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: 19/01/2017

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70054-70061/2017-EX[DB] dated 18/01/2017

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/52198/2014	**Mayank & Co** Mauranipur, JHANSI UP
2	E/52199/2014	**Madhur & Company** Gopalganj, Mauranipur, JHANSI UP
3	E/52200/2014	**Brijesh Kumar Sahu** Kurechanaka Road, Mauranipur, JHANSI UP
4	E/52201/2014	**Millan & Company** Gopalganj, Mauranipur JHANSI UP
5	E/52203/2014	**Milan Products** Kurechanaka Road, Mauranipur, JHANSI UP
6	E/52202/2014	**Hari Shankar Ballaiya** Mauranipur, JHANSI UP

7 E/52770/2014 **Sitaram Billaiya**
Kurechanaka, Mauranipur,
Mohalla Sabungram
JHANSI
UP

8 E/53266/2014 **Milan & Sons**
Kurechanaka Mauranipur,
Mohalla Sabungram
JHANSI
UP

Name and Address of
Respondent

9 C.C.E. & S.T.-Kanpur
117/7...SARVODYA NAGAR,
KANPUR,
UTTAR PRADESH-208005

10 C.C.E. & S.T.-Kanpur
117/7...SARVODYA NAGAR,
KANPUR,
UTTAR PRADESH-208005

11 C.C.E. & S.T.-Kanpur
117/7...SARVODYA NAGAR,
KANPUR,
UTTAR PRADESH-208005

12 C.C.E. & S.T.-Kanpur
117/7...SARVODYA NAGAR,
KANPUR,
UTTAR PRADESH-208005

13 C.C.E. & S.T.-Kanpur
117/7...SARVODYA NAGAR,
KANPUR,
UTTAR PRADESH-208005

14 C.C.E. & S.T.-Kanpur
117/7...SARVODYA NAGAR,
KANPUR,
UTTAR PRADESH-208005

15 C.C.E. & S.T.-Kanpur
117/7...SARVODYA NAGAR,
KANPUR,

UTTAR PRADESH-208005

16 C.C.E. & S.T.-Kanpur
117/7...SARVODYA NAGAR,
KANPUR,
UTTAR PRADESH-208005

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Other Appellants and Respondents as per Annexure

Copy To

17 Advocate(s) / Consultant(s):

S. K. PANDEY
(ADVOCATE)
62, KHURSHED BAGH,
LUCKNOW-226004

18 **GST Consultancy and Legal Services**
D-40, 1st floor, South Extenstion Part-I,New Delhi-110049

19 **B K SINGH**
GST CONSULTANCY & LEGAL SERVICE, D-40, 1ST FLOOR,
(OPPOSITE-UNION BANK OF INDIA), SOUTH EXTENSION, PART-I,
NEW DELHI,
DELHI
110049

20 **GST Consultancy and Legal Services**
D-40, 1st floor, South Extenstion Part-I,New Delhi-110049

21 Bar Association, CESTAT, Allahabad

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

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

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

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

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

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

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

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

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

31 C.D.R. 32 Office Copy 33 Guard File

Asstt. Registrar

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

Appeal Nos.E/52198-52203, 52770 & 53266/2014-EX[DB]

Arising out of Order-in-Original No.KNP/EXCUS-000-COM-021-13-14 dated 31.12.2013 passed by Commissioner Central Excise & Service Tax, Kanpur.

For approval and signature:

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

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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. Whether Order is to be circulated to the Departmental Authorities? : Yes

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(i) M/s Mayank & Co.
(ii) M/s Madhur & Company
(iii) Brijesh Kumar Sahu
(iv) M/s Milan & Company
(v) Hari Shankar Billaiya
(vi) M/s Milan Products
(vii) Sitaram Billaiya
(viii) M/s Milan & Sons

APPELLANT(S)

VERSUS

Commissioner of Central Excise & Service Tax, Kanpur

...RESPONDENT (S)

APPEARANCE:
Shri S.K. Pandey, Advocate for the Appellant (s) (in Appeal No.52198/14 & E/52201/14) and Shri B.K. Singh & Shri Garvit Chauhan, Advocates in remaining other appeals

Shri K.M. Mondal, Special Counsel (AR) for the Department

CORAM:

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

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

CUSTOMS EXCISE & SERVICES TAX APPELLATE TRIBUNAL

DATE OF HEARING & PRONOUNCEMENT: 09.11.2016

FINAL ORDER Nos.-70054-70061/2017

Per Mr. Anil G. Shakkarwar:

The above stated appellants were issued with a common show-cause-notice DZU/INV./65/D/Central Excise/2010/1238 dated 30.11.2011, therefore, the said appeals are taken together for decision.

2. The brief facts of the case are that M/s Milan & Sons, Mauranipur, District-Jhansi were registered with Central Excise and were manufacturing branded manufactured tobacco bearing Brand Name-"Hathi Chhap 8 No. Tobacco", "Hiran Chaap 8 No. Tobacco" and "Kashi Chhap Tobacco" and Shri Dharmpal was the proprietor. M/s Milan Products, Mauranipur, District-Jhansi was registered with Central Excise Department and were manufacturing branded manufactured Tobacco bearing brand name-"Maa Chhap 8 No.Tobacco", "Bharat Chhap 8 No. Tobacco", "Kashi & Sagar Brand Tobacco", and Mr. Brijesh Kumar Sahu was its proprietor. M/s Madhur and Company, Mauranipur, District- Jhansi, was registered with Central Excise Department and was manufacturing branded manufactured Tobacco bearing brand-names "Tota Chhap 8 No. Tobacco", "Shree Chhap 8 No. Tobacco", "Guruji & Kashi brand Tobacco", and Shri Govind Das was its proprietor.

