IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL Nos.E/57307 & 57308/2013-EX[DB]

(Arising out of Order-in-Original No. 02-CE/COMMR/2013 dated 30/01/2013 passed by Commissioner of Central Excise & Service Tax, Kanpur)

Shri Radhey Shyam Gupta &

M/s Radhey Shyam and Sons **Appellants**

Vs.

Commissioner of Central Excise & S.T., Kanpur **Respondent**

<u>Appearance:</u>

Shri Rupesh Kumar & Shri Jitin Singhal, Advocates for Appellant
Shri Mohammad Altaf, Assistant Commissioner (AR), for Respondent

<u>CORAM:</u>

Hon'ble Smt. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 10/09/2018
Date of Pronouncement : 30/10/2018

FINAL ORDER NO-**72526-72527 / 2018**

Per: Anil G. Shakkarwar

The above stated two appeals are taken up together for decision since they are directed against common impugned Order-in-Original No. 02-CE/COMMR/2013 dated 30/01/2013 passed by Commissioner of Central Excise & Service Tax, Kanpur.

2. The brief facts of the case are that M/s Radhey Shyam and Sons (hereinafter referred to as manufacturer-appellant) were engaged in the manufacture of Pan Masala containing tobacco which is commonly known as Gutkha falling under Tariff Item No.24039990 of First Schedule to Central Excise Tariff Act, 1985 under the brand name "VIKAS" and "SIMOGA" allegedly with the help of two pouch packing machines (FFS) from some part of the premises no.130/1309, Bagahi, Kanpur. The officers of Central Excise Intelligence conducted a search of the premises situated at 130/1309, Bagahi, Kanpur on 29.10.2009. It was found that the said premises consisted a big compound having various separate doors or shutters at the periphery. The shutters facing the main road were shops, selling various miscellaneous commodities, while the other doors, facing the side lanes, were leading to independent halls. In some part of the said premises the Central Excise officers found that Two FFS machines were installed. Therefore, investigations were conducted and various statements were recorded. Further, physical stock taking of raw material and loose gutkha valued at Rs. 87,910/- was found lying at the premises where the said two FFS machines were found installed. The search of other two halls situated near the registered premises of manufacturer-appellant resulted in detection of raw

materials and packing materials of "VIKAS" and "SIMOGA" brand gutkha. The other materials that were found were Supari Cutter, drier machines, electric heater, hand channa etc. valued at Rs.5.5 lakhs approx. No documentary evidences or records were maintained in the premises where 2 FFS machines were found to be installed. During the course of investigation various statements were recorded, which are as follows:-

a) Statement dated 29.10.2009 of Shri Ashish Gupta, Supervisor of the manufacturer-appellant.

b) Statement dated 29.10.2009 of Shri Rajeev Gupta, Proprietor of the manufacturer-appellant.

c) Two statements dated 29.10.2009 & 02.12.2009 of Shri Har Narayan Gupta, partner of M/s Anandeshwer Enterprises, which was also branding through some part of the same premises at 130/1309, Bagahi, Kanpur.

d) Two statements dated 31.10.2009 and 02.12.2009 of Shri Sharad Gupta, proprietor of M/s Gaurav Enterprises, who was also owned house some part of the same premises 130/1309, Bagahi, Kanpur.

e) Two statements dated 29.10.2009 and 30.10.2009 of Shri Ajay jaiswal, Partner of M/s A.G. Engineering Works.

f) Statement dated 03.11.2009 of Shri Arpit Jain, Director of M/s Shree Bhawani Prints & Laminates Pvt. Ltd.

g) Two statements dated 09.03.2010 and 04.06.2010 of Shri Vikas Agarwal, Partner of M/s Shubh Multipack.

h) Statement dated 13.11.2009 of Shri Dilip Kumar Malu, Manager of M/s Aman Marketing (supplier of tobacco).

In his statement dated 29.10.2009 Shri Rajeev Gupta admitted that they were manufacturing Gutkha with "VIKAS" brand and that they were having two paddle sealing machines in their premises and that gutkha mixed was manually filled in the pouches and sealed with the aid of said paddle sealing machines. During the further investigations revenue came to know that in some part of the same premises two other business entities were working by name M/s Anandeshwer Enterprises and M/s Gaurav Enterprises. Shri Har Narayan Gupta was partner of M/s Anandeshwer Enterprises and Shri Sharad Gupta was proprietor of M/s Gaurav Enterprises. Both Shri Har Narayan Gupta and Shri Sharad Gupta through their statements stated that they were tenants of the same premises at 130/1309, Bagahi, Kanpur. Inquiry was also conducted at the end of manufacturers of FFS machines. It appeared to revenue that the said machines were manufactured by M/s A.G. Engineering Works and statement of partner of said Engineering Works Shri Ajay Jaiswal was also recorded. On the bases of the said statements and investigations, it appeared to revenue that two undeclared FFS machines found installed in some part of the same premises were installed by the manufacturer-appellant and the same were in operation since 1st July, 2008. By restoring to the provisions of Rule 17 of Pan Masala Packing Machines (Capacity Determination and Collection of duty) Rules, 2008 (hereinafter referred to as said Rule, 2008). It also appeared to revenue that manufacturer-appellant were liable to pay Central Excise duty on said two pouch packing machines for the period from 1st July, 2008 to October, 2009. It further appeared to revenue that per machine per month duty liability was to be fixed at Rs.12.5 lakhs in terms of Notification No.42/2008-CE dated 01.07.2008 since the MRP of Gutkha was Rs.1. Therefore, it appeared to revenue that from 1st July, 2008 to October, 2009, duty liability worked out to Rs.4 crores. Therefore, through show cause notice dated 08.02.2011 manufacturer-appellant were called upon to show cause as to why Central Excise duty of Rs.4 crores should not be demanded from them under first proviso to Sub-section (1) of Section 11A of Central Excise Act, 1944. The other appellant was proposed to be imposed with personal penalty.

3. The manufacturer-appellant submitted before the Original authority that w.e.f. 08.09.2008 they started manufacture Pan Masala (Gutkha) using hand operated Packing Machine under intimation to the Range Superintendent and continued the same till November, 2008 and stopped production w.e.f. 01.12.2008 due to economic crises and intimated the same to the Jurisdictional Assistant Commissioner through letter dated 01.12.2008. They further submitted that on the date of search the factory was closed and the officers broke open the doors of the factory and conducted eye estimation of stocks and without comparing it with the recorded balance seized the entire material. They further submitted that the officers found two paddle operated pouch packing machines in conformity with their intimation to the department. They further contended that there were two more Central Excise registered manufacturing units in the same premises having address at 130/1309 Bagahi, Kanpur namely M/s Gaurav Enterprises unit no.2, for manufacture of pan samagri and the other was M/s Shree Anandeshwar Enterprises, for manufacture of preparation containing tobacco but not containing lime and catechu. The manufacturer-appellant contended before the Original authority that the officers conducted search of the said two units and later treated the said two FFS machines found in said two manufacturing premises as undeclared machines purchased by the manufacturer-appellant. They further

submitted that officers noticed one pouch packing machine in each of said two premises, allegedly mounted with laminated rolls of VIKAS Brand Gutkha and certain raw materials and that officers taken photographs of the machines found in the said premises and slapped the ownership of the premises along with raw materials to the manufacturer-appellant, projecting the premises as unregistered premises of manufacturer-appellant and fastened the duty liability on the same. They further submitted that the registered premises of manufacturer-appellant was a part of house compound bearing no.130/1309, Bagahi, Kanpur. Before the Original authority they submitted the ground plan of the entire premises and marked the premises occupied by them in red color. They further submitted that hall no.1 and 5 in the map was premises other than occupied by manufacturer-appellant and hall no.1 and 5 was occupied by Shri Sharad Gupta, Proprietor of M/s Gaurav Enterprises and hall no.2, 3 & 4 were occupied by Shri Har Narain Gupta proprietor of M/s Shiv Shivansh Enterprises and that Shri Har Narain Gupta was partner of M/s Shree Anandeshwar Enterprises. They therefore, contended that the premises from where two FFS machines were found by DGCEI Officers were not the premises occupied by them and, therefore, they were not liable to pay Central Excise duty demanded. The Original authority did not appreciate the contentions of the manufacturer-appellant and confirmed the demand with equal penalty and also ordered to pay interest. The Original authority also imposed a personal penalty of Rs.50 lakhs on the other appellant under provisions of Rule 26 of Central Excise Rules, 2002. Aggrieved by the said order appellants are before this Tribunal.

