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: 18/07/2017

To

Appellant as per address in table below
Respondent as per address in table below

Final Order No. A/70638/2017-SM[BR] dated 30/06/2017

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/1347/2008	**ALLAHDAD TANNERY PVT. LTD.** 99/85-A, JAJIMAU ROAD,JAJIMAU, KANPUR.
		Name and Address of Respondent
2		-C.C.E. KANPUR 117/7, Sarvodaya Nagar, Kanpur 208005.

--

Copy To

3Advocate(s) / Consultant(s):

Jitendra Kumar
B-7, ASHADEEP, 9- HAILEY ROAD, NEW DEHLI-110001

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/1347/2008-EX[SM]

(Arising out of Order-in-Appeal No. 154-ST/APPL/KNP/2008 dated 31/03/2008 passed by Commissioner of Central Excise & Customs (Appeals), Kanpur)

Allahabad Tannery Pvt. Ltd. (formerly Allahabad Tannery)

Appellant

Vs.

Commissioner of Customs & Central Excise, Kanpur **Respondent**

Appearance:

Shri Jitendra Kumar (Advocate) for Appellant
Shri Sandeep Kumar Singh (Deputy Commissioner) for Respondent

CORAM:

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

Date of Hearing : 30/06/2017
Date of Decision : 30/06/2017

FINAL ORDER NO. 70638/2017.........

Per: Anil Choudhary

The issue in this appeal filed by the appellant-assessee a manufacturer and exporter of leather products is against rejection of the refund claim of Service Tax paid during the period January, 2005 to August, 2005 on Reverse Charge Basis on the services received from outside India.

2. The brief facts are that the appellant had deposited Service Tax on the services received from outside India being service by their agents, located outside India in procuring

orders for export sales. The appellant had deposited the Service Tax under protest on demand being made by the Revenue during the period January, 2005 to August, 2005. Thereafter on being so advised, the appellant filed refund claim on 24 January, 2007 for Rs. 17,94,864/- on the ground that they are an exporter and hence, not in position to utilize Cenvat Credit on 'input services'. The Deputy Commissioner rejected the refund claim on various grounds like the appellant availed duty drawback, and that the commission paid is not verifiable with the shipping bills etc. Being aggrieved the appellant preferred appeal before learned Commissioner (Appeals), who vide the impugned order was pleased to uphold the rejection. Being aggrieved the appellant is before this Tribunal.

3. Heard the parties.

4. Having considered the rival contentions I find that in view of the ruling of Hon'ble Bombay High Court in Indian National Shipowners Association reported at 2009 (13) STR 235 which have been confirmed by the Hon'ble Supreme Court it have been held that no Service Tax is leviable on reverse charge prior to 18 April, 2006 when Section 66A was enacted in the Finance Act, 1994. In this view of the matter I hold that the appellant is entitled to refund of the amount paid by them under protest on Reverse Charge Basis, which is related to the period prior to 18 April, 2006. Accordingly, I allow this appeal with consequential benefits and set aside

the impugned order. I further direct the Adjudicating Authority to grant the refund with interest as per rules within 30 days from the date of receipt or service of the copy of this order.

(Dictated and pronounced in Court)

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

Ankit

प्रमाणित प्रति/Certified True Copy
21/07/2017
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

FAX : 0532-2400149

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

Dated: 18/07/2017

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70639-70641/2017-EX[DB] dated 06/07/2017

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/1759/2010	JAGANNATH DALIP SINGH 528, G T Road, Ghaziabad. (UP)
2	E/1760/2010	ARUN KUMAR PARTNER U/A-29, Banglow Road, Jawahar Nagar, Delhi.
3	E/1761/2010	SHRI GULAB SINGH PARTNER U/A-29, Banglow Road, Jawahar Nagar, Delhi.
		Name and Address of Respondent
4		-C.C.E. GHAZIABAD C.G. O. Complex-II, Kamla Nehru Nagar, Ghaziabad 201302
5		-C.C.E. GHAZIABAD C.G. O. Complex-II, Kamla Nehru Nagar, Ghaziabad 201302
6		-C.C.E. GHAZIABAD C.G. O. Complex-II, Kamla Nehru Nagar, Ghaziabad 201302

