

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Excise Appeal No.70111 of 2018

(Arising out of Order-in-Original No.03/Commr./VNS/2017 dated 24/10/2017
passed by Commissioner of Central Excise & GST, Varanasi)

Commissioner of Central Excise &

CGST, Varanasi

(09, MA Road, Varanasi)

.....Appellant

VERSUS

M/s KG Pan Products Pvt. Ltd.,

....Respondent

(Unit-XV), BL-4, Sector-13, GIDA, Sahjanawa, Gorakhpur)

APPEARANCE:

Shri Santosh Kumar, Authorised Representative for the Appellant

Shri Atul Gupta, Advocate for the Respondent

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

FINAL ORDER NO.70961/2024

DATE OF HEARING : 10 December, 2024

DATE OF DECISION : 10 December, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Original No.03/Commr./VNS/2017 dated 24/10/2017 passed by Commissioner of Central Excise & GST, Varanasi. By the impugned order proceeding initiated against the Respondent-assessee by show cause notice dated 02.05.2016 has been dropped.

2.1 Respondent is engaged in manufacture of Jarda Scented Tobacco/Chewing Tobacco, classifiable under tariff heading 24039930/24039910 of the First Schedule to the Central Excise Tariff Act, 1985. The said product is a notified goods manufactured under Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination & Collection

of Duty) Rules, 2010 read with Notification No.11/2010-CE(NT) dated 27.02.2010.

2.2 On the basis of parameters furnished in declaration in Form-1 by the Respondent the Annual Capacity of Production (ACP) and Monthly Duty Liability (MDL) in respect of the machines installed and functional in the unit was determined under Rule 6 of the packing rules and appropriate order was passed by the Assistant Commissioner, Central Excise & Service Tax Division, Gorakhpur. Respondent was required to pay duty as determined and an intimation of monthly duty paid was submitted in Form-2 to the Superintendent under Rule 9 of the Packing Rules. During the scrutiny of Form-2 submitted for the months of May, 2015 to August, 2015 it had been observed that the respondent had short paid duty .

2.3 On the basis of information furnished in Form-1 dated 18.05.2015 & 25.05.2015 the ACP and MDL of the machine had been fixed.

2.4 In the form-I respondent has declared their products to be Chewing Tobacco, but the MDL Order dated 27.05.2015 was fixed in respect of 'Jarda Scented Tobacco' subject to confirmation received from CRCL, New Delhi.

2.5 Samples were sent to CRCL, New Delhi for examination off its constituents. It was confirmed vide report dated 29.09.2015, 07.10.2015 & 30.10.2015 to have the characteristics of Jarda Scented Tobacco.

2.6 During the period of dispute respondent continued to pay duty according to the declaration filed by them in Form 1 treating their goods as chewing tobacco and information was submitted as required in Form 2. Accordingly, the duty short paid by the respondent is as indicated in table below:-

			Amount in Rs
Month	Duty payable as per M.D.L.	Duty paid as per Form-2	Short paid amount
May, 2015	18,54,097.00	8,72,517.00	9,81,580.00
June, 2015	1,64,22,000.00	77,28,000.00	86,94,000.00
July, 2015	1,64,22,000.00	77,28,000.00	86,94,000.00
August, 2015	1,64,22,000.00	77,28,000.00	86,94,000.00
Total			2,70,63,580.00

2.5 Show cause notice dated 02.05.2016 was issued to the respondent asking them to show cause as to why-

"(i) The short paid Central Excise Duty amounting to Rs. 2,70,63,580/-(Rs. Two Crores Seventy Lakhs Sixty Three Thousands Five Hundred Eighty only) should not be demanded and recovered from the party under Section 11A (1) of Central Excise Act, 1944 read with Rule 19 of Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination & Collection of Duty) Rules, 2010 as amended.

(ii) Interest at the applicable rate should not be demanded and recovered from them under the provisions of Section 11AA of Central Excise Act, 1944, read with Rule 9 & 19 of Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination & Collection of Duty) Rules 2010, on the demanded duty amount.