2.1 The factory premises of M/s Milan & Sons were searched on 27.02.2010. The officers conducting search, came to know that Shri Sita Ram Billaiya was owner of the Brands "Hathi Chhap 8 No. Tobacco". On 27.02.2010, statement of Shri Sitaram Billaiya was recorded, wherein he stated that he was registered owner of the Trade Mark "Hathi" and he had given "Hathi" brand for used by M/s Milan and Company and in lieu of the same, he was receiving some payments from M/s Milan & Company. The factory premises of M/s Milan Products was also visited by Officers of DGCEI on 27.02.2010 and the factory premises was found to be locked. The officer broke up the lock and conducted search. The factory premises of M/s Madhur and Company was searched. Statement of Shri Hari Shankar Billaiya was recorded on 27.02.2010 who deposed before the authorities that the owner of M/s Madhur & Comp. was Mr. Govind Das and that Chewing Tobacco was manufactured in that factory. The residential premises of Shri Hari Shankar Billaiya was searched on 27.02.2010, and some documents were recovered from the said residential premises. The main office premises of M/s Millan & Sons was also searched on 27.02.2010 in presence of Shri Jawahar Lal Modi, who was working with M/s Milan & Sons. Statement of Shri Jawahar Lal Modi was recorded on 27.02.2010, who had deposed that Shri Rajesh Nikhara was accountant of the party. The residential premises of Shri Rajesh Nakhara was searched on 27.02.2010, and some documents CPU/Pend Drive & CDs were resumed from his residence. On

27.02.2010 statement of Shri Rajesh Nakhara was recorded who deposed before the Central Excise Officers that he was an accountant by profession and that he maintained the accounts of people in the Computer and files and that the businessmen got their accounts prepared by visiting him personally and that he completed their work while staying at home and that he looked after the work of M/s Milan Products, M/s Milan & Sons and M/s Madhur & Co., and that all said three companies manufactured "Maa", "Hathi", "Tota" & "Shree" brand of Chewing Tobacco. Shri Jawahar Lal Modi in his statement dated 27.02.2010 deposed before the Office of Central Excise that he looked after work of M/s Milan & sons and M/s Madhur and Co. Mauranipur and that M/s Milan Products, M/s Milan & Sons and M/s Madhur & Co. manufactured "Tota", "Maa" and "Hathi" brand Chewing Tobacco. At the factory premises of M/s Milan & Sons 2275 pouches of different brand Chewing Tobacco were detained on 27.02.2010 and were subsequently seized on 23.04.2010. At the factory premises of M/s Milan Products Chewing Tobacco pack in 73 bags totally valued at Rs.3,46,020/- along with 540Kg of Chewing Mixture valued at Rs.1,6200/- and 80 Kg of packing materials valued at Rs.4800/- were detained on 27.02.2010 and were subsequently seized on 23.04.2010. Shri Jawahar Lal Modi accountant of M/s Milan & sons stated before the Central Excise Officers on 27.02.2010 that M/s Milan Products, M/s Milan & Sons and M/s Madhur & Co. were engaged in the manufacture of Tota, Maa & Hathi brand of Chewing Tobacco and Shri Hari

Shankar Billaiya, Shri Sita Ram Billaiya, Shri Brijesh Sahu were partners in Milan & Co. He further deposed that the records resumed at his residence on 27.02.2010, were that of Milan group of Company. On further questioning Shri Jawahar Lal Modi stated that pages 1-103 of Katcha spiral Note Book recovered from his residence contains the details of raw materials received in Milan Group of Company like Zarda Tobacco, beetle nut, bags, film purchase in cash. He further deposed that there were three partners in the Milan Group of Co. and they were Shri Sita Ram Billaiya, Hari Shankar Billaiya & Brijesh Sahu. On the basis of documents recovered at the residence of Shri Jawahar Lal Modi and on the basis of CD, Pen-drive and documents recovered from the residence of Mr. Rajesh Nikhara, Officer of Central Excise Intelligence conducted further enquiries and investigations. The investigations were also conducted at the end of raw materials of suppliers and suppliers of packing materials. Shri Sita Ram Billaiya, Shri Hari Shankar Billaiya and Shri Brijesh Sahu and Shri Rajesh Nikhara were issued summons to appear before Officer of DGCEI, New Delhi on 23.03.2010, 25.03.2010, 18.03.2010 & 22.03.2010 for retrieval of data from electronic devices i.e. Computer, Laptop, CD, which were resumed from the residence of Shri Rajesh Nikhara. Shri Sita Ram Billaiya and Shri Hari Shankar Billaiya were again issued summons to appear on 09.08.2010 and Shri Brijesh Kumar Sahu was requested to appear on 10.08.2010. Since none of them appeared for retrieval of data, the electronic devices i.e. Computer, Laptop and CDs were opened on 23.07.2010, 11.08.2010 and 13.08.2010 and data was retrieved. The Officers of DGCEI visited factory premises of M/s Milan & Sons on 25.08.2010 and collected samples of Haathi Chhap 8 No. tobacco through Panchnama dated 25.08.2010 from the goods seized referred to earlier. The Officers of DGCEI visited factory premises of M/s Milan Products on 25.08.2010 and drawn written sample of "Maa Chhap 8 no. tobacco" through Panchnama from the goods seized refered to earlier. The Officers of DGCEI visited the factory premises of M/s Madhur and Company and collected written sample of "Tota Chhap 8 No. Tobacco" and "Shree Chhap 8 No. Tobacco" under panchnama from the goods seized referred to earlier. Samples of branded Chewing Tobacco were got tested through Shri Ram Institute for Industrial Research, Delhi. All test report dated 19.10.2010 in respect of samples drawn from M/s Milan Products, M/s Madhur & Company and M/s Milan & Sons certified presence of betel nut, Lime & Katha in the samples tested by them. On the basis of data recovered from electronic devices and on the basis of test report once again statements of various persons associated were recorded. On the basis of above stated investigations, it appeared to Revenue that the products manufactured by M/s Milan & Company, Mayank & Company, M/s Madhur & Company, M/s Milan Products & Milan & Sons were correctly classifiable under Tariff Item No.2403 9990 as "Pan Masala or Gutkha" and it appeared to Revenue that duty was chargeable under Pan Masala Packing Machines (Capacity