Other Appellants and Respondents as per Annexure

Copy To

7Advocate(s) / Consultant(s):

S. D. Gaur
SB-108, SHASTRI NAGAR,
GHAZIABAD,
UTTAR PRADESH

8 Bar Association, CESTAT, Allahabad

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

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

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Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH : ALLAHABAD
COURT No. I
APPEAL No.: E/1759, 1760 & 1761/2010-EX[DB]

(Arising out of Order-in-Original No. 04-11/Commissioner/GZB/2010 dated 29/03/2010 passed by Commissioner, Customs, Central Excise & Service Tax, Ghaziabad)

Ja-gannath Dalip Singh,
Arun Kumar Partner,
Gulab Singh Partner — **Appellant**

Vs.

Commissioner of Central Excise, Ghaziabad — **Respondent**

Appearance:

Shri S. D. Gaur (Consultant) — for Appellant
Shri Rajeev Ranjan (Joint Commissioner) — for Respondent

CORAM:

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

Date of Hearing : 06/07/2017
Date of Decision : 06/07/2017

FINAL ORDER NO-70639-70641/2017

Per: Anil Choudhary

The issue in appeals is whether the appellant assessee have paid excise duty correctly under the provisions of Section 4 of the Act, instead of Section 4A. Further issue is whether the show cause notice is barred by extended period of limitation.

2. The brief facts are that the appellant – Jagannath Dalip Singh, is manufacturer of Branded Chewing Tobacco under the brand name 'MOAR CHHAP' falling under Tariff item No. 24039910 of the first schedule to the Central Excise Tariff Act, 1985 with effect from 01/03/2005. The other two

appellants are the partners of the said firm. Further facts are that by insertion of a new entry No. 24A in the Notification No. 13/2002 - CE(NT) dated 01/03/2002, as amended vide Notification No. 10/2003(NT) and dated 01/03/2003, the product of the appellants, that is branded chewing tobacco was brought under the maximum retail price (MRP)/retail sale price – RSP, based assessment, to be assessed to duty under Section 4A of the Act. Accordingly, the appellant started payment of excise duty on their product, irrespective of the size of the package, under RSP based assessment. The appellant started manufacture of 9gm. purias/pouch of their product with effect from 01/03/2004 to 31st of March 2008. Further facts are that the appellant vide the letter dated 19/02/2004 addressed to the jurisdictional Assistant Commissioner, with a copy to the Range Officer informed as under: –

"It is for your information that we are packing chewing tobacco – MOAR CHHAP – in a pack of 9gm each. These purias of 9gm each are packed in a wholesale pack containing 20 Purias. The retail sale pack containing 9gm is exempt from marking MRP under Rule 34 of the Standard of weights and measures (packaged commodities) Rules, 1977.

In view of the above facts and legal provisions we will assess the duty of excise under Section 4 of the Central excise Act, 1944 with effect from 01/03/2004."

3. Further, the appellant again vide their letter dated first

of March, 2004, addressed to the Assistant Commissioner - C. Ex., with copy to the Range, informed as under: -

"In continuation to our letter dated 19/02/2004, it is for your information that we have started assessment of chewing tobacco under Section 4 in place of Section 4A of the Central Excise Act, 1944."

4. Whereas, as intimated by the appellant through their letters dated 19/04/2004 and 01/03/2004, the appellant started making assessment of the products, of packages size 9gm, under Section 4 of the Act with effect from 01/03/2004". Further facts are that the appellant was regularly filing their returns with the Department and paying the tax as assessed by them under Section 4 of the Act. There was an inspection in the factory premises of the appellant on 01/04/2009 to enquire the pattern of sale, that is under Section 4 or 4A of the Central Excise Act, method of valuation, nature of packing and the MRP of different packages of different grams during the period 2004 to 2008. The statement of one Mr. Vinod Kumar Tyagi, the authorized Representative of the appellant was recorded under Section 14 on 01/04/2009, who inter alia stated as under: -

(i) That during the period beginning from 01/03/2004 to 31/03/2008, they had inter alia manufactured the Purias of 9gm with MRP printed on it.