(iii) A Penalty should not be imposed upon them under Rule 25 of the Central Excise Rules, 2002 read with rule 19 of the packing rules for contravention of rule 6, 7 & 9 of the packing rules and Rule 6 & 8 of the Central Excise Rules, 2002. "

2.6 The show cause notice was adjudicated as per the Order-in-Original referred in para 1 above.

2.7 Aggrieved revenue has filed this appeal on the following grounds:-

"A. The CRCL, New Delhi is the Central Laboratory to analyse the samples sent to them by the Revenue Authorities of Customs & Central Excise for the purpose of the classification under Central Excise Tariff Act 1985. The responsibility of the Chemical Examiners of the laboratory is to provide the contents/ingredients of the samples sent to them. Accordingly the jurisdictional authority sent the samples drawn from the unit to them for providing proper ingredients for finalization of its classification.

(i) In their first report dated 07.10.2015 the Chemical Examiner reported that the contents of sample are in the form of brown cutpieces of vegetable matter (bits of leaves) with pleasant odour. It is mainly composed of tobacco and flavoured. It does not contain lime. It has characteristics of Jarda Scented Tobacco

(ii) The re-test report dated 17.10.2016 shows that the contents are in the form of brownish dried cut pieces of leaves, having characteristics pleasant odour packed in unit packing. Each is composed of cut bits of tobacco leaves, flavourant and added lime. Each is preparation containing chewing tobacco. Each is other than Jarda Scented Tobacco.

It is evident from the above that the only change reported by the Chemical Examiner is presence of Lime in the sample, all other contents which are tobacco and fragrance/ odour have been re-confirmed. Merely addition of Lime in the product does not disqualify it from being Jarda Scented Tobacco.

B. The Chemical Examiner has decided the classification of the goods whereas their jurisdiction is limited to provide the contents/ingredients of the sample. In this regard, the various bench of Hon'ble CESTAT has passed the following judgments-

i. Special Civil Application No. 1128 of 1965 dated 17 & 21 & 22 July, 1970-1983 (12) E.LT. 744(Guj.)

ii. Order No. C-63811985 dated 13.09.1985-1986 (23) E.LT. 471 (Tribunal)

iii. Order No. 334/91-C dated 09.04.1991-1991 (56) E.L.T. 685 (Tribunal)

In the above judgments the Hon'ble CESTAT has held that "Classification of goods -Chemical Examiner's report - Chemical Examiner to furnish test results only and not to express opinion on tariff classification."

- a. *The Adjudicating Authority has failed to pass a speaking order by distinguishing the both reports by merely accepting the second report of Chemical Examiner. Further, the Adjudicating Authority has failed to analyse the re-test report vis-à-vis the first report submitted by the Chemical Examiner as regard to the contents of the sample.*
- b. *The Chewing Tobacco and Jarda Scented Tobacco (JST) described under Chapter sub-heading no. 24039910 and 24039930 (i.e. JST) of the Central Excise Tariff Act, 1985 are not defined in the Tariff itself or anywhere in the taxing statute. In absence of any statutory definition except for tobacco, distinction between these two products can be made in accordance with the description of the products as well as on the basis of common parlance and accordingly classify the product by following the principle of classification laid down in the Tariff itself Dictionary and common parlance connote the following meaning to these terms:*

"Chewing Tobacco, as its name suggests is a tobacco preparation for chewing purpose, also taken with paan (betel leaf). Gutku, Surti, Zarda, Quiwam and Dokta are some of the different types of chewing tobacco preparation."

&

"Zarda-A chewing tobacco product made of highly scented and flavoured tobacco flakes. Chewing alongwith betel nut and paan (betel leaf)." Also added lime does not change the character of JST. Similarly chewing tobacco also comes with or without lime. In short, presence of lime in the product does not change its character as JST. That the product is more akin to JST is based on the following findings in the CRCL report:

- *The product has pleasant odours*

- *The product has flavourant*

The comment of the CRCL "is other than Jarda scented tobacco" NEED NOT BE GIVEN ANY WEIGHTAGE because the CRCL, in so commenting, had exceeded its jurisdiction and authority, as held in the judgments listed in paragraph B above.

