloy steel ingots, who were also assessed on the basis of annual production capacity under Section 3A of the Act, there was an express provision for making an order of abatement whereas the PMPM Rules are totally silent in that regard. There is no provision for making an order of abatement under Rule 10 of the PMPM Rules.

13. As noticed earlier, Rule 10 of the PMPM Rules provides for abatement of duty calculated on proportionate basis in case where the factory does not produce notified goods during any continuous period of fifteen days or more. However, such abatement is subject to the conditions stipulated thereunder as referred to hereinabove. Once such conditions are satisfied, the assessee becomes entitled to abatement of duty to the extent of the days the factory did not produce the notified goods.

14. On a plain reading of Rule 10 of the PMPM Rules, it is apparent that while the same provides that duty calculated on a proportionate basis shall be abated, it does not provide for any procedure for doing so. Thus, whereas Rules 96ZQ, 96ZO and 96ZP of the Central Excise Rules, 1944, which also are schemes under the compounded levy scheme, there were express provisions for making an order of abatement by the Commissioner, Rule 10 of the PMPM Rules is wholly silent in that regard. Under the circumstances, having regard to the fact that Rules 96ZQ, 96ZP and 96ZO provided for making an order of abatement, however, there is no corresponding provision in the PMPM Rules, it can be inferred that the rule making authority has consciously omitted making such provision. Therefore, in the absence of any specific provision for making an order of abatement, it cannot be said that the action of the assessee in calculating the duty on a proportionate basis and setting off the same against the duty payable in the succeeding month is, in any manner, violative of the rules or the statutory scheme.**”**

6. It can be seen that as per interpretation of Hon'ble High Court the essence of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 is that the manufacturer has to pay duty for the operational days of the machines and since the appellant has deposited the proportionate amount of duty of working days of the machines, we find that Central Excise duty cannot be demanded for the period when the machines remained non-operational.

7. Similarly, this Tribunal in the case of M/s. PM Products vs. CCE, Ahmedabad – (2023) 4 Centax 419 (Tri. Ahmd.) has also held that the appellant is eligible for abatement and under no circumstance full duty can be demanded for the period when the machines were not in operation. The extract of the decision is reproduced as follows:-

“4. We have carefully considered the submission made by both sides and perused the records. We find that in the present case the appellant have followed the procedure for taking abatement of duty provided under Rule 10 of “Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008” which is reproduced below :-

*“**10. 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 seven 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 these 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 goods shall be effected by the manufacturer :
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."

From the plain reading of the above Rule 10 it is clear that the abatement is available to the appellant on following the condition laid therein. As per the condition the appellant has to intimate the jurisdictional officer in advance regarding sealing and de-sealing of the machines. In the present case there is no dispute that the intimation was given well in advance and the Jurisdictional Range Superintendent has de-sealed and re-sealed the machine and the machine was operated only during that period. From the above Rule 10 we do not find any provision for payment of duty for the whole month and thereafter to claim refund on account of abatement of duty. There is no dispute even by the department that the appellant is not liable to pay duty during the period when the machine was not in operation. The contention of the Adjudicating Authority is that the appellant was supposed to pay the entire duty first and thereafter claim the refund. In the present case, the appellant is eligible for abatement in principle and under no circumstances the full duty can be demanded for the period of abatement when the machine was not in operation. This issue has been considered in various judgments.**"**

8. In the facts of the matter and following the above-mentioned decisions, we are of the opinion that impugned order-in-original is legally not sustainable. We set-aside the same and the appeal is allowed.

(Pronounced in the open court on 24.01.2025)

(C L Mahar)
Member (Technical)

(Dr. Ajaya Krishna Vishvesha)
Member (Judicial)

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