(ii) That after 01/03/2004, they have paid Central Excise duty on the packages of 9gm under Section 4 of the Act.

(iii) That inter alia, they have cleared the 9gm packages as packed in Multi-piece pack, in the following manner: –

(a) 9 gms x 20 Purias

(b) 9 gms x 27 Purias

(iv) That they sell their products to the traders with MRP printed on it, who sell it in the retail.

(v) That they are enclosing a detailed chart, year wise, month wise, packing wise details of the value under Section 4 or 4A of the Act, as the case may be, along with MRP wherever it was available with them of their products, for the period beginning from 01/03/2006 to 31/03/2008.

(vi) That with regard to the MRP of the product cleared during the period beginning from March 2004 to March 2006, the same is neither available with them nor they can make available the same.

(vii) The appellant inter alia also provided the packing material of some of the products duly signed by them as used by them currently.

5. It appeared to Revenue that the party was engaged in packing their goods into 9.0gms package, commonly known as Purias/pouches in the trade parlance. The packages of 9.0gms where further packed in multi-piece packets. One multi-piece packet containing 20/27 Purias of 9.0 gms having weight 180/243 gms respectively. These multi-piece packets are further packed in bags/cartons for the purpose of distribution and transportation in the wholesale trade.

Whereas, clause 'b' of Rule 34 of the Standard of Weights & Measures (Packaged Commodity) Rules, 1977 (hereinafter referred to as SWAMPCR, for short), as it existed at relevant time(as referred by the party in their aforesaid letter) reads as under: -

Rule 34

"nothing contained in these Rules shall apply to any package containing a commodity, if-

(a)......

(b) the net weight or measure of the commodities, 20 gm or 20 ml or less, if sold by weight or measure."

(Quantity of "20 gm or 20 ml or less" has been substituted by "10gm or 10ml or less" vide G.S.R. 425(E) dated 17/07/2006 with effect from 13/01/2007). Further past amendment, clause 'b' of Rule 34 provides – that the net weight or measure of the commodity is 10 gm or 10 ml or less, if sold by weight or measure.

8. It appeared to Revenue that for the provisions of clause 'b' Rule 34 of SWAMPCR, exempts only packages containing a commodity if the net weight or measure of the commodity, is 20 gm or 20 ml or less, if sold by weight or measure, hence, exemption is not available for goods in question to the assessee as the exemption is subject to the condition that the products should be sold by weight or measure. Further alleged that, It is a matter of common knowledge/trade

parlance that the pouches of chewing tobacco (and pan Masala/Gutka etc.) are sold in the market by MRP/RSP in numbers and certainly not by weight or measure. Thus for this reason, it appears, that the exemption from marking 'retail sale price' is not available to chewing tobacco Purias of 9 gms, since these are not sold by unit weight or by unit measure in the trade. It further appeared to revenue that based on the statement of the authorised signatory, it appears that they are not clearing the goods in the packing below 20 gms/10 gms, but actually clearing the same in a multi-piece pack of 180 g/243 g (9.0 gms x 20 Purias = 180 gms and 9.0 gms x 27 Purias = 243 gms). This appeared to be the position up to 12/01/2007 and after amendment of Rule 2(j) and doing away with legal concept of "multi-piece package" under SWAMPCR, single 9.0 gms Purias also do not appear to get benefit of Rule 34(b) for aforesaid reasons. Further Rule 2(j) of SWAMPCR reads as follows

"multi-piece package" means a package containing two or more individual packaged or labeled pieces of the same commodities of identical quantity intended for retail sale, either in individual pieces or the package as a whole;

Illustration : a package containing 5 toilet soap cakes net weight 20gm each, total net weight 100gm is a multi-piece package.

Accordingly, it appeared that in the facts of this case one package (multi-piece package) contains 20/27 Purias of

9.0gms, each as stated in para 2 above, and the total weight of one package is 180gms/243gms. Further, the provisions of Rule 17 of SWAMPCR provides – Additional declaration to be made on multi-piece package –

"But every multi-piece packet shall be thereon in addition to the declaration as required to be made under in the provision of these Rules, a declaration of – the number of individual pieces of the commodity contained thereto, sale price of the multi-piece package.

Provided that where individual pieces contained in a multi-piece package are packaged or labeled separately and are capable of being sold separately, each piece shall bear thereon a declaration as the quantity and the sale price thereof."

Rule 17(2) - If individual pieces contained in the package do not carry retail sale price, it shall carry a declaration that they are not intended for retail sale.

It appeared that the exemptions what in Section under Rule 34(b) is not available to the appellant in view of the provisions of erstwhile Rule 17 of SWAMPCR and accordingly, they were required to mention the MRP on the multi-piece package, and thus liable to be assessed to Excise Duty on the value as applicable under the provisions of Section 4A of the Act. Further, reliance was placed on the ruling of the Apex Court in the case of Jayanti Food Processing Private Ltd versus CCE, Rajasthan

2007(215)E.L.T. 327(SC) wherein the Hon'ble Supreme Court inter alia, held as under: –

"When we read these rules along with provisions of Section 4A of the Act, it would be clear that where there is a general exemption like Section 34, under the SWM (PC) Rules, such goods and/or packages of such goods shall not be covered by Section 4A(1) and (2) of the Act. However, all such packages which are covered under Chapter-II, more particularly under Rule 6(1)(f), Rules 15, 16 and 17, would be governed under Section 4A, as such packages are required to declare the retail sale price on the packages". Further, reliance was placed by Revenue on the ruling in the case of Vernica Herbs versus CBEC New Delhi [2004 (163) ELT 160], wherein the Hon'ble Madras High Court under the fact that the party was engaged in the manufacture of herbal hair dye which was being packed in sachets of 8gms and 6gms, such pouches were being packed in a mono carton. The Hon'ble Court in para 15 of its order held that –

"A perusal of these provisions make it clear that articles packed in separate pouches by the petitioner can be termed as multi-piece package and such pouches can be sold individually in single piece or together in a mono carton of six pouches. The contention of the petitioner that exemption under Rule 34 would be applicable is not acceptable. Even though the net weight is less than 10gms, it is evident that the article is not intended to be sold, either by weight or by measure as contemplated under Rule 34(b). The contention that clarification issued by Respondent No. 1, has the effect of whittling down the exemption granted under Rule 34, is not at all acceptable." Reliance is also placed on the CBEC Circular No. 492/58/99 – CX dated 02/11/1999, wherein the board was clarified the doubts raised as regards charging of such duty with reference to MRP under Section 4A in respect of multi-piece packages on the basis of claim made by certain manufacturers, that there is no requirement for declaration of retail sale price on such packages under SWAMPCR or any other Rule made thereunder. Upon consideration, the Board examined the definition of multi-piece package, which means a package containing two or more individual packaged or labeled pieces of the same commodity of identical quantity, intended for retail sale, either in individual pieces or the package as the whole.

Illustration : – A package containing "5 toilet soap cakes net weight 20g each, total net weight 100g" is a multi-piece package. The Board clarified that as per the opinion of Law Ministry, the exemption under Rule 34(b) is applicable to a package containing a commodity and this exemption does not appear to be applicable to multi-piece packages.

Based on the above opinion of the Law Ministry, it is clarified that declaration of retail sale price of multi-piece packages and individual pieces contained in such multi-piece packages (if such individual pieces are capable of being sold separately) are statutorily required under Rule 17(1) of the SWAMPCR, 1977. In view of the statutory requirements for declaration of retail sale price under the SWAMPCR for multi-piece package, it is clarified that in respect of multi-piece packages of a commodity 'intended for retail sale' and which are notified under Section 4A, they shall be assessed to excise duty under the provisions of Section 4A of Central Excise Act, 1944. Upon such premises it appeared to Revenue that the appellants are required to pay duty on the basis of MRP under the provision of Section 4A of the Act and accordingly differential duty was computed and the duty found short paid have been demanded vide the eight show cause notices. The details of which are as under:-