- c. There is a clear demarcation in the tariff entries 24039910 and 24039930. The first covers the plain chewing tobacco without having been added any flavor/scent to it, whereas, against other tariff entry name of commodity is mentioned as Jarda scented tobacco. Thus, it clearly comes out that the product was manufactured by the party with addition of mixture other than the chewable tobacco and Lime as the same also contains "Pleasant Odour" as per both the CRCL New Delhi's reports dated 07.10.2015 and 17/21.10.2016. Such perfumery mixture in the tobacco product gives an exclusive smell to the product. In view of these facts, it has been established that the tobacco products manufactured by the party are scented tobacco which cannot be called as 'BCT' and there remains no doubt that these tobacco products are Jarda Scented Tobacco'. It is also observed that the general rules for the interpretation of First Schedule to the Central Excise Tariff Act, 1985 wherein some principles have been prescribed for classification of goods contained in the said Schedule to the Tariff Act.*

To classify the given product by applying General Rule of Interpretation, which are statutorily applicable, one can proceed as follows:

Rule 1, 2(a), 2(b), 3(a), 3(b) being obviously inapplicable, the subject goods are to be classified under the heading (24039930) which comes last in numerical order. If it still could be argued, without accepting the contention, that the product is

Chewing tobacco and not JST, Rule 4 would apply and require that the heading appropriate to the goods to which the subject goods are most akin be preferred.

In this case, as argued in detail in para B(b) above, the goods are most akin to JST (having pleasant odour and flavourant). So the subject goods must be appropriately classified under heading 24039930 as JST.

- d. *In view of above, it is felt that the impugned order passed by the adjudicating authority is not legal and proper. The Adjudicating Authority has erred by dropping the proceedings initiated vide Show Cause Notice No. 33/Commr/Alld/2016/ dt. 02.05.2016, initiated against M/s K.G. Pan Products Pvt. Ltd. (Unit-XV), BL-4, Sector-13, GIDA, Sahjanwa, District-Gorakhpur (UP)-273209."*

3.1 We have heard Shri Santosh Kumar learned Authorised Representative appearing for the revenue and Shri Atul Gupta learned Counsel appearing for the respondent.

3.2 Learned Authorised Representative reiterates the findings recorded in the order of the lower authority.

3.3 Arguing for the appellant learned Counsel submits that-

- For Classification of goods the burden is squarely upon the revenue. Reliance is placed on the following decisions:-
 - HPL Chemicals Ltd. Vs CCE, Chandigarh, 2006 (197) ELT 324 (SC);
 - Union of India Vs Garware Nylons Ltd. 1996 (87) ELT 12 (SC);
 - Som Products Pvt. Ltd. Vs CCE, Noida 2018 (10) TMI 79;
 - Flakes-N-Flavourz 2015 (327) ELT 435 (Tri.-Del.).
- The CRCL Report dated 21.10.2016 is binding on the department. Reliance is placed on the following decisions:-

- CCE, Mumhai-IV v. Damnet Chemicals Pvt. Ltd., 2007 (216) ELT 3 (SC),
 - Commissioner of Customs, Chennai v. Textworth International, 2016 (334) ELT 607
 - Madhu Wool Spinning Mills v. Union of India, 1983 (14) ELT 2200
 - HKT Mining Pvt. Ltd. v. Commissioner of Customs, Vishakhapatnam, 2010 (259) ELT 735
 - Super Tech Agro Oils Pvt. Ltd. v. Commissioner of Customs, Amritsar, 2007 (216) ELT 618.
- The Unmanufactured Tobacco Packing Machines (Capacity Determination & Collection of Duty) Rules, 2010 does not empower the officer to change the classification of the goods.

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

4.2 For dropping the demand, impugned order records as follows:-

"26. It has been alleged in the impugned show cause notice that the party is engaged in manufacture of Jarda Scented Tobacco/ Chewing Tobacco, classifiable under tariff heading 24039930/24039910 of the First schedule to the Central Excise Tariff Act, 1985. Jarda Scented Tobacco/ Chewing Tobacco is a notified goods manufactured under the Packing Rules read with Notification No.11/2010-C.E.(N.T.) dated 27.02.2010 as amended and on the basis of parameters furnished in declaration in Form-1 by the party, the annual capacity of production (ACP) and Monthly duty liability (MDL) in respect of the machines installed and functioning in the unit was determined under Rule 6 of the packing rules and appropriate order were passed by the Assistant Commissioner, Central Excise & Service Tax Division, Gorakhpur. The party was required to pay the duty as determined and an intimation of monthly duty paid was submitted in Form-2 to the Superintendent, Central

Excise & Service Tax Range Rural, Division-Gorakhpur under rule 9 of the Packing Rules. During scrutiny of Form-2 submitted by the party for the months of May-2015, June-2015, July-2015 & August-2015, it has been observed that the party have short paid duty for the said months total amounting to Rs. 2,70,63,580.00 which, the department, vide the impugned notice, seeks to recover under section 11 A (1) of the Central Excise Act, 1944 along with interest under section 11AA of the Act read with Rule 9 & 19 of the packing rules. Appropriate penalties have also been proposed on the party.

