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: 27/08/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70721-70726/2016-EX[DB] dated 08/08/2016

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/55665,55705,55706,55707,55711,55712/2013	DURGA TRADING COMPANY 14,DATIA HOUSE,K. COLONY,KHURSHED BAGH LUCKNOW U.P
2			Commissioner of CUSTOMS(PREVENTIVE)-Lucknow HALL NO.3... 5TH FLOOR, KENDRIYA BHAWAN...SECTOR-H, ALIGANJ,LUCKNOW, UTTAR PRADESH
			Name and Address of Respondent
3			ASHISH SRIVASTAVA AUTHORIZED SIGNATORY OF M/S DURGA TRADING CO.,R/O 416,GITAPALI COLONY,ALAMBAGH, LUCKNOW ,U.P

4 DURGA TRADING CO
PROPRIETOR SMT DURGA
CHAURASIA,14,DATIA
HOUSE,K.COLONY,KHURSHED
BAGH,
LUCKNOW
,U.P

5 UDAI TRADERS
PROPRIETOR SRI UDAI
CHAURASIA,,68,SHRI RAM
ROAD,AMINABAD,
LUCKNOW
,U.P

6 C.C.E. & S.T.-Lucknow
7-A...ASHOK MARG,
LUCKNOW,
UTTAR PRADESH-226001

7 R P PRODUCTS
PROPRIETOR SRI SRI RAJ KUMAR
CHAURASIA,68,SHRI RAM
ROAD,AMINABAD,
LUCKNOW
,U.P

8 NEW SHASHI ZARDA BHANDAR
PROPRIETOR SMT.SHASHI
RESTOGI,SHOP NO-17,RASHID
MARKET,NEAR RAM KRIPA CHAURAHA
RAEBARELI,LUCKNOW
,U.P

--

Other Appellants and Respondents as per Annexure

Copy To
9Advocate(s) / Consultant(s):

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

10 Bar Association, CESTAT, Allahabad

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

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

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

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

15 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

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

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

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

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

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

21 C.D.R. 22 Office Copy 23 Guard File

Asstt. Registrar

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

Appeal Nos.E/55665, 55705, 55706, 55707, 55711, 55712/2013-EX[DB]

Arising out of Order-in-Original No.16/COMMR./LKO/REMAND/CX/2012-13 dated 01.11.2012 passed by Commissioner of Central Excise & S. Tax, Lucknow.

For approval and signature:

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

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	: No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	: Yes
3.	Whether His Lordship wishes to see the fair copy of the Order?	: Seen
4.	Whecher Order is to be circulated to the Departmental Authorities?	: Yes

---

M/s Durga Trading Company (in Appealn No.E/55665/2013),
Commissioner of Central Excise & S.T.-Lucknow,(in Appeal Nos.E/55705 to 55707, 55711, 55712/2013)

...APPELLANT(S)

VERSUS

Commissioner of Central Excise & S.T., Lucknow, (in Appeal No.E/55665/2013),

Durga Trading Company (in Appeal No.E/55705/2013),

Udai Trader (in Appeal No.E/55706/2013),

R P Products (in Appeal No.E/55707/2013),

New Shashi Zarda Bhandar (in Appeal No.E/55711/2013),

Ashish Srivastava (in Appeal No.E/55712/2013),

...RESPONDENT (S)

APPEARANCE

Shri Rajiv Ranjan, Jt. Commissioner (AR) for the Revenue
Shri Bipin Garg (E/55705-55707, 55665/2013), Shri Amit Awasthi (Appeal No.E/55665, 55705-55707, 55711, 55712/2013), for the assessee

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. H.K.THAKUR, MEMBER (TECHNICAL)

DATE OF HEARING: 28.06.2016

DATE OF PRONOUNCEMENT: 08.08.2016

FINAL ORDER NO. 70721-70726/2016

Per Mr. Anil G. Shakkarwar:

These five appeals, bearing Nos.E/55705/2013, E/55706/2013, E/55707/2013, E/55711/2013, E/55712/2013, have been filed by C.C.E., Lucknow, against main noticee of the original show cause notice M/s Durga Trading Company and other co-noticee and Appeal No.E/55665/2013, has been filed by M/s Durga Trading Company. All above appeals are arising out of common Order-in-Original No.16/COMMR./LKO/REMAND/CX/2012-13 dated 01.11.2012 passed by Commissioner of Central Excise & S. Tax, Lucknow. They are taken together for disposal.

