CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.1035 of 2011

(Arising out of Order-in-Original No.48/Commissioner/Lko/CX/2010 dated 31/12/2010 passed by Commissioner of Central Excise & Service Tax, Lucknow)

M/s Simla Food & Flavours, **.....Appellant**
(30, Datia House, Khursheed Bagh, Lucknow)

VERSUS

Commissioner of Customs, Central Excise &

Service Tax, Lucknow **....Respondent**

(Commissionerate, Lucknow)

APPEARANCE:

Absent on call, for the Appellant
Shri Manish Raj, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70079/2024

DATE OF HEARING : 15 December, 2023
DATE OF PRONOUNCEMENT : 15 February, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Original No.48/Commissioner/Lko/CX/2010 dated 31/12/2010 passed by Commissioner of Central Excise & Service Tax, Lucknow. By the impugned order Commissioner has held as follows:-

ORDER

1. *I confirm the demand of Rs.12,50,000/- (Rupees Twelve Lcs Fifty Thousand Only) under Section 11A (2) of the Central Excise Act, 1944, upon M/s Shimla Food & Flavours, Khurshedbagh, Lucknow along with interest under Section 11AB of Central Excise Act, 1944.*

2. I drop the demand of Rs.37,50,000/- (Rupees Thirty Seven Lacs Fifty Thousand Only) as discussed above.

3. I, however, in the facts and circumstances of the case do not propose to impose any penalty."

2.1 Appellant is a manufacturer of Pan Masala containing tobacco called 'Gutkha' under the brand name of 'Gomti' classifiable under sub-heading No.24039990 of first schedule to Central Excise Tariff Act, 1985 of the Retail Sale Price of Rs.1.00 per Pouch. W.e.f. 01.07.2008 appellant has been discharging the duty on the compounding basis as per the provisions of Pan Masala Packing Machines (Determination of Capacity and Collection of Duty) Rules, 2008 as per the goods prescribed under Notification No.41/2008-CE dated 01.07.2008.

2.2 Appellant filed a declaration on 10.07.2008 in Form-I showing 6 (5+1) packing machines were operational during the month of July, 2008 and that the appellant was manufacturing Gutkha and sweet supari. Clearly showing that one pouch packing machine was kept separately in another room, while 5 packing machines for packing of Gutkha were kept in another room of the factory.

2.3 The Deputy Commissioner, Central Excise Division-I Lucknow determined that 9 machines were shown to be available and installed in the factory under the compounded levy scheme.

2.4 Deputy Commissioner, Central Excise, Division-I on declaration dated 17.07.2008 found that there were 9 machines installed in the factory. Subsequently, three machines were sealed on 03.07.2008. Deputy Commissioner after verification vide his order no.02/2008 dated 17.07.2008 approved installation of 9 machines on 01.07.2008 being maximum number of machines available in factory from 01.07.2008 and the retail sale price of notified goods was Rs.1.00.

2.5 Appellant vide letter dated 07.08.2008 requested for review of order dated 17.07.2008 and requested for re-determination of the goods.

2.6 Taking 9 machines installed in the factory and rate of duty per packing machine per month as Rs.12.5 lakhs, appellant was required to pay duty of Rs.1,12,50,000/- during the month of July, 2008 whereas they discharged duty liability of Rs.62.50 lakhs only. Accordingly, they were issued with a show cause notice asking them to show cause as to why-

i) *The Central Excise duty amounting to Rs.50,00,000 (upees fifty lac only) short paid by the Noticee for the month of July'08 should not be demanded and recovered from them under Section 11A of Central Excise Act, 1944 alongwith interest at appropriate rate under Section 11AB of the Act ibid.*

ii) Penalty should not be imposed upon them under Rule 17 of the Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules), 2008 read with Rule 25 of the Central Excise Rules, 2002, for the contraventions as mentioned herein before."

2.7 This show cause notice has been adjudicated as per the impugned order referred in para-1 above. Aggrieved appellant has filed this appeal.

3.1 When the matter was called for hearing on 15.12.2023 following has been observed:-

On matter being called none appeared on behalf of the appellant. On going through the record we find that the appeal was heard on 15.10.2018 by the Division Bench and order was reserved. However, the final order was not passed and the matter was released for fresh listing. We find that the appellant had filed written note of submissions on the occasion of last date of hearing. Heard learned Departmental Representative. Order is reserved."

