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

REGIONAL BENCH- COURT NO.3

Excise Appeal No. 11558 of 2013

(Arising out of OIO-22-COMMR-AKG-AHD-II-2013 dated 12/04/2013passed by Commissioner of Central Excise-AHMEDABAD-II)

Pm Products **........Appellant**
Survey No. 588, Opp-Vishal Hotel.
Narol-Sarkhej Highway, Sarkhej,
Ahmedabad, Gujarat

VERSUS

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

APPEARANCE:
Shri P.P Jadeja, Consultant appeared for the Applicant
Shri Vijay G Iyengar, Superintendent (AR) for the Respondent

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

Final Order No. A/ 10155 /2023

DATE OF HEARING: 24.01.2023
DATE OF DECISION: 25.01.2023

RAMESH NAIR

The brief facts of the case are that the appellant is the manufacturer of Pan Masala containing Tobacco commonly known as "Gutkha" falling under CTH 24039990 of the First Schedule of Central Excise Tariff Act, 1984. The appellant was operating under the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 and they had followed the said rules and regulations.

1.2 The appellant has paid the duty under the compounded levy scheme for the days of operation of the machine in their factory under intimation of jurisdictional officer and de- sealing and re-sealing of the machine was taken place under the supervision of the jurisdictional officer. The appellant also availed the abatement of duty for the days the machine was sealed and not in operation. The details are given in the following chart.

Sr. No	Details	August 2011	November 2011	December 2011	March 2012 (upto 16/3/12)	March 2012 (From 17/3/12)	April 2012
1	Date of Intimation for Opening Seal	28.07.2011	04.11.2011	13.12.2011	-	17.03.2012	11.04.2012
2	PPM Opened to Operated From - To	16.08.2011 to 30.08.2011	18.11.2011 to 25.11.2011	26.12.2011 to 30.12.2011	Not operated (upto 16/3/12)	22.03.2012 to 25.03.2012	15.04.2012 to 17.04.2012
3	No of days PPM machine operated	15	8	5	-	4	3
4	PPM Re-Sealed Date	30.08.2011	25.11.2011	30.12.2011	-	25.03.2012	17.04.2012
5	Duty Payable for the whole month	12,50,000	12,50,000	12,50,000	12,50,000	19,00,000	19,00,000
6	Duty payable per day	40,322	41,667	40,322	40,322	63,333	63,333
7	Duty Paid for days PPM operated	6,04,839	3,33,333	2,01,613	-	2,45,161	1,90,219
8	Differential duty demanded	6,45,161	9,16,667	10,48,387	6,45,161	6,74,194	17,09,781
9	Abatement availed Suo Moto	6,45,161	9,16,667	10,48,387	6,45,165	9,19,355	17,09,781

1.3 Revenue observed that during August- 2011 , November-2011, December- 2011, March-2012 & April, 2012 appellant had not paid the duty for the entire month but paid only for the numbers of days their machine was operated. Accordingly, the show cause notice bearing F. No V.24/15-59/OA/2012 dated 06.08.2012 for recovery of Central Excise Duty amount of Rs. 56,39,351/- was issued. The said show cause notice was adjudicated by the Adjudicating Authority vide impugned order in original No. 22/ COMMR/AKG/AHD-II/2013 dated 15.04.2013 wherein OIO has confirmed the Central Excise duty demand of Rs. 56,39,351/- with interest and penalty of Rs. 2,80,000/-. Hence the appellant has filed the present appeal before this Tribunal.

2. Shri P.P Jadeja, Learned Consultant appearing on behalf of the Appellant submits that the Adjudicating Authority has demanded the duty for the days for which the machine was not in operation. The contention of the Adjudicating Authority is that the appellant was supposed to pay duty for the entire month and thereafter they should have claimed the abatement. It is his submission that there is no condition in the Rules that for the days of closure of the machine first duty should be paid and then claim the refund. Therefore, the entire order is based on the contention which does not have support of law and therefore not sustainable. It is his submission that abatement of duty in principle was not objected by the department. The meaning of abatement is to reduce the amount of abatement. Therefore, the appellant has rightly paid the duty only for the days for which the machine was in operation. He takes support from the following judgments:-

- CCE Vs. Kaipan Pan Masala Pvt Ltd - 2012 (285) ELT 296 (Tri. Del)
- Kay Pan Sugandh Pvt Ltd vs. CCE – 2017 (353) ELT 376 (Tri. Del)
- Commissioner vs. Thakkar Tobacco Products Pvt Ltd – 2016 (332) ELT 785 (Guj.)
- CCE Delhi –I vs. Shakti Fragrances Pvt Ltd Unit-II- 2015 324 ELT 390 (Del.)
- CCE, Kanpur Vs. Trimurti Fragrances Pvt Ltd – 2019 (370) ELT 257 (All.)
- Pan Parag India Ltd Vs. CCE, Bangalore-III- 2016 (344) ELT 497 (Tri. Bang)

3. Shri Vijay G Iyengar, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

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 Jurisdiction 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 .