2 The brief facts of the case are that M/s Durga Trading Company (hereinafter referred to as DTC), 14, Datia House, K. Colony, Khurshed Bagh, Lucknow was engaged in the manufacturing of Pan Masala & Gutkha under the Brand name 'Pukar'. Most of the finished goods of DTC are sold to various dealers either directly by DTC or through the traders, namely, M/s Udai Traders (UT, for brevity) and M/s R.P. Products (RP, for brevity), Shri Udai Chaurasia was the Proprietor of M/s Udai Traders. Smt. Asha Chaurasia W/o Shri Udai Chaurasia was the proprietor of DTC

while Shri Ashish Srivastava was the authorized signatory of the said firm. Shri Udai Chaurasia was looking after day to day work of DTC, besides being the proprietor of M/s Udai Traders (U.T.), M/s Udai Traders was trading in all major Raw materials of Pan Masala & Gutkha, such as Betel nuts, Katha, Perfume etc. and was also engaged in trading of Pan Masala Gutkha, exclusively purchased from DTC. M/s R.P. Products was another trading firm, engaged in similar activities as that of M/s U.T. Shri Raj Kumar Chaurasia was the proprietor of M/s R.P. Products. Both these trading firms, had same set of dealers, who were getting their supply of Pan Masala & Gutkha from DTC.

2.1 M/s Kashi Laminators (P) Ltd., (KL, for brevity), Khadra, Daliganj, Opposite Shia College, Sitapur Road, Lucknow was engaged in the manufacture of Plastic Products. DTC was the main customer of K.L.

2.2 M/s New Shashi Zarda Bhandar was a dealer of DTC for selling their goods in and around Raebareli. Smt. Shashi Rastogi was the proprietor of the firm & she was being assisted in day to day work of the firm by her husband Shri H.K. Rastogi & son Shri Ankit Rastogi.

2.3 An intelligence gathered indicated that DTC was engaged in the suppression of production of their finished goods and in the clandestine removal of unaccounted goods to their various dealers without payment of Central Excise duty. Manufacturing premises of DTC, trading premises of U.T., R.P., factory of KL &

others premises including the residential premises of relevant persons etc. were searched on 18.03.2004 by the officers of Central Excise Intelligence (DGCEI).

2.4 At the factory premises of DTC, the officers took the stock of raw material & finished goods in the presence of Shri Ashish Srivastava & following alleged discrepancies were noticed.

(i). 915.84 Kgs. Of 53 bags of Gutkha & 48.6 kgs., i.e. 3 bags of Pan Masala was found short over the corresponding recorded balance.

(ii). 1128.92 Kgs. Of pouch roll was found short over the corresponding recorded balance.

(iii). 714 Kgs. Of Supari & 250 Kgs. Of Katha was in excess over the corresponding recorded balance.

2.5 The above alleged anomalies in the physical stock of finished goods, packing material and raw material could not be properly explained by the authorized signatory on the spot to the officers conducting search. Shri Udai Chaurasia explained that 120 bags of Gutkha bearing Pukar brand was received by his firm UT on 17.03.2004 from DTC without accounting for the same in their proper books of accounts. The said 120 bags of Gutkha were detected by the officers at various other premises. Further, it also came to the notice of the officers that another consignment of 40 bags was removed from the factory of DTC without accountal in their books of accounts as said consignments were also traced by the officers at different premises. Cash amounting to Rs.13,18,000/- (Rupees Thirteen lakhs eighteen thousand) was recovered from the ground floor of the premises by the officers conducting search. The officers seized the said cash for further investigation. DTC deposited Rs.60 lakhs vide eight TR-6 Challans during the course of investigation.

2.6 The officers searched the premises of M/s Udai Traders and seized 21 bags of Pukar Gutkha & 18 bags of Pukar Pan Masala on a reasonable belief that such goods were cleared from the factory of DTC without accountal in their records.

2.7 Similarly the officers searched the trading premises of M/s R.P. Products and seized cash amounting to Rs.18,41,380/-.

2.8 The Godown of R.P. was also searched on 18.03.2004. A huge stock of supari, Katha, Lime Tobacco, Cardamom etc. valuing more than 80 lakhs, was available there. The officers resumed one pocket diary & one pen drive/thumb drive for further investigation.

2.9 The officers searched the residential premises of Shri Pushkar Chaurasia, Shri Raj Kumar Chaurasia & Shri Pankaj Chaurasia and seized cash amounting to Rs.3,70,000/-, Rs.10,03,000/- & Rs.2,93,000/- respectively.

2.10 The officers intercepted a Tata truck containing 110 bags of 'Pukar'Gutkha which was part of 120 bags of Gutkha purchased by U.T. (10 bags were still lying in the godown) from DTC. The consignment of 110 bags was seized by the officers. The remaining 10 bags of Gutkha were also seized from M/s Narayan Transport & forwarding Agency, Aishbagh, Lucknow in follow up action.