3.2 In the written note filed by the appellant appellant have contested the demand relying on the declaration filed by them in Form-I along with the ground plan. Their contention is that as per the declaration they have sated in respect of the machine installed in separate room as per the ground plan that the same will be used for packing of sweet supari.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 For holding against the appellant, Commissioner has observed as follows:-

> *"As already observed hereinbefore, for the purpose of computation of duty liability for the month of July 08, only the operative packing machines which were unsealed and engaged in manufacturing process are relevant. Therefore the basic issue that needs to be addressed in these proceedings is to find out the actual number of installed and operating packing machines during the month of July 08.*
>
> *For ascertaining this, I have carefully gone through various sealing request letters given by the Noticee in respect of sealing/unsealing of machines in their factory from time to time and the sealing/unsealing reports given on the face of such request letters he copies of these reports were submitted by the Noticee in their defence reply. These have been got crosschecked from the jurisdictional authorities and were found in order.*
>
> *From the perusal of the sealing request dated 12.06.08 and the remark appearing therein, I find that after sealing of one machine on 13.06.08, the number of machines in use were five. Further, the party requested on 30.06.08 for sealing of machines on. 03.07.08 on account of closure of production for four days. Accordingly, the five machines were sealed on 03.07.08 and a clear remark / report had been given by the officer incharge. This makes abundantly clear that between 12.06.2008 to 03.07.2008, only five: Gutkha machines were operating On 07.07.08, when the production was restarted, only five machines were unsealed and subsequently when on 01.08.03, seal of one machine was opened, the number of operating packing machines for Gutkha had risen to 6. The Range Superintendent vide his letter dated 28.12.10 has confirmed that there does not exist any other sealing*

report between 12.06.08 & 01.08 0b Thus, it is evident that all the time during July 2008, a maximum of five Gutkha machines was operating in the factory of the Noticee.

Proceeding further, I notice that the Nolicee in their Form-I declaration dated 10.07.2008 have intended to operate 6 (5 + 1) machines. The one machine above shown separately, according to them, is exclusive machine for Sweet Supari. The law, however, does not make any such distinction. Although it is correct to say that 'Sweet Supari' is not the 'notified goods' under the Notification No 29/2008 ibid, nevertheless, it is manufactured on a pouch packing machine which is also capable of being used for manufacturing of Gutkha. Most importantly, no ground plan showing the position or segregation of machines in their premises had been filed by the Noticee alongwith their Form-1 Declaration dated 10:07.08 In view of this, the sixth machine which was purported to have been operated for manufacturing of Sweet Supari only, would deem to have been used for manufacture of Gutkha too and would, thus, be an operating packing machine for the month of July'08. It is not under dispute that the machine said to be used for manufacturing of 'Sweet Supari was installed/unsealed and operational during the month of July 08. It is also evident from the ER-1 of July 08 that the manufacturing of Sweet Supari during the month had taken place and had been shown in the relevant column of ER-1. Since the Noticee have not produced any evidence showing that 'Sweet Supari' machine was stored separately or kept in a segregated place nor their ground plan has any clue about this fact, in this situation, I have no other option but to treat this machine as an operating packing machine for July 2008.

As regards, the machine said to have been exclusively allotted for Zarda packing, a report dated 01.10.2007 of the concerned Inspector has been *forwarded by the Noticee in their reply which says that the said machine was sealed on 01.10.2007. This has also been confirmed by the jurisdictional Range Officer vide letter dated 23.12. 10 that the said Zarda machine remained sealed all the time after 01 10 2007.*

In view of the above factual analysis, it now becomes clear that on 1st & 2nd of July 2008, the total number of operating packing machines were six (5 + 1) This is the same number of machine which the Noticee intended to operate in their Form-1, declaration and which they continued to operate even after 10.07.2008 There is no evidence on record to show that 9 machines or any number of machines in excess of 6 were operational on any day during July' 08.

