CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
OLD RED BUILDING, 38, M.G.MARG, CIVIL LINE, ALLAHABAD-211001
REGIONAL BENCH, ALLAHABAD

DIVISION BENCH
Court-I
Appeal No.E/70443/2016 and

(Arising out of OIA No.364/CE/Appl/LKO/15 dt.15.9.2015 passed by the CCE (Appeals), Lucknow)

E/70118/2018-EX (DB)
(Arising out of OIO No.LKO/EXCUS/000/COM/EX/049/2017-18 dt.9.11.2017 dt.15.9.2015 passed by the Commissioner, Central GST, Lucknow)

Date of hearing:27.12.2018

Date of Decision:16.01.2019

Durga Trading Company **Appellant**
Vs.
CCE & ST, Lucknow **Respondent**

Present for the Appellant:Sh.Bipin Garg& Amit Awasthi, Advocates
Present for the Respondent: Shri Shiv Pratap Singh, AR

Coram: Hon’ble Mr. Ashok Jindal, Member (Judicial)
Hon’bleMr.AnilG.Shakkarwar, Member (Technical)

FINAL ORDER NO-70064-70065 / 2019

PER: ASHOK JINDAL

The appellant has filed these two appeals against impugned orders.

2. As both the appeals are arising out of a common issue, therefore, both the appeals are decided by a common order.

3. The facts of the case are that the appellant is registered with the Central Excise department and manufacturing the following products:-

(i) Pan Masala

(ii) Branded Chewing Tobacco (BCT)

(iii) Jarda Scented Tobacco. (JST)

The appellant was paying duty in terms of Notification No.16/10-CE dt.27.2.2010 on BCT and filing regular ER-1 return by classifying their product under heading 24039910 of Central Excise Tariff Act,1985. On 1st March, 2015, Notification No.16/15-CE was amended by Notification No.5/15-CE dt.1.3.2015 wherein the rate of duty on BCT was enhanced to Rs.38.64 lakh per machine per month and duty on JST was fixed to Rs.27.05 lakh per machine per month. Due to change of duty structure, the appellant filed declaration under Rule 6 of Chewing Tobacco Rules in Form-I on 2.3.2015 with effect from 1.3.2015, declaring their product as JST. The Assistant Commissioner vide order ddt.4.3.2015 after taking the facts into account re-determined annual capacity of the appellant holding that the appellant is not manufacturing JST and their product is only BCT. The said order was accepted by the appellant and started paying duty in terms of order of the Assistant Commissioner dt.4.3.2015.

4. Further, vide Notification No.25/15-CE dt.30.4.2015, Notification No.16/10-CE was amended wherein the rate of duty on JST was enhanced from Rs.27.05 lakh to Rs.82.11 per machine per month. The appellant continued to paying duty by classifying their product as BCT but the order of the Assistant Commissioner dt.4.3.2015 was challenged by the Revenue after May, 2015 before the Commissioner (Appeals) who vide impugned order dt.11.5.2015 allowed the appeal filed by the department holding that the product

manufactured by the appellant is JST and not BCT and against the said order, the appellant has filed Appeal No.E/70443/2016. Consequent to the order of the Commissioner (Appeals), the show cause notice dt.12.1.2017 was issued to the appellant to demand duty holding their product as JST and the impugned demand has been confirmed against the appellant and penalty is also imposed on them. Against the said order also, the appellant is in appeal. Hence, these are interconnected appeals to be decided by this Tribunal.

5. Ld. Counsel for the appellant submits that initially the appellant tried to take benefit under Notification No.5/15-CE dt.1.3.3015 and filed declaration by showing that as they are manufacturing JST but the adjudicating authority held that the appellant has filed the said declaration under the guise of reduced rate of duty on JST. In fact, the appellant has manufactured BCT only. The said order of the adjudicating authority dt.4.3.2015 was accepted by the appellant and paid duty accordingly. Till 30.4.2015, there was no dispute. The dispute arose after 1.5.2015 when the Notification No.25/15-CE came into force wherein the rate of duty on JST was enhanced and the order dt.4.3.2015 was reviewed on 27.5.2015, thereafter the appeal was filed before the Commissioner (Appeals) without examining the samples that whether the product is JST or BCT. In fact, at the time of filing the declaration, no sample was drawn by the department and there is no test report is available on record. Therefore, in that circumstance, the product of the appellant cannot be known and

when the appellant themselves has admitted that they are manufacturing BCT and started paying duty as per order dt.4.3.2015, in that circumstance, the Commissioner (Appeals) cannot change classification without examining the samples and test report available on record. The impugned order has been passed on assumption and presumption holding that the appellant has filed correct declaration on 2.3.2015 which is without basis. Therefore, the impugned order is to be set aside.

6. He further submits that in other proceedings in the appellant's own case wherein the classification was changed from BCT to JST, the Commissioner (Appeals) held that in terms of declaration made in Rule 6 of Chewing Tobacco and Unmanufactured Tobacco Packing Machine (Capacity Determination and Collection of Duty) Rules, 2010, the classification cannot be changed from BCT to JST. Therefore, the Commissioner (Appeals) classifying their product as JST is to be set aside. Consequently, the demand of duty is not sustainable against the appellant.

7. The arguments advanced by Ld. Counsel was opposed by the Ld.AR, who submitted that the Commissioner (Appeals) has examined the issue and held that the product JST has been declared by the appellant in their declaration dt.2.3.2015. He further submits that authorized representative of the appellant has admitted their product Pukar Zarda 55 is consumed by mixing with pan masala and is not consumed independently. Thus, the mode of consumption of the said tobacco product is in harmony with the common accepted practice of Jarda consumers. Further, selling of

Jarda in the garb of chewing tobacco also can tantamount to violation of consumer rights which will be an illegal trade practice. Therefore, the product manufactured by the appellant is only JST.

8. Heard the parties and considered the submissions.

9. On careful consideration of the submissions made by both sides, we find that the following facts are in dispute:-

The appellant was manufacturing BCT and was paying duty thereon and filing their ER-1 returns declaring their product under heading 24039910 of Central Excise Tariff Act. The dispute arose in terms of Notification No.5/15-CE dt.1.3.2015. In terms of the said notification, the rate of duty of JST was reduced and to take the benefit of reduced duty, the appellant filed declaration under Rule 6 of the Rules declaring their product as JST dt.2.3.2015 without evidence. The said declaration was examined by the adjudicating authority, who held vide order dt.4.3.2015 that the product is BCT and not JST and the order of the adjudicating authority has been accepted by the appellant and the appellant started paying duty on BCT and was filing regular ER-1 return by classifying their product under heading 24039910 of CETA. On 30.4.2015, another notification came into force i.e. 25/15-CE wherein the rate of duty was enhanced on JST. At that time, the issue was raised whether the product manufactured by the appellant is BCT or JST and the order dt.4.3.2015 was reviewed. The said order was challenged before the Commissioner (Appeals) who held that the declaration filed by the appellant is correct. It is also admitted fact that no sample at any stage was drawn to find out composition of the product manufactured by the appellant and everything was going on the basis of declaration and ER-1 returns filed by the appellant to classify the product. To find out the composition of the product, the samples are required to be drawn and test report is essential to classify the product. Admittedly, in this case, no sample was drawn to find out the composition of the product, in that circumstance, we hold that the classification determined by both the sides are on assumptions and presumptions. Although the appellant filed declaration on 2.3.2015 and changed their classification from BCT to JST. The said declaration was rejected by the adjudicating on 4.3.2015, which has been accepted by the appellant and started paying duty on BCT of their product from 1.3.2015. In that circumstance, the benefit of doubt goes in favour of the appellant. The order of the adjudicating authority was reviewed only after introduction of Notification No.25/15-CE dt.30.4.2015 wherein the duty on JST was enhanced and prior to that period, the duty paid by the appellant on BCT was accepted by the Revenue has not objected the classification during the period 1.3.2015 to 30.4.2015 as BCT. Further, no declaration was filed by the appellant, therefore, the change of classification from 30.4.2015 is not acceptable, if the said notification would not have come into force, in that circumstance, the order of the adjudicating authority would not have reviewed. The classification of the product cannot be done on the basis of assumptions and presumptions. In the facts and circumstances of the case, we hold that the declaration decided by the adjudicating authority on 4.3.2015 (which has been accepted by the appellant) is correct classification. Therefore, by giving the benefit of doubt to the appellant, we hold that in the absence of test report of the sample of the product in question, the classification of as BCT in terms of the order dt.4.3.2015 under heading 24039910 is correct. In these terms, the order of the Commissioner (Appeals) is set aside. Consequently, the appeal No.E/70443/2016 is allowed.

10. As we are holding the classification of the product is as BCT under heading 24039910 of CETA, therefore, the duty against the appellant is not sustainable, therefore, the demand of duty is set aside. In that circumstance, the appeal No.E/70118/2018 is also allowed.

11. In the result, after setting aside the impugned orders, we allow the appeals filed by the appellant with consequential relief.

(Pronounced in the court on -16.01.2019)

SD/-	SD/-
(ANIL G.SHAKKARWAR) **MEMBER (TECHNICAL)**	**(ASHOK JINDAL)** **MEMBER (JUDICIAL)**

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