Determination and Collection of Duty) Rules, 2008. It appeared to Revenue that any preparation containing betel nut and Tobacco and anyone of the ingredients namely Lime & Katha would qualified for classification under Tariff Item No. 2403 9990 and on the basis of Chemical examiner report testifying that such preparation contained betel nut, Lime & Katha, the goods which were detained and seized were "Pan Masala or Gutkha" classifiable under 2403 9990. It further appeared to Revenue that to determine the correct duty liability, it was necessary to know about the number of pouchs packing machines operated by the parties during relevant period. On the basis of intimation given by the appellants to the jurisdictional Central Excise Officers from time to time, the number of pouchs packing machines installed in the factory were as given in Table No.33 on Page No.124 of the show-cause-notice dated 23.07.2010. On the basis of such information, the duty liability of "Pan Masala/ Gutkha" was calculated and stated in said Table No.33 of show-cause-notice. On the basis of above investigation and inference ~~interference~~ drawn from the investigation, the appellants were issued with a show-cause-notice No.DZU/INV./65/D/C.Ex./2010/1238 dated 30.11.2011. Through the said show-cause-notice, M/s Milan & Company, M/s Mayank & Company, M/s Madhur & Company, M/s Milan & Sons & M/s Milan Products, Shri Sitaram Billaiya, Shri Hari Shankar Billaiya and Shri Brijesh Kumar Sahu were called upon to show cause.

The proposals in the said show-cause-notice in Para 58 & 59 are reproduced herein below:-

"Now, therefore, M/s Milan & Co., Gopal Ganj, Mauranipur, District-Jhansi, U.P., M/s Mayank & Co., Kurechanaka Road, Mauranipur, District-Jhansi, U.P., M/s Madhur & Co., H/o of Hari Shankar, Gopal Ganj, Mauranipur, District-Jhansi (U.P.); M/s Milan & Sons, R/o ohan Lal, Krechanaka Road, Mohalla Sabungram, Mauranipur, District-Jhansi (U.P.) and M/s Milan Products, H/o Shri Santosh Kumar Sahu, O. Kurechanaka, Mauranipur, District-Jhansi, are hereby separately called upon to show cause to the Commissioner of Central Excise Kanpur at his office at 117/7, Sarvodaya Nagar, Kanpur-208 005 within thirty days (30) days of the receipt of this notice as to why:

(i) Central Excise duty amounting to Rs.7,51,14,382/- and Rs.1,50,00,000/- on M/s Milan & Co., Mauranipur, District-Jhansi, Rs/1,62,50,000/- on M/s Mayank & Company, Mauranipur, District-Jhansi, Rs.3,37,50,000/- on M/s Madhur & Company Mauranipur, District-Jhansi, Rs.5,62,50,000/- on M/s Milan & Sons, Mauranipur, District Jhansi and Rs.2,25,00,000/- on M/s Milan Products, Mauranipur, District-Jhansi (as detailed in table No.32 & 33 shown in para 48 & 48(iii) respectively) not paid by them should not be demanded and recovered from them separately under the proviso to Sub-Section (1) of Section 11A of the Act ibid.

(ii) penalty should not be imposed under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944 upon M/s Milan & Co., Mauranipur, District-Jhansi, upon central Excise duty evasion for the period 01.12.2006 to 30.06.2008.

(iii) Penalty should not be imposed under Rule 17 of Pan Masala Packing Machine Rule 2003, read with Section 11AC of the Central Excise Act, 1944 upon M/s Milan & Co., M/s Mayank & Company, M/s Madhur & Company, M/s Milan & Sons and M/s Milan Products, Mauranipur, District-Jhansi for the period as per detailed mentioned in Table No.33 [para 48(iii)]

(iv) Penalty equal to the said amount of Central Excise duty as detailed in para above should not imposed and recovered from them separately under Section 11AC of the Act, ibid.

(v) Interest on the said amount of Central Excise duty as mentioned in para 61(i) should not be charged and recovered from them separately under Section 11AB of the said Act.

Shri Sita Ram Billaiya, Shri Hari Shankar Billaiya and Shri Brijesh Kumar Sahu are further required to show cause as to why penalty should not be imposed and recovered from under Rule 26 of the Central Excise Rules 2002 for their active role in the clandestine removal of manufacture of Gutkha without payment of Central Excise duty and knowingly misclassified their goods to escape assessment of duty liability under Pan Masala Packing Machine Rules 2008 as detailed in para above."

3. In para 48 of the said show-cause-notice, it was stated that M/s Milan & Company manufactured Gutkha and evaded Central Excise duty amounting to Rs.7,51,14,382/- during the period from 01.12.2006 to 30.06.2008. Further as Para 48(i), it was stated that the products manufactured by M/s Milan & Company, M/s Mayank & Company, M/s Madhur & Company, M/s Milan Products & M/s Milan & sons appeared to be correctly classifiable under Tariff Item No.24039990 as "Pan Masala Packing or Gutkha". The said show-cause-notice was issued by invoking provision of proviso to Sub-Section (1) of Section 11A of Central Excise Act, 1944.

4. M/s Milan & Company contended before the Original Authority that there are two pre conditions to be established for invoking the provisions of Pan Masala Packing Machines (Capacity Determinations and Collection of duty) Rules, 2008 and they are the composition of the products qualified the criteria of the "Pan Masala or Gutkha" as defined in Chapter note 4 of the Chapter 24 of First Schedule to Central Excise Tariff Act, 1985 and 'Packing Machines' as defined under Rule 2(c) of Pan Masala Packing Machines Rules, 2008 should be used in the manufacturing activities and that they were manufacturing Tobacco products and the goods manufactured by them did not qualify the criteria of Pan Masala or Gutkha and further

submitted that after obtaining the registration on 19.07.2006, they informed the jurisdictional range Superintendent vide their letter dated 01.08.2006 that they were undertaking the manufacture of different brands of Tobacco and each 7.5gm pouch would contain 4gms of perfumed No.8 Tobacco along with 3gms. Supari Powder and their manufacturing unit was verified on 13.10.2006 by Central Excise Officers and again on 08.11.2006, who verified their RG-I Register and made an endorsement in the said register and did not find any discrepancy as compelled to the declaration about the goods being manufactured by them submitted to Range Superintendent. Further, at the time of introduction of said Pan Masala Packing Machines Rules, 2008, they through letter dated 11.07.2007 had informed the range Superintendent that they were not using Katha and Lime in their product and their product was not "Pan Masala or Gutkha" and further that they wound up their manufacturing activities on 05.04.2009 and surrendered Central Excise registration on 28.05.2009. They further contended that on the basis of result of incomparable products of other ~~assets~~ assessees, the goods manufactured by them which have stopped production by the time raid was conducted were alleged to be "Pan Masala or Gutkha" and, therefore, such show-cause-notice is unsustainable. They further contended that they did not have the machine described under the said Pan Masala Packing Machines Rules, 2008 but they were having Paddle Punch Sealing Machines. Therefore, on both grounds of composition of their product and the machines used by them, the duty proposed in the show-cause-notice was not payable by them.

5. M/s Mayank & Company submitted before the Original Authority that the show-cause-notice relied on the chemical analysis report given by Shri Ram Institute for Industrial Research, Delhi conducted on samples of incomparable finished goods manufactured by some other manufacturer. They contended that on 06.10.2008, they had declared composition of their product to the department that they were manufacturing Chewing Tobacco and each 5gm pouch would contain 3 gms. of perfumed Tobacco and 2gms of Supari Powder. Thus, in view of the said composition, their product was not "Pan Masala or Gutkha" as defined in said Chapter Note 4 of the Chapter 24 of said Tariff Act. They further contended that the show-cause-notice did not produce any circumstantial evidence of purchase receipt and physical availability of Lime and Kattha, market report and enquiry from users establishing presence of Lime and Kattha in the product manufactured by them. They further contended that they were using two Paddle Punch Sealing Machines and such Sealing Machines did not qualify the definition given in Pan Masala Packing Machines Rules, 2008. They contended that since their product was not Gutkha and they were not using machines defined under said Rules, the duty demanded from them of Pan Masala/Gutkha is not payable by them.