2.11 The officers searched the premises of various transporters & dealers, engaged in the transportation of finished goods manufacture by DTC and noticed-

S.N.	Name of the Company (M/s)	Result of seizure
1.	Narayan Transport Co., Gorakhpur(Transporter)	a. Challans issued by M/s Narayan Transport & Forwarding, Agency, Lucknow. b. Unloading report of M/s Narayan Transport, Freight Carrier, Deoria.
2.	New Malik Transport Co., Lucknow (Transporter)	a. 40 bags of Pukar Gutkha. b. GR's supported by cash/credit memo issued by Udai Trader.
3.	Sardar Transport, Tulsipur.	-------
4.	Chaurasia Traders, Tulsipur.	a. 16 Cash/credit memo issued by U.T. b. GR's issued by Lucknow, Tulsipur forwarding Agency. c. 240 packets of Gutkha.
5.	New Shashi Zarda Store, Raebareli.	a. 15 bags & 32 packets of Gutkha (Pukar).
6.	Residential premises of Shri Ankit Agencies, Raebareli.	a. Cash of Rs.6,85,000/-.
7.	Shop of M/s Rastogi General Stores, Allahabad.	a. 13 bags of Pukar Gutkha.

3. On the basis of investigation, M/s Durga ~~Trader~~ Trading Company and other co-noticee were issued with a show cause notice No.DZU/INV/31/2004/1728 dated 16.09.2004, directing M/s Durga Trading Company to show cause as to why Central Excise Duty amounting to Rs.5,18,16,960/- should not be demanded for removing 17992 bags of Pukar Gutkha without accounting of the same and certain other proposals as far as:-

3.1 M/s Durga Trading Co., Lucknow was required to show cause as to why:-

(i) The Central Excise duty amounting to Rs.5,18,16,960/- should not be demanded for removing 17992 bags of Pukar Gutkha (all manufactured by DTC) without accounting the same.

(ii) All amount of Rs.60 lakhs, deposited during the investigation, should not be appropriated against the aforesaid demand.

(iii) The Central Excise duty of Rs.4,60,800/- on goods seized in transit (i.e. 110 bags of Gutkah, 10 bags of Gutkha seized at the Godown of M/s Narayan Transport & Forwarding Agency, Lucknow and 40 Bags of Gutkha seized at the premises of M/s New Malik Transport on 18.03.2004) should not be demanded. As this amount has already been deposited why this should not be appropriated against the above demand.

(iv) Central Excise duty amounting to Rs.1,05,030/- should not be demanded towards the finished goods seized at the premises of UT on 18.03.2004.

(v) Central Excise duty amounting to Rs.44,865/- should not be demanded towards the shortage of finished goods noticed in the factory of DTC on the day of search.

(vi) Following seized Pukar Pan Masala/Gutkha should not confiscated.

(1) 18 bags Pukar brand Pan Masala & 21 bags of Pukar Brand Gutkha valued at Rs.3,51,000/- seized at 67, Sri Ram Road, Lucknow on 18.03.2004.

(2) 15 bags and 32 packets of Pukar brand Gutkha valued at Rs.1,45,920/- seized at Shashi Zarda Bhandar, Raebareli on 18.03.2004.

(3) 13 bags of Pukar brand Gutkha valued at Rs.1,24,800/- seized at M/s Rastogi General Store, Allahabad seized on 18.03.2004.

(4) 1.5 bags of Pukar brand Gutkha valued at Rs.14,400/- seized on 21.07.2004 at M/s Chaurasia Traders, Tulsipur.

Duty on these goods has been covered in demand at Point No.(i) above.

(vii) Cash amounting to Rs.13,18,000/- seized from the factory cum residential premises i.e. 14, Datia House, Lucknow should not be confiscated.

(viii) Interest should also not be charged.

(ix) Penalty should not be imposed.

3.2 Further, M/s Udai Traders, Lucknow and M/s R P Products, Lucknow (Noticee No.2 & 3) were asked to show cause as to why the following seized cash should not be confiscated-

(a) Rs.10,61,000/- seized from the business premises of M/s R P Products;

(b) Rs.2,93,000/- seized from the residence of Shri Pankaj Chaurasia;

(c) Rs.10,03,000/- and Rs.3,70,000/- seized from the residence of Shri Raj Kumar Chaurasia and Shri Pushkar Chaurasia;

and why penalty should not be imposed upon them under 26 of Central Excise Rule, 2002.

3.3 M/s New Shashi Zarda Bhandar were asked as to why-

(i) Cash amounting to Rs.6,85,000/- seized from the residence cum business premises on 18.3.2004 should not be confiscated.

(ii) Penalty should not be imposed on them under Rule 26 of the Central Excise Rules, 2002.

3.4 Shri Ashish Srivastav was called upon to show cause as to why penalty should not be imposed on him.

4. The said show cause notice was adjudicated through Order-in-Original No.19/Commr/LKO/2005 dated 27.05.2005, wherein the Original Authority has held as follows:-

(a) Confirmed duty of Rs.5,18,16,960/- for removing 17992 bags of Pukar Gutkha without payment of Central Excuse duty against M/s Durga Trading Co., Lucknow.