27. The party have contested the demand on the ground that they were engaged in the manufacturing of Chewing Tobacco" as declared under tariff sub heading no 24039910 of the schedule to the Central Excise Tariff Act, 1985 and accordingly, were paying duty in terms of the Packing Rules, 2010, prescribed under section 3A of the Central Excise Act, 1944. Whereas, the department at the time of Provisional Assessment for determining the duty liability for the month of May 2015 to Aug, 2015 held that the goods manufactured by the units were Jarda Scented Tobacco' and not 'Chewing Tobacco', as declared. Accordingly, duty liability of the units for the month of May 2015 to Aug, 2015 were provisionally determined in terms of the Packing Rules, on the basis that the goods manufactured were Jarda Scented Tobacco. But, the CRCL re-test report dated 17.10.2016 clearly confirmed that that goods manufactured by the units during the relevant period were 'Chewing Tobacco', as declared and not Jarda Scented Tobacco, as is sought to be claimed by the Department. In light of the re-test report, there remained no dispute that the goods manufactured by the units were indeed chewing tobacco, and the duty was correctly paid the units of K.G.Pan Products Pvt Ltd.

28. *In light of the contents and allegations in the Show cause Notice, defence reply, submissions made before me during the course of personal hearing written as well as oral, I find that the following points need to be determined:*

(1) Whether the party during the period May, 2015 to August, 2015 manufactured the Jarda Scented Tobacco, a notified goods falling under the chapter sub heading 24039930 of the First schedule to the Central Excise Tariff Act, 1985 and manufactured under the packing rules and were liable to pay duty as determined by the department under Rule 6 of the packing rules or the product manufactured by the party were chewing tobacco falling under the chapter sub heading 24039910 attracting central excise duty as per notification no. Notification No. 11/2010-C.E.(N.T.(dated 27.02.2010 as amended.

(ii) Whether the party is liable to pay differential duty as alleged to have been short paid during the period from May, 2015 to Aug, 2015?

(iii) Whether the demand is liable to be confirmed and recovered from the party under section 11A of Central Excise Act, 1944 read with Rule 19 of the Packing Rules, 2010 as amended?

(iv) Whether Interest at the applicable rate is liable be demanded and recovered from them under Section 11AA of Central Excise Act, 1944 read with Rule 9 & 19 of the Packing Rules, 2010, on the demanded duty amount?

(v) Whether Penalty is liable to be imposed upon the party under the provision of Rule 25 of the Central Excise Rules, 2002 read with rule 19 of the packing rules for contravention of rule 6, 7 & 9 of the packing rules and Rule 6 & 8 of the Central Excise Rules, 2002.

29. *I find that the main dispute to be decided is whether the party during the relevant period manufactured Jarda*

scented tobacco falling under the Tariff Heading 24039930 or 'chewing tobacco falling under tariff sub heading 24039910 and the both the commodities are notified goods manufactured under the Packing Rules. Hence, before proceeding to examine the points listed above. it is imperative to visit the relevant provisions contained in the Central Excise Act, 1944 and Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination & Collection of Duty) Rules 2010 and the rules framed there under, with regard to levy of Central Excise duty on Chewing Tobacco/Jarda scented tobacco. The relevant provisions of packing rules are as under:

Rule 3 to Rule 19 -----

30. I now proceed to examine the facts of the instant case and the evidence available on record in light of the statutory provisions and the case law cited above. I find that the party filed FORM-1 dt. 18.05.2015 and 25.05.2015 declaring therein the at the sl. No. 12, the description of the goods to be manufactured as (i) Chewing Tobacco classifiable under tariff sub heading No. 24039910 of the Schedule with brand name Rounak, Panchamukhi, Shudh Plus, S-Plus & R-Plus of M.R.P. Rs. 1.00 per pouch each brand & S-Plus of M.R.P. Rs. 00.50 per pouch. Accordingly, the Assistant Commissioner, Central Excise, Gorakhpur vide Order C. No. VI(J) (21) Tech ACP/KG-XV/12/215 dt. 27.05.2015, on the basis of parameters furnished in declaration Form-1 by the party determined the annual capacity of production (ACP) and monthly duty liability (MDL) in respect of unit, under Rule-6 of the packing rules, as under:-

(i) Annual capacity of production (ACP): 1,28,45,852 Pouches

(ii) Monthly duty liability (MDL): Rs. 18,54,097/- on pro-rata basis for May-2015 as the unit started functioning in the

month of May-2015 with effect from 25.05.2015 & Rs. 82,11,000/- for further months.

31. I find that the although the party declared the product to be manufactured as Chewing tobacco falling under chapter sub heading 24039910 but the Assistant Commissioner, Central Excise, Gorakhpur found the goods as 'Jarda scented tobacco falling under chapter sub heading 24039930 and accordingly fixed the duty liability, provisionally.

32. I find that the duty liability was fixed provisionally although I do not find any provision of fixing liability provisionally, but at the stage of adjudication it is out of purview to ascertain as under what rules or provisions the duty liability fixed provisionally. But it is undisputed that the MDL was fixed considering the goods being manufactured as other than what was declared by the party.

33 The office of the Assistant Commissioner, Central Excise & Service Tax Division-Gorakhpur drew the samples of tobacco products manufactured by the units of the party during May, 2015 to August, 2015 for testing from the CRCL, New Delhi to ascertain the correct classification of the manufactured product for leviability of Central Excise Duty under Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 as amended.

34. The samples were sent to the CRCL New Delhi for testing. Out of these samples the samples drawn from unit no. XIV & XV on 03.06.2015 were returned un-tested by giving remark of rejected on the back of envelope. Then duplicate samples of tobacco products drawn from unit no. XIV & XV on 03.06.2015 were sent to the CRCL, New Delhi for testing. In the mean time, the party filed appeals before the Commissioner (Appeals), Central Excise Allahabad against the provisional Orders issued by the

department during May, 2015 to August, 2015 by which monthly duty liability in respect of Unit No. XIV & XV were provisionally fixed in the category of Jarda Scented Tobacco falling under Chapter Sub Heading No. 24039930 subject to confirmation of tobacco product received from the CRCL

35. The CRCL New Delhi vide their letter dated 29.09.2015, 07.10.2015 & 30.10.2015 has reported that the tobacco products are classifiable under the category of 'Jarda scented tobacco'. The test reports were communicated to the assessee vide letter dated 13.10.2015, 23.10.2015, 27.10.2015 & 31.12.2015. It was also informed that all provisional orders issued shall be treated as final orders. The assessee vide their letters all dated 11.01.2016 contended that their tobacco products was 'chewing tobacco' and not Jarda scented tobacco as reported by the CRCL New Delhi and they were dissatisfied with test result and requested for re-testing on duplicate or triplicate samples. The party also paid requisite applicable fees for re-test

36. On consideration of the assessee's request, orders dated 25.01.2016 & 27.01.2016 for re-test on duplicate or triplicate samples were passed by the Assistant Commissioner, Central Excise Division, Gorakhpur and duplicate/triplicate samples were sent to the CRCL, New Delhi for re-testing purposes,

37. Initially, the CRCL, New Delhi vide letter dated 07.03.2016 returned said duplicate/triplicate samples untested, with direction to obtain prior approval of the Commissioner for re-testing on duplicate/triplicate samples. However, the Director, CRCL, New Delhi was again requested vide letter dated 29.03.2016 to re-test on duplicate samples in terms of point 8.9/8.10 of Chapter 11(Samples) of the Central Excise Law Manual as permission from the Commissioner is not required in case

of departmental laboratories i.e. CRCL New Delhi. In response, the Joint Director, CRCL, New Delhi vide letter dated 13.04.2016 suggested to get the prior approval of the Commissioner, Central Excise for re-testing on duplicate samples.

Accordingly, a letter dated 25.04.2016 was sent to the Commissioner Central Excise, Allahabad for seeking necessary approval for re-testing on duplicate/triplicate samples of tobacco products. In response, the Assistant Commissioner (Tech), Central Excise, Allahabad vide their letter dated 10.06.2016 has communicated to the office that the Commissioner of Central Excise Allahabad has accorded the technical approval for re-testing of duplicate samples. The same was Communicated to the CRCL, New Delhi and duplicate/triplicate sample were again sent to them for re-testing vide letter dated 24.06.2016.

