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: 09/06/2017

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70540/2017-EX[DB] dated 18/05/2017

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/200/2011	**DURGA TRADING COMPANY,** KRISHNA COLONY, KHUSRSHED BAGH, LUCKNOW.
		Name and Address of Respondent
2		-C.C.E. LUCKNOW 7-A, Ashok Marg, Lucknow.

Copy To

3Advocate(s) / Consultant(s):

Amit Awasthi
H-1, IST FLOOR, RADHEY APPARTMENT,
PLOT NO. 7/116A, SWAROOP NAGAR,
KANPUR,
UTTAR PRADESH
208002

4 Bar Association, CESTAT, Allahabad

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

6 M/s Centax 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/200/2011-EX[DB]

(Arising out of Order-in-Original No. 34/Commr/LKO/2010 dated 22/10/2010 passed by Commissioner of Central Excise, Lucknow)

M/s Durga Trading Company **Appellant**

Vs.

Commissioner of Central Excise, Lucknow **Respondent**

Appearance:

Shri Amit Awasthi, Advocate for Appellant
Shri Rajeev Ranjan, Joint Commissioner (AR), for Respondent

CORAM:

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

Date of Hearing : 18/05/2017
Date of Decision : 18/05/2017

FINAL ORDER NO. 70540/2017

Per: Anil Choudhary

The appellant, a manufacturer of Pan Masala/Gutkha is in appeal against Order-in-Original No. 34/Commr/LKO/2010 dated 22/10/2010 passed by Commissioner of Central Excise, Lucknow, whereby duty has been demanded of Rs.3,25,00,000/- with interest under Section 11 (1) of the Act.

2. The brief facts of the case are that upon introduction of the Pan Masala Packaging Machines (Determination of capacity and collection of duty) Rules, 2008 (hereinafter referred to as the Rules,

2008), with effect from 01.07.2008 the appellant who was an existing manufacturer of Pan Masala and Gutkha, was having 48, packing machines available in their factory. Further, admitted facts are that 4 packing machines were lying sealed prior to 01/07/2008. Out of the balanced 44 machines, the appellant applied for sealing of 26 machines on 02/07/2008, which were duly sealed by the Central excise authorities on 03/07/2008 at 9:30 AM. The appellant filed the requisite declaration in form-1, under the said rules on 10th July 2008 within the time permitted, declaring that they intend to operate 18 packing machines having speed of 125 pouches per Minute of MRP Rs. 1 each. In response to which an order dated 17/07/2008 was passed determining the 'Annual Capacity of Production' for 48, packing machines. The said order further says, after making necessary inquiry including physical verification against the declaration, the following have been observed:-

Sl. No.	Description of the goods to be manufactured and their Brand names	Retail Sale Price of the Pouches	Number of Single track packing machine available in his factory	Number of packing machines out of (4) which are installed in his factory	Number of packing machines out of (5) which he intends to operate in his factory for Production of the notified Goods	Maximum Speed of the packing machines at which they can be operated for packing of the notified goods of various retail sale price
1	2	3	4	5	6	7
1	Gutkha & Pan Masala Brand-Pukar	Re.1.00	48 (on 02.07.2008)	48 (on 02.07.2008)	44 (on 02.07.2008)	140 Pouches per minute

on receiving the said order, the appellant immediately filed a representation on 24th July, 2008 stating that the said order is prima facie wrong, stating therein that as per the said rules under Notification No. 48/2008–CE the Government specified duty on Pan Masala and Gutkha respectively under Section 3A of the Act. The Government notified rate of duty per packing machine per month in respect of Pan Masala & Gutkha, and for determining the rate of duty in addition to the number of machine, the factor determining the rate of duty was the Retail Sale Price (RSP). The said Notification further specified the factors for computation of duty payable on the goods and further specified that the number of packing machines for the purpose of computation of the amount of excise duty, specified in terms of the Rules, 2008. It was also brought to notice that in response to the appellants request dated 02/07/2008, 26 packing machines were sealed on 03/07/2008. It was further urged that pursuant to physical verification and supervision of the sealing and uninstalling of the machines done on 03/07/2008, a copy of which report was also sent by fax, duly acknowledged and pursuant to the sealing, the number of operating packing machines in the factory were 18, that is 16 for Gutkha and two for Pan Masala all having MRP not exceeding Rs. 1. Accordingly, it was also urged to rectify the order dated 17/07/2008, determining the 'Annual Capacity Production' along with monthly duty liability taking into consideration, the facts available on record.