4.1 In the case of Commissioner vs. Thakkar Tobacco Products Pvt Ltd – 2016 (332) ELT 785 (Guj.)the Hon'ble Gujarat High Court considered the same issue and passed the following judgment:

> ***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.

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 contemporaneaexpositio 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.*

15. *Besides, in the light of the findings recorded by the Tribunal to the effect that it is not disputed that the adjustments made were not more than the amounts of duties mandated to be abated as per Rule 10 of the PMPM Rules, the action of the respondent-assessee in computing the proportionate amount of duty towards the abatement and setting it off against the duty payable in the next month does not adversely affect the revenue in any manner. The abatement, in the opinion of this Court, is not akin to refund and means reduction or diminution of the duty. Therefore, when the duty stands reduced to the extent provided in the rule, there is no liability to pay the same, inasmuch as, to that extent the duty stands abated. Therefore, if the assessee has correctly calculated the proportion of duty and set off the same against the duty payable for the next month, it cannot be said that the said action is contrary to the statutory scheme. When the rules do not provide for the manner in which duty is required to be abated, nor do they provide that abatement shall be by an order of the Commissioner or any authority, but nonetheless provide for abatement of duty and the extent of entitlement to such abatement, no fault can be found in the approach of the assessee in suo motu taking the benefit of such abatement.*

> ***16.*** *In the light of the above discussion, it cannot be said that the view adopted by the Tribunal is not a plausible view warranting interference by this Court. In the absence of any infirmity in the impugned order passed by the Tribunal, it is not possible to state that the same gives rise to any question of law, much less, a substantial question of law. The appeals, therefore, fail and are accordingly dismissed."*

In the case of CCE Delhi –I vs. Shakti Fragrances Pvt Ltd Unit-II- 2015 324 ELT 390 (Del.), the Hon'ble Delhi high Court also considered the similar issue and passed the following judgment:

> ***"11.*** *In the present case, the appellant had pressed into service Rule 10 of the PMPM Rules requires the duty calculated on a proportional basis to be abated in case the factory does not produce the notified goods during any continuous period of 15 days in a month. Rule 10 further requires the intimation to that effect to be given to the authorities at least three working days prior to the commencement of the period of closure. Rule 9 requires the monthly duty payable to the authorities to be paid by the fifth day of the same month. There is nothing in Rule 9 to suggest that the failure to pay the duty payable on all the machines upfront by the 5th day of a month would disentitle the assessee to claim pro rata abatement of duty. The requirement under Rule 10 of giving intimation three days prior to the closure has been complied with by the assessee.*
>
> ***12.*** *On a collective reading of Rules 9 and 10 of the PMPM Rules, the Court is of the view that the failure to make the payment of duty on fifth day of every month cannot result in depriving the assessee of the pro rata abatement of duty which he is in any way entitled to since admittedly in the present case there has been a closure of the factory from 14th to 31st August, 2012 and an abatement order has also been passed on 28th August, 2012. However, the assessee would be liable to pay the interest for the period of late deposit of duty."*

The same issue has been considered by the Hon'ble Allahabad High court in the case of CCE, Kanpur Vs. Trimurti Fragrances Pvt Ltd – 2019 (370) ELT 257 (All.). wherein the Hon'ble court decided as under:-

> ***"22.*** *The sole issue under consideration is as to giving benefit of abatement for non-production, whether the assessee could on their own calculate Excise duty and set off the same against the duty payable in the next month. The argument of the Department relying upon Rule 9 of the PMPM Rules, 2008 claiming that the monthly duty on notified goods is to be paid by 5th day of the month and the assessee cannot simpliciter claim set off without first depositing the same had been repelled by the Gujarat High Court in the case of Thakker Tobacco (supra) holding that Rule 10 of the PMPM Rules, 2008 envisages a situation and provides for abatement of excise duty calculated on proportionate basis, in case where factory does not produces notified goods during continuous period of 15 days or more.*
>
> ***23.*** *Moreover, the statue, that is proviso to sub-section (2) of Section 3A itself provides for abatement where a factory producing notified goods did not produce the same during any continuous period of 15 days or more, the duty calculated on the proportionate basis shall be abated in respect of such period, if the manufacturer of such goods*

fulfills such condition as may be prescribed. In the present case as the assessee having complied the statutory requirement, is entitled to the benefit claimed by him.

24. *The judgment in case of Thakker Tobacco (supra) having been accepted by the C.B.D.T. in its circular dated 16-2-2018, the controversy does not remain any longer as the matter is not res integra any more.*

25. *In view of the above, we are of the considered opinion that once the Department has accepted the judgment in case of Thakker Tobacco (supra) and has issued circular holding that assessee is entitled to abatement of duty, in the event of closure of factory for continuous period of 15 days or more, without first depositing the duty in terms of Rule 10 of PMPM Rules, 2008, the appeal of the revenue has no force and is hereby dismissed.*

26. *The question of law is, therefore, answered in favour of the assessee and against the revenue."*

5. In view of the above High Courts Judgments and observation made by us herein above , the demand is not sustainable. Accordingly, the impugned order is set aside. Appeal is allowed.

(Pronounced in the open court on 25.01.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

RAJU
MEMBER (TECHNICAL)

Geeta