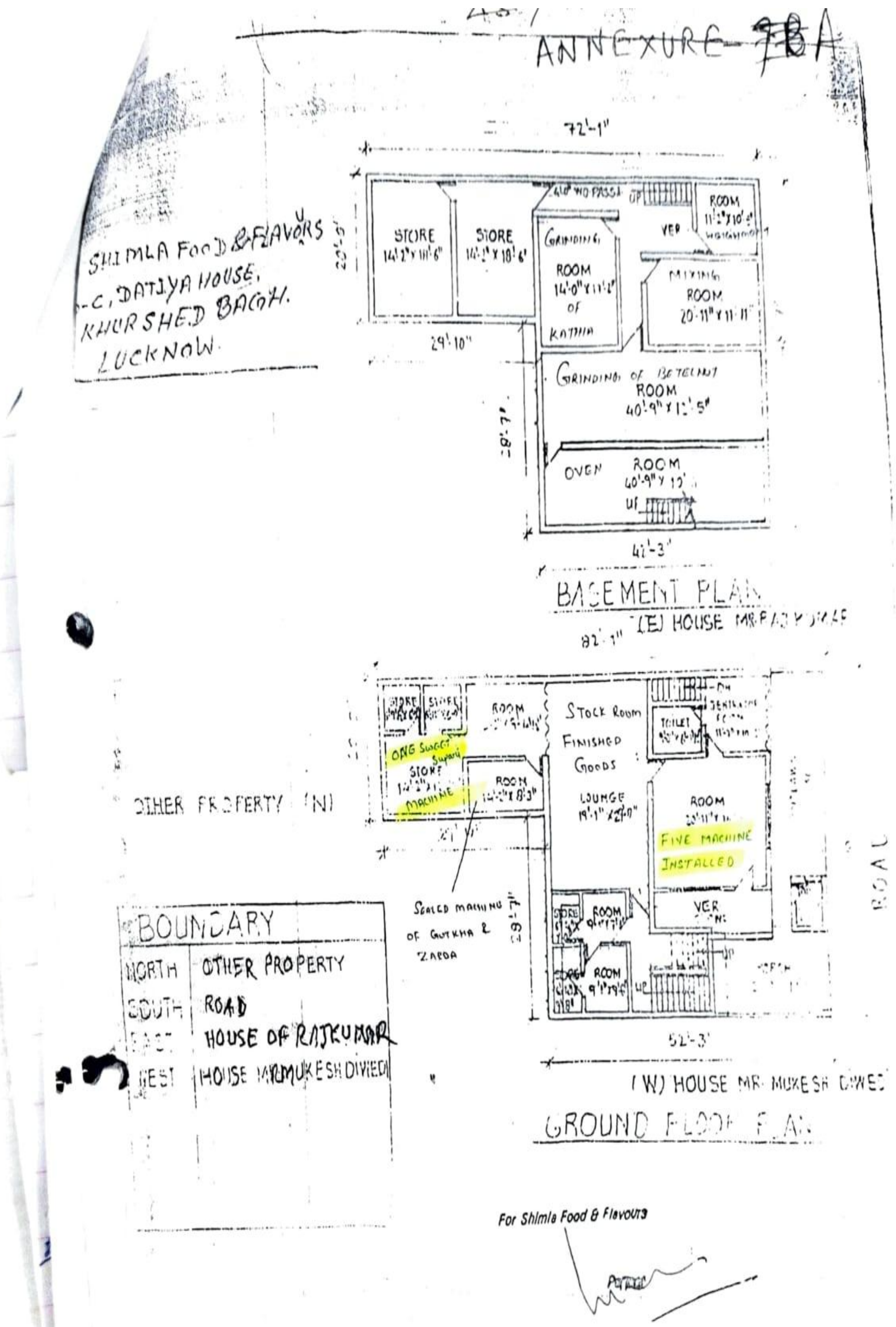
Looking into the above position, the order of the Deputy Commissioner, Central Excise, Division-I, Lucknow dated 17.07.08 fixing the production capacity on the basis of nine operating and installed machines is not correct. During the month of July 2008 the Noticee were required to pay duty in respect of 6 machines only. As they have paid duty in respect of five machines only, there was a short payment of 7.12.5 lacs which is liable to be recovered from them under Section 11A (1) of the Act along with interest.