(b) Appropriated Rs.60 lakhs paid during the investigation towards the above duty liability.

(c) Confirmed duty of Rs.4,60,800/- against M/s Durga Trading Co., Lucknow on goods seized in transit, namely 110 bags of Gutkha, 10 bags of gutkha seized at the Godown of M/s Narayan Transport & Forwarding Agency, Lucknow and 40 bags of Gutkha seized at the premises of M/s New Malik Transport. This amount has already been deposited therefore he ordered to appropriate the same.

(d) Confirmed duty of Rs.1,05,030/- against M/s Durga Trading Co., Lucknow on the goods seized at the premises of M/s UT.

(e) Imposed penalty of Rs.5,23,82790/- against M/s Durga Trading Co., Lucknow.

(f) Ordered for recovery of interest on the above duty.

(g) dropped duty amounting to Rs.44,865/- as the shortage at M/s DTC is not proved.

(h) dropped the confiscation of goods seized at 67, Sri Ram road, Lucknow, M/s New Shashi Zarda Bhandar, Raebareli, M/s Rastogi General Store, Allahabad and M/s Chaurasia Traders, Tulsipur.

(i) dropped the confiscation proceedings against goods seized from M/s New Shashi Zarda Bhandar. He ordered release of Rs.6,85,000/- seized from M/s New Shashi Zarda Bhandar, Raebareli. The then adjudicating authority did not impose any penalty on M/s New Shashi Zarda Bhandar Raebareli under Rule 26.

(j) ordered confiscation of cash amounting to Rs.13,18,000/- seized from the factory cum residential premises i.e. 14, Datia House, Lucknow.

(k) ordered confiscation of cash amounting to Rs.10,61,000/- seized from business of M/s R.P. Products, Lucknow.

(l) ordered confiscation of cash amounting to Rs.2,93,000/- seized from residence of Shri Pankaj Chaurasia, Lucknow.

(m) ordered confiscation of cash amounting to Rs.10,03,000/- and Rs. 3,70,000/- seized from residence of Shri Raj Kumar Chaurasia and Shri Pushkar Chaurasia.

(n) imposed a penalty of Rs.1,50,000.00/- on M/s Udai Traders, Lucknow under Rule 26.

(o) imposed a penalty of Rs.1,00,000.00 (Rs. One lakh only) on M/s R.P. Products, Lucknow.

(p) The then adjudicating authority did not impose any penalty on Shri Ashish Srivastava.

5. Aggrieved by the said Order-in-Original No.19/Commr./LKO/2005 dated 27.05.2005, parties filed an appeal before this Tribunal. This Tribunal vide final Order No.732-737/2011 EX[DB] dated 12.08.2011, remanded the matter for consideration thereof afresh, inter-alia observing as under:-

(i). No proper investigation was made on the point of duplicity of product though adjudicating authority (A/A) has himself held that similar product with similar brand name was manufactured in Nepal and available in India. Further, the party has filed nine FIRs regarding duplicity of their product.

(ii). Some of the documents relate to the products which are not manufactured by the Party and yet they were included in the list of documents relating to the goods alleged to have been removed clandestinely.

(iii). There is no assessment of evidence to ascertain whether the seized documents disclose link with the goods sated to have been manufactured and clandestinely cleared by the Party.

(iv). A/A held the party involved in conspiracy though SCN carries no such charge.

(v). As regard the excess quantity of Supari and Kattha, the statutory requirement of recording such quantities was deleted from Form-IV register. A/A erred in holding that this defence was not given by the Party during search and it was given for the first time during reply of SCN only.

(vi). The excess quantity of Supari and Kattha was not weighed at the time of raid and it was concluded on mere assumption. A/A is not proper in holding that such objection was not raised by the Party at the time of raid. It is necessary for A/A to ascertain from the analysis of all material on records whether the same establishes correctness of the weight as disclosed in the Panchnama. However, no such exercise was done by the A/A.

(vii). Finding of A/A that the excess or shortage of tobacco/gutkha is to be presumed as the Party might have hidden the excess tobacco is not good as such conclusions cannot be drawn without analyzing the evidences in this regard more particularly in the cases where the Department has to discharge burden to establish the case of clandestine removal.

(viii). The A/A has relied on arithmetical calculations for arriving at the number of pouches that could have been manufactured from a certain quantity of packing material. Further, the clandestine removal of such pouches was also concluded on the same basis.

(ix). A/A is not proper in concluding that recovery of nine slips has sufficiently proved possibility of taking finished goods for the purpose of evasion by clearing unaccounted finished goods. In-fact, unless credibility of the slips is established by properly analyizing the materials it cannot be concluded that recovery of such slips sufficiently proves possibility of packing finished goods. Further mere possibility of clearance cannot be a substitute for the evidence regarding actual clearance.

(x). As regards the details retrieved from Pen Drive, the A/A has not analyzed the materials retrieved from the Pen Drive. Merely, because the large amount is shown as labour charges in the material retrieved from Pen Drive, it cannot be justified that the same links with the alleged manufacturing activity by the Party unless there is any analysis of material to establish the link.

(xi). As regards the supply of 18602.35 Kg of Laminated Plastic Rolls by M/s Kashi Laminators to M/s DTC, it was held by A/A on the basis of some slips, issued in the name of "Sanjai Kumar, LKO" and recovered from residential premise of the father of MD of M/s Kashi Laminators, that same were issued for M/s DTC and the name "Sanjai Kumar, LKO" was the code name given to M/s DTC as stated by the MD of M/s Kashi Laminators in his statement. However, cross-examination of the MD of M/s Kashi Laminators was not permitted to the Party though same would have to be done.

(xii). Findings of A/A regarding the fact that no excess of tobacco or the shortage thereof was found in Party premise, are not proper as the A/A has just assumed that there was excess quantity of tobacco and/or that it might have been hidden by the Party.

(xiii). As regards the cash recovered from the premises there is no attempt on the part of A/A to ascertain its link with the proceeds of the goods alleged to have been clandestinely removed. The link cannot be established on mere assumption and there must be some material on record which is to be ascertained by analyzing the same.

(xiv). The correct course for the A/A would be to test the correctness of the statements of transporters and dealers stating that it is M/s DTC M/s Udai Traders who were arranging the transport to ascertain whether the words "zarda gutkha in GRs/challans means Pukar brand gutkha of M/s DTC and whether the goods were being booked for transport on slips of M/s Udai Traders and for that purpose to permit cross-examination of deponents and thereafter to decide the matter."

6. In compliance to said order dated 12.08.2011, remanded proceedings were adjudicated vide impugned Order-in-Original No.16/Commr./LKO/REMAND/CX/2012-13 dated 01.11.2012, wherein the Original Authority has ordered as follows:-

(i). He confirmed Central Excise duty of Rs.39,08,160.00 (Rupees Thirty nine lacs eight thousands one hundred sixty only) under sub Section (i) of Section 11A of the Central Excise Act, 1944 for removing 1357 bags of excisable goods/ 'Pukar Gutkha' without payment of Central Excise Duty against M/s Durga Trading Co., Lucknow.

(ii). The central excise duty of Rs.39,08,160.00 (Rupees Thirty nine lacs eight thousands one hundred sixty only) was ordered to be recovered under Section 11A(I) of the Central Excise Act, 1944 from M/s Durga Trading Co., Lucknow and the same was being appropriated from Rs.60 lkhs, which were deposited during the investigation towards the above duty liability.

(iii). He confirmed duty of Rs.4,60,800/- (Rs. Fourt Lacs Sixty thousands Eight hundred sixty only) against M/s Durga Trading Co., Lucknow on goods seized ~~k~~in transit, namely 110 bags of Gutkha, 10 bags of gutkha seized at the Godown of M/s Narayan Transport & Forwarding Agency, Lucknow and 40 bags of Gutkha seized at the premises of M/s New Mallik Transport under Section 11A of the Central Excise Act, 1944. This amount has already been deposited therefore he ordered to appropriate the same.

(iv). He dropped the proposal for demand of duty of Rs.1,05,030/- (Rs. One lacs Five thousand and thirty only) against M/s Durga Trading Co., Lucknow on the goods seized at the premises of M/s UT under the sub-section 1 of Section 11A of the Central Excise Act, 1944.

(v). He imposed penalty of Rs.43,68,960/- (Rupees Forty three lacs sixty eight thousands nine hundred sixty only) againt M/s Durga Trading Co., Lucknow under Section 11AC of the Central Excise Act, 1944.

(vi). He ordered recovery of interest on the Central Excise duty of Rs.39,08,160.00/- (Rupees Thirty nine lacs eight thousands one hundred sixty only) under Section 11AB of the Central Excise Act, 1944 at the applicable rate from M/s Durga Trading Co., Lucknow.

(vii). He dropped the proposal to demand duty amounting to Rs.44,865/- (Rs. Forty Four Thousand Eight Hundred and Sixty five only) on account of shortage at M/s DTC.

(viii). He dropped the proposal to confiscate goods seized at 67, Sri Ram road, Lucknow, M/s New Shashi Zarda Bhandar, Raebareli, M/s Rastogi General Store, Allahabad and M/s Chaurasia Traders, Tulsipur.

(ix). He ordered release of Rs.6,85,000/- (Rs. Six Lacs Eighty five thousands only) seized from M/s New Shashi Zarda Bhandar, Raebareily and did not impose any penalty on M/s New Shashi Zarda Bhandar, Raebareily under Rule 26 of Central Excise Rules, 2002.

(x). He ordered release of the cash amounting to Rs.13,18,000/- (Rs. Thirteen Lacs Eighteen thousands only) seized from the factory cum residential premises i.e. 14, Datia House, Lucknow under the provisions of Section 121 of Customs Act, 1962.

(xi). He ordered release of the cash amounting to Rs.10,61,000/- (Rs. Ten Lacs Sixty One thousands only) seized from the business of M/s R.P. Products, Lucknow under Section 121 of Customs Act as made applicable to Central Excise Act.

(xii). He ordered release of cash amounting to Rs.2,93,000/- (Rs. Two Lacs Ninety Three thousands only) seized from residence of Shri Pankaj Chaurasia, Lucknow under Section 121 of Customs Act as made applicable to Central Excise Act.

(xiii). He ordered release of cash amounting to Rs.10,03,000/- (Rs. Ten Lacs Three thousands only) and Rs.3,70,000/- (Rs. Three lacs Seventy Thousand only) seized from residence of Shri Raj Kumar Chaurasia and Shri Pushkar Chaurasia under Section 121 of Customs Act as made applicable to Central Excise Act.

(xiv). He did not impose any penalty on M/s Udai Traders, Lucknow under Rule 26 of Central Excise Rules, 2002.

(xv). He did not impose any penalty on M/s R.P. Products, Lucknow under Rule 26 of Central Excise Rules, 2002.

(xvi). He did not impose any penalty on Shri Ashish Srivastava under Rule 26 of Central Excise Rules, 2002.

7. Challenging the said impugned Order-in-Original dated 1.11.2012, Commissioner of Central Excise, Lucknow, as filed above said appeals on the grounds as follows:-

(a) While dealing with the facts of the case and dropping the major portion of duty demanded of Rs.5,18,16,960/- on the basis of transporters documents, the findings of Adjudicating Authority are neither legal not proper in as much as he has simply drawn the inferences in favour of the noticees without considering that the transporters and other persons have already stated the correct facts against DTC. The adjudicating authority has accepted the statements during cross-examination as such, ignoring the earlier statements and relevant evidence. Based on the cross-examination he has drawn the following inferences:-

(i). All the transporters have admitted to have booked the goods on t he strength of proper bill;

(ii) Whenever they were asked to clarify the description of zarda gutkha, most of the transporters had stated that the booked consignments were never opened and as such it was difficult to indicate, as to which brand of goods were being transported.

(iii). Some of the transporters had also confirmed that they were also transporting gutkha of various other brands.

(iv). Some of the transporters have already stated that Mr. Udai Chand Chaurasia of M/s Udai Traders never came to their transport company for booking the consignment and whenever the goods were received in their transport company. The said person asserted that they had no contractual relationship with M/s Udai Traders and further they were not aware whether M/s Udai Traders had a Rickshaw Trolley or not.

As seen above, the inferences, so drawn, by the adjudicating authority are self contradictory. If most of the transporters have stated that the consignments were never opened, then how is it possible to conclude that whatever product was being carried in the consignment was not the product of M/s DTC when the facts have been admitted in their statements.

In fact, it is amply substantiated in the SCN that the whole manner of manufacturing and clearance was clandestine in nature. The transporters in their earlier statements have also corroborated the allegations. Further, the transporters have never retracted their statements on their own and it was only on the cross-examination, made several years later, during second adjudication that they have denied their earlier statements. The fact of not retracting their statements on their own establishes that the retraction by the transporters is a pure after-thought.

Further, the adjudicating authority has himself stated that the transporters were the apparent co-accused in the case who acted in connivance with the Party and hence their earlier statements cannot be relied upon.

In view of this finding of the adjudicating authority he ought not to have accepted the cross-examination by the Counsel of the Noticee who he has held to be co-accused.

(b) Further, the cross-examination was not done in proper manner. In fact, the proper manner of cross-examination was to make the transporters etc. to simultaneously face the Party's counsel on the one side and the Departmental Counsel/Investigating Officers on the other side. However, in the instant case no such opportunity was given to Department/Investigating Officers to Cross-examine the transporters.

It is observed that there is overwhelming categorical evidence where the facts have been admitted and the retractions are belated and baseless after-thought made after more than eight years. The adjudicating authority has without any basis ignored the categorical statements. The retractions should not have been admitted being belated and without any opportunity of examination by the Departmental Officers/Counsel/Investigating Officers.

(i). Statement dated 29.03.2004 of Shri Radhey Shyam, employee of M/s Narain Transport Co., Gorakhpur, (RUD No.-62 page 57 and 58 of SCN) where in his detailed statement he stated categorically in reply to question No.9, as under:-

"Q. No.09- Please go through said challan wherein Zarda Gutkha is mentioned under the column contents. What do you mean by Zarda Gutkha and who has manufactured such goods?

Ans.- Zarda Gutkha means Gutkha pouch which was manufactured by DTC under the brand Pukar. Such goods were received under the credit/debit memo of UT."

In view of the above, his later submissions i.e. during cross examination are an afterthought made belatedly after eight years.

(ii). Statement dated 02.04.2004 of Shri Dharmendra Pratap Singh, Prop. M/s Narain Transport Co., Gorakhpur (page 59 of show cause notice). He was shown the chart which was earlier shown to Shri Radhey Shyam and Shri Harish Chandra Singh of M/s Narain Transport & Forwarding Agency, Lucknow. Shri Dharmendra Pratap Singh also confirmed the chart as the Pukar

Gutkha received through M/s Narain Transport & Forwarding Agency, Lucknow for their delivery at Gorakhpur. Retraction of Shri Harish Chandra Singh, Prop. Of M/s Narain Transport & Forwarding Agency, Lucknow of his statement dated 15.03.2004 is belated afterthought.

(iii). It is observed from points (iv) and (vii) of para 9.3 of O-I-O regarding cross-examination dated 01.11.2012 of Shri Vivek Gupta, Prop. of M/s Lucknow Allahabad Forwarding Agency, that he did not deny his statement dated 27.05.2004 (Q/A No.26) that the rickshaw Trolly of Pukar Chhap Gutkha was booked by M/s UT at Lucknow (iv). At point No.(vii) he confirmed having stated that transportation of 10 bags or more which has been done is Pukar Gutkha. His belated explanation that he had said so because he was scared of the Govt. Deptt. And that he was instructed by the Departmental Officers, is a baseless afterthought made after a long period of 8 years.

(iv). Enquiry from M/s Lucknow Tulsipur Forwarding Agency M/s Sardar Transport Agency, Tulsipur/M/s Chaurasia Traders, Lucknow. All such goods, booked under the description Zarda Gutkha were delivered to Shri Om Prakash of M/s Chaurasia Traders, Lucknow, are Pukar Gutkha.

(v). All these statements and facts have also been corroborated by enquiries at the end of dealers and other persons mentioned in the Show cause notice.

(c) Further, the adjudicating authority has wrongly relied upon the statement of Shri Udai Chaurasia (which was also an afterthought), that he used to put his Brand Name on all the goods supplied. When Shri Chaurasia himself was an accused in the case who acted clandestinely in non-accountal and clandestine clearance and transportation of goods, then his statement could not be relied upon as it was an afterthought without any basis and was contrary to the overwhelming evidence mentioned above and detailed in the SCN. In fact, the adjudication authority has himself observed that the statement of co-accused cannot be relied upon in absence of any corroborative evidence. In such case, the reliance placed by the adjudicating authority upon the statement of Shri Chaurasia is contrary to his own observation.

The seizure of 10.61 lakh cash was not explained on the spot and remained unexplained even after 4 months of seizure.

Regarding cash amounting to Rs.10.03 lakhs seized from the residence of Shri Raj Kumar Chaurasia. He in his statement dated 11.08.2004 admitted that an amount of Rs.5.03 lakhs was received for unaccounted sale of finished goods manufactured by DTC and unaccounted sale of raw materials.

Seizure of the unaccounted finished goods at the various premises of traders on 18.03.2004 who received the goods through UT was enquired in at length and it was found tat all such goods were owned by DTC inasmuch as DTC asked for

(RUD-122: all release application by DTC seeking release of finished goods seized/detained at different premises on 18.03.2004) their release to them. Further, it was also found that the 21 bags of Pukar Gutkha and 18 bags of Pan Masala seized at the premises of UT was claimed by DTC as their goods. Hence claiming the ownership of such goods by DTC clearly shows that all the said parties e.g. DTC, UT etc. were involved together in the unaccounted clearance of such goods for evasion of Central Excise Duty.

(d) More so, the evidence are overwhelming in the form of statements, slips, challans and clandestine modus-operandi of fraudulent preparation of transport documents, clandestinely sending through rikshwa pullers and clandestine transaction in cash payments and evidence of machines of production, seizure of non-duty paid goods. Therefore in the facts and circumstances of the case, there is clear evasion and nexus between the parties. The amounts of cash recovered from different premises was only the sale proceeds of the clandestine manufacture and removal of excisable goods i.e. Pan masala & Gutkha. The sale proceeds were due to evasion of duty. The explanations given by the Parties that the cash did not relate to evasion of duty have no basis, at all.

Therefore, the cash amounts recovered were liable for confiscation. The adjudicating authority has without any reason or proper basis dropped the charges and confiscation of cash.

(e) Further, the adjudicating authority has wrongly dropped the demand on the presumption without any basis that the other bags on which Pukar Brand was not written were duty paid. The standard of proof required in quasi-judicial proceedings is that of "preponderance of probability" and it is not "proof beyond reasonable doubt" as has been wrongly held by the adjudicating authority. In this case the allegations were clearly established on the basis of "preponderance of probability" as well as on the basis of "beyond doubt".

In view of the above, the entire demand was liable to confirmation and entire seized goods were liable for confiscation.

In fact, Pan Masala/Gutkha industry is a known evasion prone industry and usually all transacations are made in cash and everything deals in chits and papers and nothing is recorded. Clandestine removal is an activity resulting in avoidance of legal duties to the State. Secrecy and stealth being its covering guards, it is impossible for investigation to un-reveal every link of the process. As held by Hon'ble Supreme Court in case of Collector of Customs, Madras & others Vs. D. Bhoormull [1983(13)ELT 1546 (SC)] the Department is not required to prove its case with mathematical precision, but what is required is the establishment of such degree of probability that a prudent man may on its basis believe in the existence of the facts in issue.

However, in this case the investigation has sufficiently established the charges.

(f) Out of the demand of Rs.5,18,16,960/-, the Adjudicating Authority has confirmed the demand of Rs.39,08,160/- and dropped the rest. However, the operating portion of O-I-O has no mention of such dropping.

(g) O-I-O under scrutiny is passed in respect of eight parties, however, nothing is discussed about the eighth party namely Shri Ashish Srivastava and he is simply referred to in one line in the operative portion of O-I-O stating that no penalty is imposed upon him. Since the CESTAT Order quashes the first adjudication order hence while undertaking the second adjudication all eight parties were supposed to be addressed with proper discussion.

8. In appeal No.E/55665/2013, the appellant, M/s Durga Trading Company, filed appeal, challenging the findings of Original Authority in Order-in-Original dated 01.11.2012, the grounds of appeal, inter-alia include findings by the Original Authority that 1,357 bags out of 15250 of Pukar Gutkha transported by Transporters, were not duty paid goods as contrary to law, the findings of Order of Original Authority to the appellant i.e. M/s Durga Trading Company, to pay Central Excise duty of 39,08,160/- without any basis taking into consideration, the fact that the said decision was arrived at by the original authority based on the evidence in cross-examination of the third party i.e transporters.

9. The Learned D.R. for revenue has reiterated the grounds of appeal in the appeals filed by the Commissioner of Central

Excise, Lucknow and he has contested the appeal preferred by M/s Durga Trading Company. The Ld. Counsel representing M/s Durga Trading Company has submitted that the following facts are undisputed in these proceedings (i) both M/s Durga Trading Company and M/s Udai Traders are separate legal juristic persons. (ii) Clearance of Pukar Brand Gutkha at ex-factory gate of the manufacturer, is not disputed. (iii) ownership of 21 bags of Pukar Brand Gutkha and 18 bags of Pukar Pan Massala allegedly seized in the premises of M/s Udai Trading is not disputed to the extent of both duty paid nature as well as ownership of M/s Udai Traders. (iv) There was no resumption of any incriminating documents either from M/s Durga Trading Company or from Udai Traders. (v) The entire duty has been worked on the basis of tabulated chart which in turn have been prepared on the basis of private unsigned documents resumed from the transporters premises in the form of purported goods chalans. He has further contended that the demand dropped by Original Authority was by following the direction of this Tribunal in its final order dated 12.08.2011 and the grounds of appeal preferred by Revenue do not prove that the findings of the Original Authority so far as dropping of demand is concern[ed] in any way deviated from the said directions of this Tribunal. He has requested to set aside the impugned order to the extent the same is against the interest of M/s Durga Trading Company and other co-noticee.

10. We have carefully taken into consideration the rival contentions. We find that the contentions of Revenue in the grounds of appeal are more or less repetition of show cause notice. We find that the show cause notice and earlier Order-in-Original dated 27.05.2005, have merged into the final order dated 12.08.2011 passed by this Tribunal, as per the doctrine of merger. The issue for our consideration is present appeals before us is whether the impugned order in original is sustainable with reference to the directions that were given by this Tribunal in its said final order dated 12.08.2011. The grounds of appeal by Revenue & M/s Durga Trading Company are stated is foregoing paras. In none of the grounds, either Revenue or M/s Durga Trading Company would establish that any of the direction given by this Tribunal while remanding the matter to Original Authority have been violated while passing the impugned Order-in-Original. We therefore, hold that present Order-in-Original is sustainable in respect of all the above stated appeals. Therefore, all the above stated appeals are dismissed.

(Dictated and pronounced in the open Court)

24.8.16
(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

08/08/2016
(ANIL G. SHAKKARWAR)
MEMBER (TECHNICAL)

Mishra

प्रमाणित प्रति / Certified True Copy
23.9
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