6. M/s Madhur & Company contended before Original Authority that they were engaged in the manufacture of Tobacco/Pan preparation containing tobacco and they were using only tobacco and betel nut and appropriate duty was paid by them and returns were filed and that they had never used Lime or Kattha in the manufacture of their finished goods. Their factory premises was searched on 27.02.2010. The Panchanama indicates that finished goods i.e. Chewing Tobacco and Brand Tobacco was found in the premises on physical verification. They further contended that the show-cause-notice relied on the statements given by Shri Hari Shankar Billaiya, Shri Jawahar Lal Modi & Shri Rajesh Nikhara and none of them in their statement dated 27.02.2010 stated that M/s Madhur & Company was engaged in the manufacture of "Pan Masala or Gutkha". On the contrary, all of them categorically, unambiguously, consistently and repeatedly clarified that M/s Madhur & Co. were engaged in the manufacture of branded Tobacco products. They further stated that Shri Jawahar Lal Modi in his statement dated 27.02.2010 stated that M/s Madhur & Company was engaged in the manufacture of Chewing Tobacco. They further contended that in their show cause notice No.DZU/INV./66/D/C.Ex./2010 dated 20.06.2010, it was proposed to confiscate branded tobacco detained and seized from their premises and the said show-cause-notice did not described the said goods proposed to be confiscated as "Pan Masala or Gutkha". They contended that in view of the said show cause notice issued by them, they

contended that they did not manufacture "Pan Masala or Gutkha" and, therefore, duty in respect of "Pan Masala or Gutkha" was not payable by them.

7. M/s Milan & Sons vide their defence reply reiterated the facts similar to the facts as put forth by M/s Madhur and Company and contended that they never manufactured Gutkha and demand Central Excise duty on Gutkha is not payable.

8. M/s Milan Products vide their defence reply before the Original Authority also reiterated the facts similar to the facts put forth by M/s Madhur and Company and contended that they never manufactured "Pan Masala or Gutkha" and duty demanded on "Pan Masala or Gutkha" was not payable by them.

9. Shri Sitaram Billaiya, Shri Hari Shankar Billaiya and Shri Brijesh Sahu contended that they never dealt with goods liable for confiscation and in the show cause notice there is no proposal for confiscation of any goods and therefore, they are not liable for penalty under Rule 26 of Central Excise Rules, 2002.

10. Original Authority recorded that nobody had attended the personal hearing and on the basis of record, he decided the case. The Original Authority has relied on the statements which was recorded by the Officers of DGCEI and without accepting the defence reply decided the said show cause notice through his Order-in-Original No.KNP/EXCUS/000/Commr.-021-13-14 dated

31.12.2013. The order passed by Original Authority is reproduced herein below:

" (i) I confirm the demand of duty of Rs.7,51,14,382/- and Rs. Rs.1,50,00,000/- made against M/s Milan & Co., Mauranipur, District-Jhansi (noticee No.1), and order for its recovery under Section 11A of Central Excise Act, 1944.

(ii) I also confirm the demand of interest, on the above duty amount, under Section 11AA (erstwhile Section 11AB) of Central Excise Act, 1944.

(iii) I also impose a penalty of Rs.7,51,14,382/- and Rs. Rs.1,50,00,000/- made against M/s Milan & Co., Mauranipur, District-Jhansi (noticee No.1), under Rule 25 of Central Excise Rules, 2002 readwith Rule 17 of Pan Masala Packing Machine (Capacity determination and Collection of Duty) Rules, 2008, also read with Section 11C of Central Excise Act, 1944.

(iv) I confirm the demand of duty of Rs.1,32,50,000/- made against M/s Mayank & Company, Mauranipur, District-Jhansi (noticee No.2), and order for its recovery under Section 11A of Central Excise Act, 1944.

(v) I also confirm the demand of interest, on the above duty amount of Rs.1,62,50,000/-, under Section 11AA (erstwhile Section 11AB) of Central Excise Act, 1944.

(vi) I also impose a penalty of Rs.1,62,50,000/- on M/s Mayank & Company, Mauranipur, District-Jhansi (noticee No.2), under

Rule 17 of Pan Masala Packing Machine (Capacity determination and Collection of Duty) Rules, 2008, also read with Section 11AC of Central Excise Act, 1944 .

(Vii) I confirm the demand of duty of Rs.3,37,50,000/- made against M/s Madhur & Company, Mauranipur, District-Jhansi (noticee No.3), and order for its recovery under Section 11A of Central Excise Act, 1944.

(viii) I also confirm the demand of interest, on the above duty amount of Rs.3,37,50,000/-, under Section 11AA (erstwhile Section 11AB) of Central Excise Act, 1944.

(ix) I also impose a penalty of Rs.3,37,50,000/- on M/s Madhur & Company, Mauranipur, District-Jhansi (noticee No.3), under Rule 17 of Pan Masala Packing Machine (Capacity determination and Collection of Duty) Rules, 2008, read with Section 11AC of Central Excise Act, 1944.

(x) I confirm the demand of duty of Rs.5,62,50,000/- made against M/s Milan & Sons, Mauranipur, District-Jhansi (noticee No.4), and order for its recovery under Section 11A of Central Excise Act, 1944.

(xi) I also confirm the demand of interest, on the above duty amount of Rs.5,62,50,000/-, under Section 11AA (erstwhile Section 11AB) of Central Excise Act, 1944.

(xii) I also impose a penalty of Rs.5,62,50,000/- on M/s Milan & Sons, Mauranipur, District-Jhansi (noticee No.4), under Rule 17 of Pan Masala Packing Machine (Capacity determination and Collection of Duty) Rules, 2008, also read with Section 11AC of Central Excise Act, 1944.

(xiii) I confirm the demand of duty of Rs.2,25,00,000/- made against M/s Milan Products, Mauranipur, District-Jhansi (noticee No.5), and order for its recovery under Section 11A of Central Excise Act, 1944.

(xiv) I also confirm the demand of interest, on the above duty amount of Rs.2,25,00,000/-, under Section 11AA (erstwhile Section 11AB) of Central Excise Act, 1944.

(xv) I also impose a penalty of Rs.2,25,00,000/- on M/s Milan Products, Mauranipur, District-Jhansi (noticee No.5), under Rule 17 of Pan Masala Packing Machine (Capacity determination and Collection of Duty) Rules, 2008, also read with Section 11AC of Central Excise Act, 1944.

(xvi) I impose a penalty of Rs.20,38,64,382/- on Shri Sita Ram Billaiya (noticee No.6) under Rule 26 of the Central Excise Rules, 2002.

(xvii) I impose a penalty of Rs.11,25,00,000/- on Shri Hari Shankar Billaiya (noticee No.7) under Rule 26 of the Central Excise Rules, 2002.

(xviii) I impose a penalty of Rs.11,25,00,000/- on Shri Brijesh Kumar Sahu (noticee No.8) unde Rule 26 of the Central Excise Rules, 2002."

11. Aggrieved by the said Order-in-Original, the appellants have preferred these appeals before this Tribunal.

12. Heard the learned counsel for M/s Milan and Company. He has contended that samples of branded Tobacco manufactured by M/s Milan & Sons, M/s Milan Products & M/s Madhur & Company were drawn on 25.08.2010 and sample of goods manufactured by them was not drawn and on the basis of test report given by Shriram Institute for Industrial Research, Delhi in respect of samples drawn, in respect of said goods, the allegations were made in the show-cause-notice that Milan & Company had manufactured Gutkha/Pan Masala. He further contended that the reliance is placed for issue of show cause notice to them on computer printouts and that in terms of Section 36B of Central Excise Act, 1944, the conditions stipulated in said Section that the Computer should have been used regularly to store or process information for the purpose of any activities regularly carried on over that period and that information was regularly supplied to the computer in the ordinary course of the said activities was not fulfilled in the present case, since the computer from which data was retrieved was neither used by them nor belonged to them. They further contended that the documents stated to have been used in making entries in the Laptop neither were produced nor relied upon for issue of show cause notice. They further contended that the computer printouts relied upon by Revenue for issue of show cause notice

to them also contained entries during the period when their factory was closed i.e. from 21.08.2007 to 05.10.2007. He further contended that the computer printouts were required to be taken out in presence of the noticee but it was taken out in the absence of noticee and no Panchanama was drawn for retrieval of printouts. They further contested the finding by the Original Authority that they had purchased raw materials and packing materials and the purchase was by payment through cash and the same were not entered into the statutory records. They contended that there was no evidence available on record for Commissioner i.e. Original Authority to come to such conclusion and such conclusion was only a presumption. They further contended that the show-cause-notice has failed to bring on record any tangible and cogent evidence to establish purchase of raw materials for manufacture of allegedly clandestinely cleared goods and their transportation and sale proceeds etc. They further contended that the goods manufactured by them were tobacco mixed with betel nut and not Gutkha. He contended that M/s Milan & Sons, M/s Milan Products and M/s Madhur & Company got their one set of samples drawn on ~~28.05.~~25.06.2010 tested through State Government Laboratory of Government of Uttar Pradesh and the test report indicates that the samples contained only Supari and Tobacco and test report indicates that there was no Lime and Kattha in the said samples and therefore, he has raised question about the authenticity of test report given by Shri Ram Institute for

Industrial Research, Delhi. He further contended that the test report given in respect of goods manufactured by other manufacturers was not applicable to him for demand of duty. He further contended that test report was applied retrospectively to them. He contended that since the goods manufactured by them could not be established to be Gutkha and Pan Masala and they have not been given opportunity to show cause as to why the goods manufactured by them should not be classified as Gutkha or Pan Masala in the said show cause notice, therefore, they have been denied opportunity to present the case to establish that the goods manufactured by them were not Gutkha and Pan Masala and Revenue has without giving opportunity concluded the classification of the goods was under Tariff Item No.2403 9990 and this is how Revenue has pre judged the issue and without giving opportunity conclude that the goods manufactured by them were Pan Masala or Gutkha classifiable under the Tariff Item No. 2403 9990.

13. The learned counsel for the M/s Mayank & Company has contended that the test report given by Shri Ram Institute for Industrial Research, Delhi indicates that seal on the samples was not found ~~eligible~~ legible. He contended that the test Memos were prepared for forwarding the samples drawn on ~~28.05~~ 25.08.2010 to be submitted to Central Revenue Control Laboratory, New Delhi for testing however the show cause notice has relied on test report given by Shriram Institute for Industrial Research, Delhi and the

show cause notice did not clarify as to why the samples were got tested through Shriram Institute for Industrial Research, Delhi when department had its own laboratory and under what authority such test can be relied on was not specified in the said show cause notice. He further contended that the test reports received from Shriram Institute for Industrial Research, Delhi show presence of Lime and Kattha and there is no mention of Tobacco in the said reports. He had contended that the reliability of test report given by Shriram Institute for Industrial Research, Delhi is doubtful and when they got one set of sample drawn on ~~28.05~~ 25.08.2010 tested through Laboratory of State Government of Uttar Pradesh, the test report indicated that the samples did not contain Lime and Kattha. He further relied on the argument put forth in respect of Milan and Company in respect of computer printouts. He further contended that statements of various persons are recorded on 27.~~07~~ 02.2010 and all of them stating that they were manufacturing branded Chewing Tobacco and nowhere it was stated that they were manufacturing Gutkha Pan Masala. He further contended that Sitaram Billaiya reiterated his statement dated 26.09.2011 vide his letter dated 05.10.2011 and original Authority has not accepted the said retraction which is contrary to the established Law. He further contended that the test report cannot be applied retrospectively. He further contended that the show case notice did not offer them opportunity to present their case to contest the classification claimed by Revenue of the goods manufactured by them and that without offering opportunity to them to present their case, Revenue in the said show cause notice has unilaterally concluded that the goods manufactured by them were Pan Masala or Gutkha classifiable under Tariff Item No. 2403 9990. The action by Revenue to unilaterally conclude that the goods manufactured by them were Pan Masala/Gutkha was equal to adjudicating the matter without giving opportunity to present the defence. Therefore, such show cause notice is not sustainable.

14. The learned counsel for M/s Madhur & Company, M/s Milan Products, M/s Milan & Sons, Brijesh Kumar Sahu, Hari Shankar Billaiya and Sita Ram Billaiya submitted that the pleadings by counsels in respect of M/s Milan & Company and M/s Mayank & Company has very clearly brought out that all the manufacturers were manufacturing branded Chewing Tobacco and declarations about the same were given at appropriate time to the department. He further submitted that the records were maintained in the manufacturing units, and that the manufacturing units were repeatedly visited by the Officers of the Department and that some of the RG-1 Registers maintained by them contain the signatures put by the Officers during their visit and nobody had ever doubted that the goods manufactured by them were not branded Chewing Tobacco. The samples drawn from the seized goods were instead of being forwarded to Central Revenue Control Laboratory, New Delhi, the same were forwarded to a private Laboratory and the reports submitted by

them are not free from doubt. He further submitted that on the date of visited by the officers i.e. on 27.02.2010 various statements were recorded and from none of the statements it was revealed that any of the noticee in the present show cause notice manufactured Pan Masala or Gutkha. He further supported the arguments in respect of failure by Revenue to give opportunity to contest the classification put forth by the other counsels during the hearing. He has further argued that there was no proposal to confiscate any goods in the said show caused notice and therefore, Revenue did not find any goods liable for confiscation, and therefore, no person is liable to be imposed with penalty under Rule 26 of Central Excise Rules, 2002.

15. During the hearing on 08.07.2016, this Tribunal issued following Misc. Interim Order which is reproduced below:

"We direct Revenue to file the following information/documents"

(i) Result of the samples forwarded through Ref. No.DZU/INV/65/D/C.CX/2010/4298 dated 01.09.2010 addressed to the Chemical Examiner, Shriram Institute for Industrial Research, Delhi by Capt. Kapil Choudhary, Dy. Director, Directorate General of Central Excise Intelligence, Delhi Zonal Unit;

(ii) Copy of letter, Ref.No.DZU/INV/65/D/C.CX/2010/5440 dated 01.10.2010, in response to which test Certificate dated 19.10.2010, referred to in the SCN as RUG 53 was issued;

(iii) Copy of letter, Ref. No.DZU/INV/65/D/C.CX/2010/5438 5439 dated 01.10.2010;

(iv) Reasons available on record, if available, for not accepting the test report received in respect of samples forwarded through reference at (i) above;

(v) The Dept. of Revenue's order through which, Shriram Institute for Industrial Research, Delhi has been re-cognized as laboratory for testing of samples in place of Central Revenue Control Laboratory, New Delhi;

(vi) Copies of communication through which, it was made known to S/Shri Sitaram Billaiya, Hari Shankar Billaiya, Brijesh Kumar Sahu and Rajesh Nikhara that their presence is required for retrieval of data from the electronic devices, namely, computer, laptop and C.D.'s as dealt with in para 23 and Para 23(a) of SCN dated 30.11.2011."

16. Replied to the quarries raised by said order dated 08.07.2016 was filed on 17.08.2016 and a copy of the same was ordered to be given to the appellants or their counsels to present their case on the same if they wish to do so. Revenue through its reply dated 11.08.2016 reported that the electronic devices were recovered from residential premises of Shri Rajesh Nikhara and Shri Jawahar Lal Modi and therefore, both were summoned on 12.03.2010, 22.03.2010, 06.04.2010, 08.06.2010, 29.06.2010, 29.07.2010, 22.09.2010 and 11.11.2010 to present themselves

for opening the electronic devices and to tender statements. They further clarified that Shriram Institute for Industrial Research, Delhi is an accredited laboratory and is also approved testing laboratory of Delhi Government however, for the quarry on the order by the Department of Revenue through which Shriram Institute for Industrial Research, Delhi has been recognized as laboratory for testing of samples in place of Central Revenue Control Laboratory, New Delhi has not been replied by Revenue.

17. On the report submitted dated 11.08.2016 submitted by Revenue in compliance to above stated Misc. Interim order dated 08.07.2016, the learned counsel for the appellants have argued that the case record indicates that the information from the electronic devices such as Laptop, CPU & CDs were retrieved on 27.02.2010, 23.07.2010, 11.08.2010 and 13.08.2010. The Revenue has submitted before this Tribunal that Shri Rajesh Nikhara and Shri Jawahar Lal Modi were summoned to be present for opening of electronic devices and to tender statement on 22.09.2010 & 11.11.2010. It means that till 11.11.2010, the said devices were not cloned and printouts of the same were not taken, however, the case records state that the printout of the said electronic devices were cloned & print out of date was taken on 23.07.2010, 11.08.2010 & 13.08.2010 and such record does not appear to be reliable, therefore, the data revealed by said printouts is not reliable to confirm the

demands. They have further argued that in the response submitted by Revenue for compliance of said Interim Order dated 08.07.2016, Revenue is silent on the reason as to why they have not submitted any order of the Department of Revenue through which Shriram Institute for Industrial Research, Delhi was recognized as laboratory for testing of samples in place of Central Revenue Control Laboratory, New Delhi. Therefore, the reliability of the test results given by Shriram Institute for Industrial Research, Delhi is not reliable for confirmation of demand.

18. Shri K.M. Mondal State counsel for Revenue, he has taken us through the order of the Original Authority and also relied on provisions of Para 8.11 of CBEC's supplementary instructions 2005. He further argued that the appellants had no right under the said para of supplementary instructions to get the set of samples in their possession tested in a laboratory of their choice ignoring the provisions of earlier paragraphs such as para 8.9 & 8.10 of the said instructions. He further contended that computer printouts were admissible as evidence. He relied on the statements recorded under Section 14 of the Central Excise Act, 1944 and argued that the said clandestine clearance of the finished goods was established in the show cause notice. He further argued that retraction of the statement given by Shri Sitaram Billaiya was not tenable and the statements initially given by him was corroborated by the documents relied upon.

He further contended that in case of clandestine clearances, it is not possible to establish case beyond reasonable doubt and preponderance of probability was sufficient to establish the case. He further contended that in the show-cause-notice which were issued by other adjudicating authority for confiscation of seized goods, the said adjudicating Authority was not required to determination whether the seized goods were Gutkha or Chewing Tobacco.

19. Having considered the rival contentions, we find that initially in all the statements recorded on 27.02.2010 i.e. the date of search, every statements indicates that appellants were manufacturing branded Chewing Tobacco and none of the statements indicated that the goods manufactured by the appellant as on 27.02.2010 were Gutkha or Pan Masala. We also find that the appellants had obtained the Central Excise Registration, they had submitted the details of the goods to be manufactured by them, the factory premise were repeatedly visited by Central Excise Officers before 27.02.2010, the visits by Officers were recorded in RG-1 Registers of the same of the notices. The record indicates that such Officers never raised any doubt about the nature of the goods manufactured them to be Gutkha or Pan Masala. On introduction of Pan Masala Packing Machines, Rules 2008 when the details were obtained from the appellants by jurisdictional range Superintendent, the appellants had categorically stated that they were not using Lime or Kattha

for the goods manufactured by them. On 27.02.2010, when the simultaneous raids were conducted at many places, the proceedings do not indicate that the Officers of DGCEI found any stock of Lime or Kattha as raw materials being used by the appellants. Though, the samples were drawn to be forwarded to Central Revenue Control Laboratory, New Delhi, they were not forwarded to the Central Revenue Control Laboratory, New Delhi and they were got tested through a private laboratory and Revenue is silent on the authority given to them by Department of Revenue to forward such samples for testing to Shriram Institute for Industrial Research, Delhi in place of Central Revenue Control Laboratory, New Delhi. The contention of the counsel for the appellant that they got one set of samples with them tested through laboratory belonging to Government of Uttar Pradesh which has given a test report indicating that there was no presence of Lime and Kattha in the said samples cannot be ignored. We further find that though there were weak evidences with Revenue it was unilaterally concluded in their show cause notice that the goods manufactured by the appellants were Pan Masala/Gutkha classifiable under Tariff Item No.2404 9990. We find that the show cause notice at the beginning discusses about the branded Chewing Tobacco being manufactured by the appellants and suddenly the said show cause notice started making allegations that the goods manufactured by appellants were Gutkha/Pan Masala. The show cause notice indicates that it was within the knowledge of the

Revenue that the goods manufactured by the appellants was branded Chewing Tobacco. If on the basis of test report submitted by the Shriram Institute for Industrial Research, Delhi, Revenue had a reason to believe that the goods manufactured by appellants were Gutkha/Pan Masala, then under Law it was necessary for Revenue to issue show cause notice to the appellant calling upon them to show cause as to why the goods manufactured by them should not be treated as Gutkha/Pan Masala classifiable under Tariff Item No. 2403 9990. Instead Revenue unilaterally concluded that the goods manufactured by appellants were Gutkha/Pan Masala. Therefore, there has been violation of principle of natural justice and said show cause notice indicates the pre judging of the issue by the framers of the charge in the show cause notice. Therefore, there has been miscarriage of justice. We therefore, hold that impugned show cause notice dated 30.11.2011 is not sustainable. We set aside the said show cause notice dated 30.11.2011 and as a result we set aside impugned Order-in-Original dated 31.12.2013 and allow all the appeals.

(Dictated & pronounced in the open Court)

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

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

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प्रमाणित प्रति / Certified True Copy
20.1.17
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