38. The Joint Director, CRCL, New Delhi vide their letter dated 17/21.10.2016 has reported that "Each of the six samples is in the form of brownish, dried cut pieces of leaves.. having characteristics pleasant odour packed in unit packing. Each is composed of cut bits of tobacco leaves, flavourant and added lime. Each is preparation containing chewing tobacco. Each is other than Jarda scented tobacco."

39. Now, in backdrop of above, I find that initially the party declared his product to be manufactured as 'chewing tobacco' falling under chapter heading 24039910. Though the Assistant Commissioner at the time of fixing ACP and MDL considered the subject goods as "Jarda scented tobacco" falling under the chapter sub heading 24039930, but certainly had doubts that is why the duty liability was fixed provisionally and samples were drawn and were sent for testing to CRCL, New Delhi. Thereafter, some of the samples were rejected for want of technical nature as a result duplicate sample was sent. The CRCL declared the

sample as Jarda scented tobacco falling under chapter sub heading 24039930. When the party contested the initial test report claiming that their tobacco products was chewing tobacco and not the Jarda scented tobacco and requested for re-testing on duplicate/triplicate samples. The Assistant Commissioner, Central Excise Gorakhpur passed an order dt. 27.01.2016 wherein it was observed that-

.....I find that the ground for re-testing as submitted by the party are genuine. Also the remnant sample have lost its original quality. The Duplicate/Triplicate sample has been kept preserved in the store of the Division office which is well packed and intact with seal and the same may be utilized for re-testing to obtain proper results. Therefore, retesting on Duplicate/Triplicate sample may be conducted in terms of Point no. 8.9 of chapter 11 of the CBEC manual.

With these findings, Order dated 27.01.2016 was passed allowing for re-test on Duplicate/Triplicate sample of the tobacco products of the party. Further, on suggestion of the Joint Director of CRCL, technical approval for re-testing was also obtained vide letter dt. 10.06.20106, from the competent authority.

40. I also find that when the party contested the first CRCL Report and requested for re-test, the request of the party was found genuine and the permission for re-testing on duplicate/triplicate sample was granted unconditionally from the same laboratory i.c. CRCL New Delhi. Thereafter, on insistence of CRCL technical approval from competent authority was also obtained for re-test. The CRCL reported, after the re-test, the sample to be chewing tobacco and not the Jarda scented tobacco, Now, the crux of the issue is which report is to be considered for classification of the goods in question.

In this regard, I find that following case laws relevant to decide the issue:

In 2016 (334) E.L.T. 607 (Mad.) IN THE HIGH COURT OF JUDICATURE AT MADRAS V. Ramasubramanian and K. Ravichandrababu, JJ. COMMR. OF CUS. (EXPORTS), CHENNAI-1

Versus

TEXWORTH INTERNATIONAL

Civil Miscellaneous Appeal No. 1936 of 2010 and M.P. No. 1 of 2010, decided on 18-3-2016 Samples Retesting of samples Central Silk Technology Research Institute in its first test report opining that imported mulberry raw silk of yam is of 2A grade, while on retesting changing its opinion to hold said goods of 3A grade Since samples were drawn from same consignment and there is no conditionality attached to it, no ground for not following second test report more so when Department itself had initially accepted it.

Appeal dismissed

REPRESENTED BY: Ms. R.K. Sekna Reshma, for the Appellant.

Shri Joseph Prabhakar, for the Respondent.

[Judgment per: V. Ramasubramanian, J.). This appeal was filed by the Revenue under Section 130 of the Customs Act, 1962 and it was admitted on 30-7-2010 on the following two substantial questions of law.

Whether the "(i) order of the CESTAT upholding the qualified and conditional second test report is correct as against the unqualified/unconditional report done based on the testing of samples by competent testing authorities in India under Section 144 of the Customs Act, 1962? and

Whether the (ii) order of the CESTAT upholding the qualified and conditional second test report is correct

ignoring the fact that the second test itself was not done in accordance with the established procedure for testing of samples as observed by the testing authority?"

2. Heard Mr. Sekna Reshma, learned counsel for the appellant and Mr. Joseph Prabhakar, learned counsel appearing for the respondent.

3. The respondent filed a bill of entry on 29-4-2004 for the clearance of an imported consignment of mulberry raw silk yarn of Chinese origin. The invoice indicated that the mulberry raw silk was of 3A Grade, as per CIQ certificate.