SCN No.	Period	Qty.	Demand
02/09/dt.04/04/2009	2003 to 2007-08	9gms	2,41,51,532.00
03/2009 dt. 04/04/2009	March 05 to 2007-08	8gms	1,35,88,049.00
36/Adc/09 dt.04/04/2009	2007-08	7.5gms	23,93,443.00
37/Adc/09 dt. 04/04/2009	2003-04 to 2006-07	6gm	6,44,444.00
38/Adc/09 dt. 28/04/2009	April 08 to Sept'08	7.5gm	30,68,186.00
42/Adc/09 dt. 14/05/2009	October 08 to March 09	2.5gm 6.0gm 7.5gm	37,50,088.00
03/09 dt. 04/04/2009	March 04 to 2004-05	10gms	18,552.00
4/09 dt. 04/04/2009	01/04/2007 to 31/03/2008	5gms	47,971.00

The show cause notices were confirmed vide Order-in-Original dated 29 March 2002, and proposed demand confirmed with equal amount of penalty. Further penalty of 15 lakhs each was also imposed on the partner(s) of Jagannath Dalip Singh, namely - Arun Kumar and Gulab Singh under Rule 26 of CER. Being agrived appellants are before this Tribunal.

The Learned Counsel for the appellant states that it is nowhere the case of Revenue that the bigger pouches of 20/27 purias were having retail sale price, MRP/RSP on them. The Learned Counsel further states the bigger pouches were meant for sale in wholesale, to the intermediaries in trade, and there is no evidence brought on record by the Revenue that such bigger pouches containing 20/27 tobacco purias were also being sold in retail market at MRP/RSP. It is mentioned in para 4.2 of the impugned order by the Learned Commissioner as follows: -

"I observed that Shri V.K. Tyagi, authorized representative of the party in his statement dated 01/04/2009, recorded under Section 14 of the Central Excise Act, 1944 admitted that MRP and weight is printed on each pouch/Puria, which is further packed in a packet. He also admitted that the packet is further marked with MRP and weight of each Puria contained in one packet. This means that weight and MRP of the packet is also made clear to the customer. I also find that individual Puria/pouch is capable of being sold separately. The party has contended that they clear chewing tobacco in gunny bags/cartons containing 144 packets with each packet having different number of Purias/pouches and these gunny bags are not meant for retail sale to the ultimate consumer. As such their packing is wholesale package. This contention of the party is not correct and acceptable in view of the fact that in retail market it is the Puria/pouch which is sold to ultimate consumer, not the gunny bags having packets. Also, I find that party's authorized representative in his statement dated 01/04/2009 has inter alia admitted that they clear the Purias/pouches packed in the packages with MRP printed on it to the traders who sell it in the retail market. In view of these facts, I observe that the pouches/purias cleared by the party are in multi-piece package."

9. The Learned Counsel have taken us to the complete statement of Shri V. K. Tyagi and submitted that there is no such admission on the part of Shri V. K. Tyagi, that the bigger packets of the pouches containing 20/27, and/or more than 10 Purias marked with MRP. Mr. V. K. Tyagi has categorically stated that it is only the individual Puria of 9gms or less, which is marked with MRP and the weight.

10. Learned AR for Revenue have relied on the impugned order.

11. Having considered the rival contentions we find that wholesale package have been defined in the Package Commodity Rules as meaning a package containing –(i) Retail packages, where such first mentioned package is intended for sale, distribution or delivery to an intermediary and is not intended for sale direct to a single consumer, or (ii) a commodity sold to an intermediary in bulk to enable such intermediary to sell, distribute or deliver such commodity to

the consumer in similar quantities, or (iii) packages containing 10 or more than 10 retail packages provided that the retail packages are labeled as required under the Rules. Accordingly, we find that the larger pouches containing more than 10, under the admitted facts, 20/27 Purias are wholesale packages. Further we find that there is no material on record that such wholesale packages were marked with MRP or where intended for retail sale. Under such circumstances we hold that the appellant was entitled to assessment to duty under the provisions of Section 4 of the Central Excise Act in respect of the retail packages in question. Under such circumstances, we find that the impugned order is not sustainable and accordingly, we set aside the impugned order, and allow all the appeals with consequential benefit to the appellants.

(Dictated & Pronounced in Court)

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

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

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