The Noticee have raised certain arguments which are not relevant to the facts of the case like re-fixation of the capacity on the basis of number of days for which machines were operated during whole of the year. This argument is untenable as it has been seen that liability of duty is to be calculated monthly and on the basis of maximum number of machines operated on any day of the month. In view of these specific provisions, it is not relevant as to for how many days, the machines were operated during the month or year. For the purpose of these Rules, it is sufficient if a machine remains installed and operative on any number of days during the month, *then duty liability in respect of that machine has to be discharged by the Pan Masala Gutkha manufacture for entire month.*

It is also their contention that prior to the introduction of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 vide Notification No.30/08 C.Ex (NT) dated 01.07.08, another Notification No 38/07-CE dated 19.12.07 was in force, which was rescinded only on 16.07.2008 Therefore, for the period under reference, both the notifications were operative.

In this regard, I am of the view that the comparison would have been logical had it been made by a Noticee who had opted for both the Notifications. Notification No. 38/07-CE dated 19.12.07 issued under Rule 15 of the Central Excise Rules, 2002 was optional, The Noticee did not opt for the same Instead, they paid duty on ad-valorem basis against the clearances as affected by them. Now, such a plea has been advanced by the Noticee, which is nothing but an afterthought to take shelter of the provisions of a Notification which they have never opted."

4.3 Appellant has contended that out of six pouch packing machines 5 were installed in a common room and one machine is used for packing sweet supari was installed in the separate room. They had filed a declaration along with form-1 enclosed the ground plan, which is reproduced bellow:-



4.4 Commissioner in the impugned order no discussion has been made about the ground plan which clearly shows that one separate machine has been installed in a separate room and other five operational pouch packing machines used for packing Gutkha. It is also evident that on 03.07.2008 officers has sealed 5 machines and unsealed five pouch packing machines on 07.07.2008, as is evident from the remark affixed on the letter dated 30.06.2008, which is reproduced bellow:-

8 ANNEXURE- ~~10~~C

Shimla Food & Flavours

30 C, Daliya House, Khurshed Bagh, Lucknow.

केन्द्रीय उत्पाद शुल्क, रजि नं० AAXFS1612HXM001

सेवा में, दिनांक 30.6.08

श्रीमान अधीक्षक महोदय
केन्द्रीय उत्पाद शुल्क
रेंज राजेन्द्र नगर - 1
लखनऊ,

Counter Signed
N Singh
3/7/08

SANJAY KUMAR
Inspector

विषय:- (4) — चार दिनों के लिए फैक्टरी बन्द करने के सम्बन्ध में,

महोदय,

आपको सूचित किया जाता है कि हम अपनी फैक्टरी दिनांक 2.7.08 को दोनो शिफ्ट चलाने के उपरान्त दिनांक 3.7.2008 से दिनांक 6.7.08 तक बरसात में माल की माँग कम होने कारण बन्द करने जा रहे हैं एवम्. पुनः उत्पादन दिनांक 7.07.2008 को पहली शिफ्ट से प्रारम्भ कर दिया जायेगा।

अतः आपसे अनुरोध है कि आप दिनांक 3.7.08 को प्रातः आकर हमारी यूनिट की मशीनों को सील करने का कष्ट करें।

धन्यवाद

Visited m/s Shimla Food & Flavours on 07.07.2008 at 2.40 pm and counted five (5) pouch packing machines. Now, the number of machines in use is five (5).

7/7,
(SANJAY K
INSPECTOR
C.Ex.R.R.
LUCK.

Counter Signed
N Singh
7/7/08

भवदीय

प्रतिलिपि :-
डिप्टी कमीश्नर,
केन्द्रीय उत्पाद शुल्क, रेंज राजेन्द्र नगर
डिवीजन - 1, लखनऊ

N Singh

4.5 Further in their declaration, they have stated that out of six machines available in their premises 5 were being used for packing of Gutkha and one was used for packing sweet supari. No findings has been rendered by the Commissioner taking into account the ground plan and the form-I filed by the appellant during the relevant time. The whole dispute is in respect of one pouch packing machine that was installed in separate room as per the ground plan and used for packing sweet supari. We find that no evidence has been produced by the revenue to establish that this machine was being used for packing Gutkha. All the evidences produced in form of declaration, ground plan and correspondences show that this machine was installed in the separate room and was used only for the purpose of packing sweet supari. Accordingly, we do not find any merits in the impugned order to that extent. It demands duty contrary to the declaration filed along with the ground plan, which is required in terms of Pan Masala Packing Machines (Determination of Capacity and Collection of Duty) Rules, 2008.

5.1 Appeal is allowed.

(Pronounced in open court on-15 February, 2024)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp