IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
REGIONAL BENCH : ALLAHABAD

E/2261, 2080-2087, 2222, 2223, 2313/2012

(Arising out of Order-in-Original No.02/Commr./LKO/CX/2012-13 dated 20.4.2012 passed by the Commissioner of Central Excise & Service Tax, Lucknow.)

Sushant Kamalkunar Saha, Proprietor, M/s. Durga Trading Company, Udai Chand Chaurasia, Proprietor, Rajesh Kumar Suri, Partner. Ashish Srivastava, Authorised Signatory, Alim Ali, Authorised Signatory, Hari Mohan Tripathi, Accountant, Naval Kishore Pandey, Accountant, C.C.E. & S.T., Lucknow, Rajendra Daji Jadhav, Prop., Rakesh Chadha, Jitendra Gandhi

…APPELLANT(S)

VERSUS

CCE, Lucknow, Durga Trading Company

RESPONDENT (S)

APPEARANCE

Shri Bipin Garg (Advocate) & Shri Vaibhav Dixit (Advocate) in Appeal No.E/2080, 2081, 2083-2087/2012

Shri Gyanendra Kumar Tripathi (AC) (A.R.) for the Revenue

CORAM:

SHRI ANIL CHOUDHARY, HON'BLE(JUDICIAL)
SHRI ANIL G. SHAKKARWAR, MEMBER(TECHNICAL)

DATE OF HEARING/DATE OF DECISION : 08.03.2018

FINAL ORDER NO.70852-70863/2018

Per ANIL G. SHAKKARWAR:

The above stated 12 appeals are arising out of impugned order-in-original No. 02/Commr./LKO/CX/2012-13 dated 20.4.2012 passed by the Commissioner of Central Excise & Service Tax, Lucknow. Therefore they are takne together for decision. Out of the 12 appeals, appeal No.E/2087/2012 is preferred by Revenue and remaining appeals are preferred by manufacturer Durga Trading Co. and other co-noticees.

2. Brief facts of the case are that M/s.Durga trading co. (hereinafter referred to as DTC) were engaged in the manufacture of Gutkha having brand name Pukar. On 28.02.2007 officers of central entelligence conducted search operations at the office premises of M/s.Laxmi Agencies, Ghatkopar, Mumbai and at Laxmi chicken centre, Ghatkopar, Mumbai on the reasonable belief that they were dealing with Pukar brand gutkha manufactured by DTC. At Laxmi chicken centre, officers recovered a note book wherein certain payment details were mentioned for the period from July 2006 to December 2006. The said note book was seized by officer under panchnama on 28.2.2007. Further at Laxmi agencies 48000 pouches of Pukar gutkha valued at Rs.48,000 were seized under panchnama on 28.2.2007. Further investigations were also carried out at Bandra terminus railway station where search of a vehicle resulted in seizure of 3 lakh 60 thousand pouches of Pukar gutkha. The person accompanying said vehicle was Shri Ramji Tiwari. On 28.2.2007 statement of Shri Ramji Tiwari was recorded. The officers also found another consignment of 30 bags of Pukar Gutkha lying at Bandra terminus railway station. The said consignments were detained and were further seized on 9.5.2007. Further investigation revealed that 25 gunny bags containing Pukar gutkha was intercepted at Dadar by octroi authorities of Greater Mumbai Municipal Corporation. The said bags containing 6 lakh pouches of Pukar gutkha valued at Rs.6 lakh were seized on 30.30.2007. Further investigation were carried out and statement was recorded. Statement of Shri Rajesh Ranjan Shettia of M/s.Balaji freight carriers was recorded on 1.3.2007. Further statement of Udai Chand Chaurasia, Proprietor of M/s.Udai Traders, Lucknow was recorded on 28.2.2007 who denied that the goods were ever sold by him bearing Pukar brand to anywhere outside Uttar Pradesh. The details of the

entries from various pages such page no.153, 154-156 etc. of the note book recovered from Shri Laxmi Agencies was scrutinized and on the basis of such a scrutiny and on the basis of statement of various persons including Rajendra Yadav, proprietor of M/s.Laxmi and that of Shri Sekhar Sanap an employee of M/s.Laxmi Mumbai. Further investigations were carry out in respect of mobile nos. which was found in the possession of Udai Chand Chourasia and that shri Kailash Sharma, Mumbai. Call logs of mobile number which was found in possession of above stated two persons were obtained from mobile service provides and on the basis of such investigation a show cause notice was issued on 30.9.2010. It was alleged in para 50 of the said show cause notice that DTC had clandestinely cleared 145632000 pouches of Pukar gutkha valued at Rs.14,56,32,000/- during the period from May 2006 to December 2006 and evaded payment of central excise duty of Rs.4,90,19731/-. It was further allege that said number of pouches of Pukar gutkha were manufactured and cleared by DTC without payment of Central Excise Duty by mis-declaring the same as kati supari, mithi supari, saunf, pili patti etc. Therefore through said show cause notice it was proposed as follows. The proposal in the show cause notice contained in para 54-55 are reproduce below:-

> *54. Now, therefore, M/s.Durga Trading Company, Krishna Colony, Khurshid Bagh, Lucknow are hereby required to show cause to the Commissioner, central excise, Lucknow having his office at 7-A, Ashok Marg, Lucknow-226001, within 30 days of the date of the receipt by them of this notice, as to why:*
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> *(a) Central Exicse duty amounting to Rs.4,90,19,731/- (Rs.Four Crores Ninety Lakhs Nineteen Thousand Seven Hundred and Thirty One only) [CENVAT duty Rs.3,64,08,000/-, National Calamity Contingent Duty (NCCD) Rs.72,81,600/-, Additional Duty of Excise (AED) Rs.43,68,960/- and Education Cess Rs.9,61,171/-], as detailed in Annexure A2 to this Notice, should not be demanded and recovered from them under the proviso to section 11 A(1) of the Central Excise*

Act, 1944 and as to why the amout of Rs.1,25,00,000/- (Rupees One Crore and Twenty Five Lakhs only) paid by them during the investigations should not be appropriated against this duty liability;

(b) Interest at the appropriate rates should not be demanded from them under Section 11AB of the Central Excise Act, 1944;

(c) Penalty should not be imposed on them under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rles, 2002 for the contraventions as discussed above;

(d) The excisable goods viz Pukar Gutkha valued at Rs.14,56,32,000/-, manufactured and cleared by them as detailed in Annexure A2 to this Notice, should not be confiscated under Rule 25 of the Central Excise Rules, 2002 on the grounds discussed above. Since these goods are not available for confiscation as they have already been cleared, as to why fine in lieu of confiscation should not be imposed under Section 34 of the Central Excise Act, 1944.

55. Shri Udai Chand Chaurasia, Proprietor, M/s.Udai Traders, Lucknow (Notice No.2), Shri Rajendra Jadhav, Proprietor, M/s.Laxmi Agencies, Mumbai (Noticee No.3), Shri Ashish Srivastava, Authorised Signatory, M/s.Durga Trading Company, Lucknow (Noticee no.4), Shri Alim Ali, Authorised Signatory, M/s.Durga Trading Company, Lucknow (Notice No.5), Shri Hari Mohan Tripathi, Accountant, M/s.Udai Traders, Lucknow (Noticee No.6), Shri Naval Kishore Pandey, Accountant, M/s.Udai Traders, Lucknow (Noticee No.), Shri Jitendra Gandhi, Proprietor, M/s.R.Jayantilal & Co, Mumbai (noticee No.8), Shri Rajesh Kumar Suri, Partner, M/s.Ramjee Agencies, Lucknow (Noticee No.9), Shri Rakesh Chadha, 9, Chadha Bldg, Dr.Ambedkar Road, Matunga, Mumbai (Noticee no.10), Sushant Kamlakar Saha, Proprietor, M/s.KKS Enterprises, Mumbai (Noticee No.11) and Shri Shekhar Sanap, Marketing Supervisor, M/s.Laxmi Agencies, Mumbai (Noticee No.12) are also required to show cause to the said Commissioner as to why penalty should not be imposed on them individually and severally under Rule 26 of the Central Excise Rules, 2002 on the grounds and evidences discussed in the preceding paragraphs.

On contest the above show cause notice was adjudicated through impugned order-in-original.

3. DTC submitted their written defence through letters dated 6.8.2011, 5.9.2011, 11.10.2011, 12.10.2011 and 19.10.2011 before the original authority as recorded in the impugned order-in-original. DTC denied the allegation of clandestinely removal and pleaded that their sales were made at the factory gate. They also stated that in the search conducted on 28.2.2007 at M/s.Laxmi Agencies, nothing incriminatory was recovered to even make out a prime facie case and mere recovery of Pukar brand gutkha may not be an evidence of clearance of gutkha without payment of duty by DTC. They further stated that it was recorded in presence of witnesses that said goods were purchased without cover of any invoice and that it has come out from statement of Shri Rajendra Yadav that he was looking after the affairs of M/s.Laxmi Agencies. The DTC also contended that statements of shri Sushant Kamlakar Saha and Shri Rajesh Shettiar recorded on 1.3.2007 did not prove anything against DTC. DTC also contended that the said show cause notice dated 30.9.2010 was based on assumption and presumption. They further argued that charge of clandestine removal should be supported by some positive evidence and such positive evidence was not present in the said show cause notice. They further contended that on 28.2.2007 during the search of DTC no incriminating documents were recovered and both raw materials and finished goods tallied with the record maintained in the factory. DTC also argued that M/s.Udai Traders as a trader can effect any sale that was their private domain and DTC has no concern with the transactions entered into by Uday Chand Chourasia of M/s.Udai Traders with anybody. They have also contended that nobody has stated to have purchased or received gutkha from DTC. The original authority did not appreciate the submissions made and confirmed the demand of Rs.4,90,19731/-. The order passed by the original authority is reproduced below:-

1. *I confirm the demand of duty amounting to Rs. 4,90,19,731/-(Four crores ninety lakhs nineteen thousands seven hundreds thirty one only) (CENVAT duty Rs. 3,64,08000/ + NCCD Rs. 72,81600/ + AED Rs. 43,68,960/ + Ed Cess Rs. 9,61,171/=) under erstwhile proviso to Section 11 A(1) of the Central Excise Rule 2002 read with the amended Section 11A upon M/s Durga trading Co. Lucknow. The amount of Rs. 1,25,00,000/- deposited by them during investigation is ordered to be appropriated towards the confirm amount. They should also pay interest at the appropriate rated as prescribed under Section 11AB (erstwhile) read with Section 11AA of the Act.*
2. *I also impose of penalty of Rs. 4,90,19,731/- (Four crores ninety lakhs nineteen thousands seven hundred thirty one only) on M/s Durga Trading Company, Lucknow under Section 11 AC of the Act read with rule 25 of the Central Excise Rules, 2002.*
3. *I do not pass any order as regards confiscation of the gutkha valued at Rs. 14,56,32000/- as proposed in the Show Cause Notice as neither the goods were seized, nor provisionally released (cleared clandestinely) or are available for confiscation under Section 25 of the Act. Also, there is no bond etc to that effect.*
4. *I impose a penalty of Rs. 4,90,19,731/- (Four crores ninety lakhs nineteen thousands seven hundreds thirty one only) on Shri Udai Chand Chaurasia, proprietor of M/s Udai Traders under Rule 26 of the Central Excise Rules, 2002.*
5. *I impose a penalty of Rs. 4,90,19,731/- (Four crores ninety lakhs nineteen thousands seven hundreds thirty one only) on Shri Rajendra Daji Jadav of M/s Laxmi Agency under Rule 26 of the Central Excise Rules.*
6. *I impose a penalty of Rs. 4,90,19,731/- (Four crores ninety lakhs nineteen thousands seven hundreds thirty one only) each on Shri Alim Ali & Shri Ashish Shrivastava the authorized signatories of M/s Durga trading Co. Lucknow under Rule 26 of Central Excise Rules, 2002.*
7. *I impose a penalty of Rs. 50,00000/- (Rupees fifty lakhs only) each on Shri Hari Mohan Tripathi and Shri Naval Kishore Pandey the accountants of M/s Udai Traders Lucknow under Rule 26 of Central Excise Rules, 2002.*

8. *I impose a penalty of Rs. 50,00,000/- (Rupees fifty lakhs only) on Shri Shekhar Sanap, Marketing Supervisor of M/s Laxmi Agency under Rule 26 of Central Excise Rules 2002.*
9. *I impose a penalty of Rs. 50,00,000/- (Rupees fifty lakhs only) on Shri Sushant Kamalakar Saha, Tempo Service provider under rule 26 of Central Excise Rules, 2002.*
10. *I impose a penalty of Rs. 50,00000/- (Rupees fifty lakhs only) on Shri Jitendra Gandhi Proprietor, M/s Jayantilal & Co., Mumbai under Rule 26 of Central Excise Rules, 2002.*
11. *I impose a penalty of Rs. 50,00,000/- (Rupees fifty lakhs only) on Shri Rajesh Kumar Suri, Partner, M/s Ramjee Agencies, Lucknow under Rule 26 of Central Excise Rules, 2002.*
12. *I impose a penalty of Rs. 50,00,000/- (Rupees fifty lakhs only) on Shri Rakesh Chadda, Mumbai under Rule 26 of Central Excise Rules, 2002.*

Aggrieved by the said order, appellant is before this Tribunal.

4. Heard the ld.Counsel for DTC, the appellant. He has submitted that Pukar brand gutkha was manufactured by DTC and all the sale was at factory gate on payment of appropriate Central Excise Duty. Further the period covered by present show cause notice is period earlier than the period for which Pan Masala Packing Rules, 2008 were made applicable. During the period of dispute in present appeal i.e. May, 2006 to December, 2006, the duty was to be paid on clearance. He has submitted that the officers searched the factory premises of DTC on 28.02.2007 and they did not find any incriminatory documents at the factory premises and the finished goods and raw materials tallied with the book balances. He has further submitted that DTC has never sold any goods manufactured by them out of Uttar Pradesh. He has further submitted that none of the persons with whom the investigations have carried out have stated that they have purchased Pukar brand gutkha from DTC. He further contended that the entire show cause notice is based on presumption. He has submitted that the entire case is based on third party record which were seized at Mumbai. He has also relied on following case laws

to contend that the show cause notice based on third party evidence is not sustainable. The case laws relied upon by him are as follows:-

1) Rama Shyama Papers Ltd. v. CCE
Reported at 2004 (168) ELT 494 (T)

2) Sakeen Alloys Pvt.Ltd. v. CCE
Reported at 2013 (296) ELT 392 (T)

3) Savitri Concast Ltd. v. CCE
Reported at 2015 (329) ELT 213 (T)

4) Sri Nakoda Ispat Ltd. v. CCE
reported at 2017 (348) ELT 313 (T)

5) Sohna Woolen Mills Pvt.Ltd. v. CCE
Reported at 2016 (340) ELT 613 (T)

6) CCE v. Rajaguru Spinning Mills (P) Ltd.
Reported at 2009 (243) ELT 280 (T)

7) Ritvi Steel & Alloys v. CCE
Reported at 2009 (243) ELT 154 (T)

5. He further submitted that during the period from May 2006 to December 2006 DTC has paid central excise duty of Rs.5,24,99,513/- and the demand for the same period in the said show cause notice dated 30.9.2010 was for Rs.4,90,19,731/-. He also submitted month wise duty payment particulars for each month from the month of April 0206 to December 2006 and interim order No.1/2018 dated 12.1.2018 was passed through which revenue was requested to confirm duty payment particulars paid by DTC on Pukar brand gutkha for each months for the months of April 2006 to December 2006. Revenue through their letter C.No.V-78/R/CESTAT/LKO/2018 dated 8.3.2018 confirmed that the duty particulars stated in the said interim order were paid by DTC as verified from ACES.

6. He has further contended that during the period involved in the present show cause notice DTC paid central excise duty of Rs.5,24,99513/- and demand of central excise duty in the present proceedings is Rs.4,90,19731/-. He has further submitted that in the entire proceedings it was not established that the goods on which duty of Rs.5,24,99513/- was paid were not the goods

on which central excise duty of Rs.4,90,19731/- was demanded. He has contended that DTC cleared goods on payment of duty at the factory. After the goods are cleared at factory who deals with those goods in what manner is beyond the control of DTC.

7. Heard Shri Anil Balani, Advocate for Shri Jitendra Gandhi, Appellant.

8. Heard the ld.AR who has submitted that Pukar brand gutkha was seized in Mumbai not only by officers of central excise, but also by officers of Mumbai Municipal Corporation, who administer local tax octroi. Further Ld.AR has supported the findings of the Commissioner in the impugned order-in-original.

9. Having considered the rival contentions and on perusal of records I find force in the contention of ld.Counsel for appellant DTC that throughout the entire proceedings of the present case revenue has nowhere established that the goods on which duty of Rs.5,24,99513/- was paid on Pukar brand gutkha for the period from May 2006 to December 2006 were different than the goods on which duty of Rs.4,90,19731/- was confirmed in the present proceedings. There is force in the argument of counsel for DTC that once the goods are cleared on payment of duty at the factory gate they have no control over the goods and purchaser of goods is free to deal with them in any manner he likes. We also find that Revenue has not carried out any investigation in respect of the goods on which duty of Rs.5,24,99513/- was paid. Revenue have not conducted investigation and proved that the goods on which duty was paid were different than the goods on which demand was raised through the present show cause notice. In the absence of any such investigation it cannot be conclusively proved that the goods on which central excise duty of Rs.4,90,19,731 was demanded were not the goods on which duty of Rs.5,24,99513/- was paid during the period from May 2006 to December 2007. Therefore allegations made in the show cause notice dated

30.9.10 are not sustainable. We therefore set aside the impugned order and allow following appeals:

Appeal No.E/2080/2012, E/2081, 82, 83, 84, 85, 86/2012, E/222/2012, E/2223, 2261, 2313/2012. Further since the confirmation of demand could not sustain we dismiss appeal filed by the Revenue bearing NO.E/2087/2012. DTC and co-noticee appellants are entitled for consequential relief, as per law.

(Dictated and pronounced in the court.)

SD/	SD/
(ANIL CHOUDHARY)	**(ANIL G. SHAKKARWAR)**
MEMBER (JUDICIAL)	**MEMBER(TECHNICAL)**

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