4. Vide Customs Notification No. 106/2003, dated 10-7-2003, the Government of India levied anti-dumping duty on the import of mulberry raw silk of 2A Grade and below, originating or exported from China. Since the invoice produced by the respondent declared the silk to be of 3A Grade no anti-dumping duty was leviable. However, samples were drawn from the consignment and sent to the Central Silk Technological Research Institute, Bangalore by the Department. The laboratory, vide its report dated 25-5-2004, stated that the samples belonged to 2A Grade.

5. Hence, a show cause notice dated 18-8-2004 was issued, leading to an Order-in-Original being passed, directing the confiscation of the entire material, with a condition that the goods can be redeemed upon payment of fine and anti dumping duty. The respondent filed an appeal before the Tribunal. Before the Tribunal, a second test report was produced from the very same Institute as per which, the goods were of 3A Grade. Therefore, based upon the same, the Tribunal allowed the appeal of the respondent, forcing the Revenue to come up with the above appeal.

6. Even as per the grounds of appeal filed by the Department, the Department itself agreed to a second test report. Once the Department had agreed to a second test report without reserving any right to rely upon the first

test report, it is not open to the Department to contend that the second test report ought to be dumped.

7. The contention of the learned counsel for the appellant/Department is that the second test report was a qualified and a conditional one.

8. But unfortunately, we do not see any condition attached. The samples sent for the second test had also been drawn from the very same consignment. The samples were actually available with the Department. This is borne out by paragraph 5 of the grounds of appeal. Therefore, we find nothing wrong with the order of the Tribunal.

9. Accordingly, the questions of law are answered against the Revenue Department. The civil miscellaneous appeal is dismissed. No costs. Consequently, the above MP is also dismissed.

Further, in the case of MADHU WOOL SPINNING MILLS Versus UNION OF INDIA AND OTHERS, reported in 1983 (14) E.L.T. 2200 (Bom.), it was held by the Hon'ble Hghh Court of Bombay observed as

"Samples tests showing different results - Effect.

Merely because the different analysis of samples showed different conclusions, it is not permissible to select that conclusion which suits the authorities to levy the duty. [para 8]"

In another case of HKT MINING PVT. LTD. Versus COMMISSIONER OF CUSTOMS, VISAKHAPATNAM, reported in 2010 (259) E.L.T. 735 (Tri. Bang.) the Hon'ble CESTAT, SOUTH ZONAL BENCH, BANGALORE in its Final Order No. 1212-1213/2010, dated 2-9-2010 in Appeal Nos. C/173-174/2009 held No dispute that retest granted and result communicated as Fe content 61.0%, entitle assessee of benefit Department's plea for remanding matter to adjudicating authority or Commissioner (Appeals) No useful purpose be served by remanding matter Following

decision in 2001 (132) E.L.T. 10 (S.C.), no bar in granting retest of samples Results of retest in favour of assessee Assessee eligible for benefit - Impugned order set aside and appeals allowed.

In the case of SUPER TECH AGRO OILS PVT. LTD. Versus COMMISSIONER OF CUSTOMS, AMRITSAR, reported in 2007 (216) E.L.T. 618 (Tri. Del.) held as "where laboratory reports differ. The issue that arises is whether, in such a case of disagreement, the decision should be in favour of the assessee or the Government, Where the evidence is not conclusive, the benefit should go to the citizen."

41. Further, I find that the reference dated 05.05.2017 have been made subsequently by the department to the Joint Director, CRCL, New Delhi regarding the identity of manufactured product for leviability of Central Excise duty under the Packing Rules, 2010 pointing out contradiction in both reports. In response, the Joint Director, CRCL vide its letter dated 11.05.2017 has advised to refer to re-test report dated 17/21.10.2017 without any amendment.

42 In light of the statutory provisions, as existed at the material time, the case law cited above, the provisions of Chapter 11 (Samples) of the Central Excise Law Manual and the facts of the case, I find that the party i.e. M/s K. G. Pan Products Pvt. Ltd. (Unit-XV), BL-4, Sector 13, GIDA, Sahjanwa, District Gorakhpur (UP) -273209, during the period May, 2015 to August, 2015 has correctly declared the product as Chewing tobacco falling under tariff sub heading 24099910 and has correctly paid duty as per Form-2 submitted, for the months of May-2015 to August, 2015."