3. Thereafter, it appears, the revenue slept over the matter for some time without acting on the said re-presentation or the objection

dated 24/07/2008, and issued show cause notice dated 07/08/2009, that is after almost one year, alleging therein that the appellant had filed declaration on 10/07/2008 from which, it was apparent that 48, packing machines were shown to be available in the factory, out of 48 machines 16 machines intended to be used in the manufacture of Gutkha of Rs. 1.00 MRP per pouch and 2 machines intended to be used in the manufacture of Sada Pan Masala of Rs.1.00 per pouch. The remaining 30 machines were shown as already sealed. It is further alleged that in compliance to Rule 6(2) of the Pan Masala Packaging Machine Rules, 2008, the Deputy Commissioner, Central Excise Division-I conducted verification on 16/07/2008 and during the course of verification and thereafter on investigation found that on 01/07/2008, there were 48 machines installed in the factory. Out of these 44 machines were in operating condition in factory premises on 02/07/2008. Therefore, Deputy Commissioner vide his order dated 17/07/2008 approved the installation of 48 machines on 01/07/2008, being the maximum number of machines during the month of July, the Retail Sale Price of the goods was Rs. 1.00 per pouch and that the goods manufactured are Gutkha and Pan Masala. The show cause further states that the appellant vide the representation dated 24/07/2008 to the Deputy Commissioner with a copy to the Range Office requested for review of the order dated 17/07/2008 for re-determination of the capacity mainly on the grounds that by the amendment vide Notification No.31/2008-CE(NT) dated 15/07/2008, the Rules were made effective from 15/07/2008 which was not noticed by the Deputy Commissioner, Central Excise, while passing the order. The determination of Annual Capacity should have been done on their declaration in respect of 18 operating pouch packing machines. The said submission of the appellant in their representation dated 24/07/2008 appear to be not correct, as the Deputy Commissioner observing that the Pan Masala Rules, 2008 were made effective from 01/07/2008 only by introduction of Notification No.30/2008--CE, and amendment vide Notification No.31/2008-CE pertains to only some of the Rules specifically mentioned therein, which were to be made effective from 15/07/2008. The notice further observed that on scrutiny of ER-1 returns for the Month of July-2008 it was found that duty paid, amounting to Rs. 2 Crores, on 16 machines of Gutkha and Rs.18,50,000/- on 02 machines of Sada Pan Masala (total Rs.2,18,50,000/-) on 15/07/2008 vide Form-2 have been paid. The said duty is not in accordance with the Pan Masala Rules, 2008 and as per the order of the Deputy Commissioner dated 17/07/2008, in which order, the appellant was required to pay duty of Rs.5,75,00,000/- (at the rate of 12.50 lakhs per machine on 46 machines and 9.25 on 02 machines or Rs.18,50,000/-. Whereas appellant have paid Rs.2,18,50,000/- and thus the duty short paid is Rs.3,75,00,000/-. Accordingly, the said amount was demanded along with interest and further penalty was also proposed under Rule 17 of Pan Masala Packing Machine Rules, 2008 read with Rule 25 of the Central Excise Rules, 2002.

4. The said show cause notice was adjudicated vide the impugned Order-in-Original by learned Commissioner, who was pleased to drop the demand of Rs.50,00,000/- being demanded on 04 packing machines which were admittedly out of order and sealed prior to 01/07/2008, and further confirm the demand for the balance 44 machines amounting to Rs.3,25,00,000/- and further pleased to drop the proposed penalty. Being aggrieved, the appellants are before this Tribunal.

5. The learned counsel for the appellant Mr. Amit Awasthi has pointed out that the very basis of show cause notice is wrong and vague. Firstly, it is evident from the order dated 17/07/2008 determining the Annual Capacity of production that there is no basis of the said order, by which the declaration made by the appellant, that they intend to operate 18 packing machines, have been rejected. The order says that after making necessary inquiry including physical verification, but no such report is referred or brought on record, neither any show cause notice issued to the appellant. Further, in the show cause notice dated 07/08/2009, also in para-5.2 it is mentioned- whereas in compliance to the Rule 6(2) of Rules, 2008, the Deputy Commissioner conducted verification on 16/07/2008 and during the course of verification and thereafter on investigation found that on 01/07/2008, there were 48 machines installed in the factory. The learned Counsel says that this averment in the show cause notice is prima-facie wrong, having no basis. The learned Counsel further points out that no such inspection report as alleged, dated 16/07/2008.

Have been made, relied upon document, as is evident from the list of RUD. Thus, the very foundation of the show cause notice being non-existent, the show cause notice is not sustainable and the impugned order is fit to be set aside. The learned counsel further refers to Section 3A of the Act, wherein in Sub-section '1', it is provided– "Notwithstanding anything contained in Section 3, where the Central Government, having regard to the nature of the process of manufacture of production of excisable goods of any specified description, the ex-extent of evasion of duty in regard to such goods or such other factors as may be relevant, is of the opinion that it is necessary to safeguard the interest of revenue, specify, by notification in the Official Gazette, such goods as notified goods and there shall be levied and collected duty of excise on such goods, in accordance with the provisions of this section". Further, Sub-section 2 of Section 3A provides – "where a notification issued under Sub-section (1), the Central Government may, by rules –

(a) provides a manner for determination of the annual capacity of production of the factory, in which such goods are produced, by an officer not below the rank of Assistant Commissioner of Central Excise and such annual capacity shall be deemed to be annual production of such goods by such factory; or

(b) (i) specify the factor relevant to the production of such goods and the quantity that is deemed to be produced by use of a unit of such factor, and (ii) provide for the determination of the annual capacity of production of the factory in which such goods are produced on the basis of such factor by an officer not below the rank of Assistant Commissioner of Central Excise and such annual capacity of production shall be deemed to be the annual production of such goods by such factory:

provided that where a factory producing notified goods is in operation during a part of the year only, the annual production thereof shall be calculated on proportionate basis of the annual capacity of production: provided further that in a case where the factor relevant to the production is altered or modified at any time during the year, the annual production shall be re-determined on a proportionate basis having regard to such alteration or modification.

6. The learned Counsel further states that the order dated 17/07/2008 passed by the Deputy Commissioner determining the annual capacity of production is prima facie wrong, and in conflict with the provisions of Section 3A of the Central Excise Act. Inspite of the admitted facts, as is evident from the show cause notice, that 26 machines were sealed on 03/07/2008 at 9:30 AM and 04 machines were lying sealed prior to 01/07/2008, totaling 30, there remained only 18 packing machines which were intended to be operated and the said fact have not been found to be wrong or mis-declared by the Department. In this view of the matter, both the order dated

17/07/2008, as well as the impugned order are bad and fit to be set aside.

7. The learned A.R. for revenue have relied on the impugned order.

8. Having considered the rival contentions, we find that the show cause notice is vague and contradictory. There is no allegation in the show cause notice that the declaration dated 10/07/2008 was found to be mis-declared or more number of packing machines were found to be in operation in contrast to the declaration. Further, we find that as alleged in the show cause notice is that there was an inspection and verification in the factory on 16/07/2008 of the appellant, is also without any basis, as no such document have been brought on record, as the relied upon document. We also find that the sealing report of 26 packing machines on 03/07/2008 is an admitted fact not disputed by revenue. We further find that the learned Commissioner have also accepted the ceiling of 04 machines prior to 01/07/2008 and dropped the duty demand on such 04 machines. We also find from the operative part of the impugned order that the learned Commissioner have stated that the new scheme of compounded levy was introduced with effect from 01/07/2008. The levy was in its nascent stage when the contraventions took place, and it can also not be denied that the assessee promptly informed the Department and requested for sealing of machines, as early as on 02/07/2008, which they did not intend to operate. There is also no case of suppression or willful mis-statement with intent to evade payment of duty. In the same breath, the learned

Commissioner further observed– having regard to the facts and circumstances of the case, while admitting that the contraventions of provisions of law took place, I am of the view that a lenient approach is warranted. Thereafter, the learned Commissioner concludes that appellant is liable to pay duty for the whole month of July, on 44 packing machines, amounting to Rs.3,25,00,000/-.

9. In view of the aforesaid findings and the anomalies in the show cause notice and the factual errors, both in the show cause notice and in the order dated 17/07/2008 for determination of annual capacity, and in the impugned order by the Commissioner, we find that these are not sustainable.

10. Accordingly, we set aside the impugned order dated 20th October, 2010. We also set aside in part the order of annual capacity determination dated 17th July, 2008. The appellant shall be entitled for consequential benefits in accordance with law.

(Dictated in Court)

-Sd/-
(ANIL G. SHAKKARWAR)
Member (TECHNICAL)

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

akp

प्रमाणित प्रति/Cerified True Copy
14/06/2017
सहायक पंजीकार/Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण/(C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001