4. Heard the learned Advocates Shri Rupesh Kumar along with Shri Jitin Singhal appearing on behalf of the appellant. The learned Advocates have made following submissions:-

I. The entire demand is based on the invocation of explanation to Rule 18A with Rule 17 (2) of said Rule, 2008 and the said provisions are not applicable in the present case.

II. The two pouch packing machines as well as the premises under they were found did not belong to the manufacturer-appellant.

III. Hall No.1 belonged to M/s Gaurav Enterprises and Hall No.2 belonged to M/s Anandeshwar Enterprises.

IV. Shri Ajay Jaiswal, Partner of M/s A.G. Engineering Works stated that he had never repaired or supplied FFS Machine to the manufacturer-appellant and that he had supplied machines to M/s Gaurav Enterprises and also submitted copy of relevant invoices.

V. The Commissioner had denied the cross examination of both Shri Shri Har Narayan Gupta partner of M/s Anandeshwer Enterprises and Shri Sarad Gupta and their statement dated 29.10.2009 and 02.12.2009 of Shri Har Narayan Gupta and statement dated 31.10.2009 and 02.12.2009 of Shri Sarad Gupta are not reliable evidences. The learned Counsel relied upon the ruling of Hon'ble Supreme Court in the case of Andaman Timber Industries Vs Commissioner of Central Excise, Kolkata reported at 2015 (324) ELT 641 (SC).

VI. Without establishing leave between the appellants as well as two pouch packing machines no reliance can be placed on the statement of lamination supplier Shri Arpit Jain and Shri Vikas Agrawal as well as Supplier Shri Dilip Kumar, since cross examination was denied and neither there was any recovery of finished goods like VIKAS Brand Gutkha nor any such recovery from the market to establish that the appellants were engaged in the manufacture and clearance of such goods.

VII. He has further taken us through affidavit of Shri Rajendra Singh, landlord of the premises verified on 08.12.2010 available at page no.296 of appeal paper book. The learned Counsel submitted that through the said affidavit the landlord of the premises of 130/1309, Bagahi, Kanpur had submitted that premises in which one FFS Machine was found was rented to Shri Har Narayan Gupta who was partner of M/s Anandeshwer Enterprises and the other premises in which another FFS Machine was found was rented to Shri Gaurav Enterprises. The learned Counsel further brought our attention to other affidavits available at page no.298 to 332 filed by Shri Ashok Kumar Omar who was running General Store from the same premises, Shri Rajesh Jain, who was running Kirana Shop from the same premises and Shri Vinod Soni and Shri Ravi Shankar Soni, who were running Mechanical Shops in front of the same premises confirming that the premises where the FFS machines were found were under the possession of M/s Gaurav Enterprises and M/s Anandeshwer Enterprises.

5. Learned A.R. for revenue has relied on the finding by learned Commissioner.

6. Having considered the submissions from both the sides and on perusal of records and the various affidavits placed before us, we find that the premises which were rented out to

the manufacturer-appellant were not the premises where two pouch packing machines were found by the officers. On the basis of various submissions made by the learned Counsel for appellant we find that the two pouch packing machines were found in the premises rented out to M/s Gaurav Enterprises and M/s Anandeshwer Enterprises. Further, revenue could not establish any evidence to establish manufacture of Gutkha by the appellant and could not establish clearance of the same and therefore, invoking Sub-rule 2 of Rule 17 of said Rules, 2008 for fastening liability on the manufacturer-appellant from 1st July, 2008 is not tenable in law. We find that it is provided in explanation to Rule 18 of the said Rule, 2008 that the goods shall be held to be manufactured with the aid of packing machines if they are cleared from the factory where the pouch packing machine are found installed. We find that the said provisions are not invokable in the present case, because revenue could not establish beyond doubt that the premises which was under the control of the manufacturer-appellant through rent agreement were the premises in which two pouch packing machines were found. We further find that the contention of learned Counsel for appellant that the statements are not relied upon documents where the cross examination has been denied. We, therefore, hold that the impugned Order-in-Original is not sustainable.

7. We, therefore, set aside the impugned order and allow both the appeals. The appellants shall be entitled for consequential relief, as per law.

(Pronounced in Court on-30/10/2018)

(Anil G. Shakkarwar)
Member (Technical)

(Archana Wadhwa)
Member (Judicial)

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