4.3 It is observed that respondent has sought for retesting of the samples and after retesting of the samples it was determined by the CRCL vide their letter dated 17/21.10.2016 that "Each of the six samples is in the form of brownish, dried cut pieces of leaves, having characteristics pleasant odour packed in unit

packing. Each is composed of cut bits of tobacco leaves, flavourant and added lime. Each is preparation containing chewing tobacco. Each is other than Jarda scented tobacco,"

4.4 As CRCL has clarified that the samples are other than of Jarda Scented Tobacco, contrary to the earlier test report given by them in which they stated that the samples were containing characteristics of Jarda Scented Tobacco. From perusal of the second test report it is very clear that the CRCL has not determined any classification of the goods to have characteristics of the samples through report after retesting. They concluded that the samples were of Chewing Tobacco other than Jarda Scented Tobacco. The submission made in the appeal by the revenue that CRCL had determined the classification of the products is without any basis. The opinion furnished in respect of the samples tested is the basis for arriving at the findings recorded in the impugned order.

4.5 Revenue have not challenged the retest report furnished by CRCL which clearly shows that the tested goods were other than Jarda Scented Tobacco. Board has also vide Circular No 30/2017-Cus dated 18.07.2017, in case where the sample test reports, during test and retest varies have clarified as follows:

"f. The competent authority shall consider the results of the re-test without prejudice to the results of the first test. In case there is a variation in the results of the first test and the re-test, the competent authority shall take the decision relying upon either of the tests specifying the grounds in writing for the decision so taken. In case the competent authority is unable to decide whether to rely upon the first or the re-test results, then it may order a second re-test provided the consignment is still within the customs control. However, this option should not be resorted to in every case of variation between the first test and re-test results."

4.6 Admittedly the adjudicating authority has in the present case proceeded to decide the issue on the basis of the second

test report given by CRCL after retesting of the samples and have concluded that the product of the appellant was other than Jarda scented tobacco, we do not find any infirmity in the approach adopted. At the best he could have asked for yet another retest of the sample. Revenue has not challenged the impugned order on this ground.

4.7 In case of Som Flavour Masala Pvt. Ltd [(2023) 6 Centax 1 (Tri.-Chan)] Chandigarh bench has held as follows:

"17. *We are also of the view that the learned commissioner has grossly erred in completely ignoring the opinion of Jt. Director, CRCL in re-test of the same samples whose earlier test reports were relied upon by the revenue in changing the classification. The appellants objected to the authority of the Chemical Examiner Gr.-II to give opinion, since as per powers and duties of officers and employees posted at CRCL, as prescribed, Chemical Examiner can only issue test reports, they cannot give any opinion. Whereas the Jt. Director, CRCL is the head of the laboratories and supervises the overall functioning of Laboratory and offers technical opinion. We also do not find the conduct of the department proper. As per the request of the appellant, re-testing was got done by the department of the samples taken on 24-7-2015 but its report was not made available to the appellants nor the department waited for the re-test report/opinion of Jt. Director, CRCL while issuing the show cause notice and the adjudicating authority confirmed the demand despite making specific plea by the appellants about the non-supply of re-test report. When the appellants approached the Hon'ble High Court challenging the earlier adjudication order, the Hon'ble High Court set aside the said order and directed the department to supply copy of re-test report to the appellants and to adjudicate the matter thereafter. In the said re-test report the Jt. Director, CRCL gave his opinion that the sample is of chewing tobacco. Even when a clarification was sought by the department*

from the Jt. Director he stated that the sample is preparation containing chewing tobacco other than Jarda Scented Tobacco. The Director, CRCL is the only appellate authority in respect of re-test of samples and as per records no appeal has been made to the Director, CRCL against the opinion given by the Jt. Director, CRCL and therefore the opinion of Jt. Director, CRCL is final and it cannot be brushed aside just because it is not in favour of the department. In our view, the opinion of Jt. Director, CRCL is in line with Indian Standard prescribed by BIS. He did not classify the goods but gave his technical opinion that the sample is of chewing tobacco.”

This order of the tribunal has been affirmed by the Supreme Court as reported at [(2023) 6 Centax 4 (S.C.)]

4.6 We do not find any merits in the appeal filed by the revenue and in view of the discussions as above and the decision of Hon’ble Madras High Court relied upon by the adjudicating authority in his order.

5.1 Appeal is dismissed.

(Operative part of the order pronounced in open court)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp