FAX : 0532-2400149 REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 09/03/2017

To

. Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70264/2017-SM[BR] dated 06/03/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar

| Application | Appeal | Name and Address of Appellant |
|---|---|---|
| 1 | E/161/2010 | SOM AROMATICS<br>B-71, Sector-64, Noida |

Name and Address of Respondent

2 -C.C.E. NOIDA
C-56/42, Sector-62, Noida-201307

Copy To

3Advocate(s) / Consultant(s):

S. Jaina & Associates
84, DARYA GANJ,
NEW DELHI,
DELHI

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise, I.P. Estate, Delhi

6 M/s Cemax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

12 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

13 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar

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

APPEAL No. E/161/2010-EX[SM]

(Arising out of Order-in-Appeal No. 299 to 301-CE/APPL/NOIDA/2009 dated 30/10/2009 passed by Commissioner of Central Excise & Customs (Appeals), Noida)

For approval and signature:

Hon'ble Mr. Anil Choudhary, Member (Judicial)

| | | |
|---|---|---|
| 1. | Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? | No |
| 2. | Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? | Yes |
| 3. | Whether their Lordships wish to see the fair copy of the order? | Seen |
| 4. | Whether order is to be circulated to the Department Authorities? | Yes |

M/s Som Aromatics — Appellant

Vs.

Commissioner of Central Excise, Noida. — Respondent

Appearance:

Shri R.K. Tewari, Advocated — for Appellant
Shri P.K. Singh, Superintendent (AR). — for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)

Date of Hearing & Date of Decision: 09/12/2016

FINAL ORDER NO....70264/2017.........

**Per: Anil Choudhary**

The present appeal is filed by the appellant, M/s Som Aromatics Order-in-Appeal No. 299 to 301/CE/APPL/NOIDA/2009 dated 30/10/2009 passed by Commissioner of Central Excise & Customs (Appeals), Noida.

2. The issue in this appeal by the appellant-assessee, engaged in manufacturer of Pan Masala & Gutkaha – falling under chapter 24 of the Central Excise Tariff Act, 1985, the fact that the appellant-assessee was under normal levy scheme under Section 3 of the Act, whether Revenue could have estimated clandestine production on the basis of some information that the appellant was operating their factory for about 12 hours instead of the stated 10 hours in the declaration and accordingly could have estimated the production or excess production during the additional 110 minutes and accordingly demand duty on the same.

3. The brief facts of the case are that the appellant-assessee are engaged in manufacture of Pan Masala & Gutkha, was paying tax under the provisions of Section 3 of the Act, based on actual production. In terms of Circular No. 854/12/2007/CX dated 7/09/2007, the appellant submitted a declaration to the Revenue dated 11/09/2007, stating that the total number of 81 pouch machines are installed in the factory premises, out of which 48 are running and remaining machines may be sealed. Average number of pouches produced by each machine is approximately 4800 pouch per

hour which were vary (+/- 10%) depending on speed. Generally, they run one shift from 9 a.m. to 7 p.m. (10 hours) including one hour of lunch break. The factory was closed on Sunday as weekly off. Thereafter, an inspection by Revenue took place in the factory premises at 8 p.m. on 18/10/2007. As per, Panchnama, dated 18/10/2007, it was seen that the factory was running in full swing and 48 packing and sealing machines where in operation. The Labour Supervisor, Shri Anandi Prasad, was available at the spot and his statement was recorded, who stated that they run the factory from 8 hours to 20 hours everyday and on the date of inspection the production was started at 8:30 hours. As per physical verification made stock of Gutkha was 61 running bags of 308 Polly pouches containing 55 pouches of MRP and 51 running bags of 308 Polly pouches containing 55 pouches of Rs.1 MRP. Accordingly, Revenue concluded that the factory was running and manufacturing for 110 minutes more each day, then their declared number of working hours. Accordingly, on the basis of production capacity as stated, it was estimated that the appellant is manufacturing 70 pouches per minute and multiplied with 110 minutes for 48 machines, worked out extra production and/or clandestine production at 3,69,600 pouches per day. On such calculation of clandestine manufacture, the Revenue formed reasonable belief that the goods manufactured in the extra time, that is 3,69,600 pouches of Gutkha bearing Rs. 1 MRP, valued at

Rs.3,69,600 were meant for surreptitious removal without payment of duty and the same was detained under seizure memo dated 28/03/ 2008. Subsequently, Show Cause Notice, dated 03/04/2008, was issued on the aforementioned allegations, among others, and it further appeared that the appellant were producing excess goods by operating for extra 90 minutes daily for the last one month except Sunday in contravention of Circular No. 854/12/2007/CX, dated 07/09/2007, issued by CBEC and Trade Notice No. 6 of 2007 dated 07/09/2007, issued by the Commissioner of Central Excise, Noida. Accordingly, production for one month prior to that date of visit was estimated for 26 working days or (3,69,600 x 26 pouches) valued at Rs.78,62,400/- involving excise duty of Rs.26,72,430/-. Accordingly, the appellant was required to show cause as to why the stock of 3,69,600 pouches of MRP Rs.1, vide seizure memo, dated 28/03/2008, be not confiscated and further why not duty of Rs.26,72,430/- be not demanded and recovered along with interest and further penalty was also proposed. The Show Cause Notice was adjudicated on contest vide Order-in-Original, dated 19/03/2009, confiscating the seized pouches with option to redeem by paying fine of Rs.1,75,000/- and confirming duty of Rs.26,72,430/- with interest and further penalty of Rs.30,42,030/- was imposed under Rule 25 of Central Excise Rules, 2002 read with 11AC of the Central Excise Act, 1944. Further penalty Rs. 1 lakh was imposed on each of the partners and Shri Atul Kumar Agarwal. Being aggrieved the appellant and its partners preferred appeal before ld. Commissioner (Appeals) who vide the impugned order observed that the demand has been concluded for a period of one month - 26 days, which is on the basis of actual position of stocks and operation of machines, beyond the declared duration. Further observing that the appellant-assessee have not contested the panchnama and further placed an affidavit of Shri Anandi Prasad - Labour Supervisor, his statement was recorded at the time of inspection observing that the affidavit dated 19/02/2009, which is much after the issue of Show Cause Notice on 03/04/2008 and accordingly the same was held to be not reliable. Both the demand and the penalty on the firm was confirmed, but the penalty on the partners was deleted being uncalled for.

4. Being aggrieved the appellant firm is before this Tribunal. The ld. Counsel for the appellant have urged that at the relevant time there was no scheme of compounded levy on the manufacture and clearance of Pan Masala "Gutkha". Further the Revenue have not found any discrepancy as is evident from the facts narrated in the show cause notice, in the stock records and/or statutory records with the physical stock found. Only on the basis of wild guess work that the appellant have manufactured or being manufactured, fixing extra quantity of Pan Masala "Gutkha" clandestinely, the

demand have been raised, which being without any basis and beyond the scheme of the act and the rules, is fit to be set aside. He, further, stated that Circular No. 854/12/2007/CX, dated 07/09/2007 issued under Rule 31 of Central Excise Rules, 2002 was only for the purpose of Revenue to gather information from the appellant-assessee(s) regarding number of machines installed and being operated, speed of the machines and/or estimated production per machine per hour, quantity packed in each pouch, etc. The said circular under Rule 31 of Central Excise Rules, 2002 did not bring into existence any compounded levy scheme and the whole show cause notice is misconceived, as the demand have been raised as if the compounded levy scheme was in force. He also urges that soon after September Revenue vide Notification No. 38/2007 under powers conferred under Rule 15 of Central Excise Rules, 2002 came out with a compounded levy scheme on optional basis. This also proves and establishes that no compounded levy scheme was invoked during the period prior to 19/12/2007. Accordingly, the show cause is wholly misconceived, without any basis and the impugned demand is fit to be set aside along with penalty.

5. The ld. A.R. relies on the impugned order and takes me through the Panchnama and seizure memo and reiterates the findings in the impugned order.

6. Having considered the rival contentions, I find that the whole demand have been raised by way of wild guesswork.

The show cause notice does not disclose finding of any excess stock, than declared stock in the statutory records. The whole demand has been raised on the basis of estimated extra minutes of production per day, which is beyond the scope of the scheme of Act and the Rules. Accordingly, I set aside the impugned order and allow the appeal. The appellant will be entitled to consequential benefits, if any, in accordance with law.

(Dictated and pronounced in Court)

-Sd/-
(ANIL CHOUDHARY)
Member (JUDICIAL)

*Ansari*

प्रमाणित प्रति / Certified True Copy
14/03/17
सहायक रजिस्ट्रार / Asstt. Registrar
सीमा शुल्क, उत्पाद शुल्क एवं सेवा कर अपील अधिकरण / C.E.S.T.A.T.
नई दिल्ली / New Delhi 110001