FAX : 0532-2400149

REGISTERED / AD

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

To

Dated: 20/09/2017

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

Final Order No. A/71128-71129/2017-SM[BR] dated 14/09/2017

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/1301/2011	**PHOOL CHAND SALES CORPORATION,** 24, BATASE WALI GALI, AMINABAD, LUCKNOW. (U.P.)
2	E/1302/2011	**PHOOL CHAND SALES CORPORATION,** 24, BATASE WALI GALI, AMINABAD, LUCKNOW. (U.P.)

Name and Address of Respondent

3 -C.C.E. LUCKNOW
7-A, Ashok Marg, Lucknow.

4 -C.C.E. LUCKNOW
7-A, Ashok Marg, Lucknow.

Other Appellants and Respondents as per Annexure

Copy To

5 Advocate(s) / Consultant(s):

A. P. Mathur
167, TAGORE TOWN,
Allahabad,
Uttar Pradesh

6 Bar Association, CESTAT, Allahabad

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

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

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

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

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

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

13 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad -- 38

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

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

16 C.D.R. 17 Office Copy 18 Guard File

Asstt. Registrar

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

APPEAL Nos.E/1301-1302/2011-EX[SM]

(Arising out of Order-in-Appeal No.35-36/CE/LKO/2010 dated 28/02/2011 passed by Commissioner of Customs & Central Excise (Appeals), Lucknow)

M/s Phool Chand Sales Corporation, **Appellants**

Vs.

Commissioner of Central Excise, Lucknow **Respondent**

Appearance:

Shri A.P. Mathur, Advocate for Appellant
Shri Sandeep Kumar Singh, Assistant Commissioner (AR), for Respondent

CORAM:

Hon'ble Mr. Ashok Jindal, Member (Judicial)

Date of Hearing : 14/09/2017
Date of Decision : 14/09/2017

FINAL ORDER NOs.-71128-71129/2017...

Per: Ashok Jindal

The appellants have filed these two appeals against the impugned order.

2. The brief facts of the case are as under:-

"2. The Appellants were manufacturing Pan Masala containing tobacco known as Gutka with two Retail Prices namely, Rs. 1.00 per pouch and Rs. 0.50 per pouch. They were paying duty based on the capacity of packing machines installed in their factory as determined under Pan Masala Packaging Machines (Capacity Determination and Collection of Duty) Rules 2008. The dispute involved in this case is the duty

Ashok Jindal

liability for one period of Aug 08 and Sep 08 and another period of Oct 2008 and Nov 2008.

3. Rule 5 and Rule 8 of the said Rules are reproduced below:-

"5. ***Quantity deemed to be produced.*** – *The quantity of notified goods, having retail sale price as specified in column (2) of the Table below, deemed to be produced by use of one operation packing machine per month shall be as is equal to the corresponding entry specified in column (3) of the said Table :*

Sl. No.	***Retail sale price (per pouch)***	***Number of pouches per operating packing machine per month***
(1)	*(2)*	*(3)*
1.	*Up to Rs. 1.00*	*37,44,000*
2.	*From Rs. 1.01 to Rs. 1.50*	*37,44,000*
3.	*From Rs. 1:51 to Rs. 2.00*	*35,56,800*
4.	*From Rs. 2.01 to Rs. 3.00*	*35,56,800*
5.	*From Rs. 3.01 to Rs. 4.00*	*34,44,480*
6.	*From Rs. 4.01 to Rs. 5.00*	*34,44,480*
7.	*From Rs. 5.01 to Rs. 6.00*	*34,44,480*
8.	*Above Rs. 6.00*	*33,69,600*

Explanation. – *For the purposes of this rule, if there are multiple track or multiple line packing machine which besides packing the notified goods in pouches, perform additional processes involving moulding and giving a definite shape to such pouches with a view to distinguish the brand or to prevent the counterfeiting of the goods, etc., two such tracks or lines shall be deemed to be one individual packing machine for the purposes of calculation of the number of pouches per operating packing machine per month."*

"8. ***Alteration in number of operating packing machines.*** – *In case of addition or installation or removal or uninstallation of a packing machine in the factory during the month, the number of operating packing machine for the month shall be taken as the maximum number of packing machines installed on any day during the month:*

Provided that in case a manufacturer commences manufacturing of goods of a new retail sale price during the month on an existing machine, it shall be deemed to be addition in the number of operating packing machine for the month :

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Provided further that in case of non-working of any installed packing machine during the month, for any reason whatsoever, the same shall be deemed to be operating packing machine for the month."

4. The Appellants had declared that during Aug 08 they had two packing machines in operation and during Sep 08 they had one packing machine in operation. This is not disputed. If these machines are assumed to be manufacturing Pan Masala of only one RSP then the duty liability worked out to Rs. 25,00,000/- for Aug 08 and Rs. 12,50,000/- for Sep 08. This is also not in dispute. The position that they were manufacturing Pan Masala of two different RSPs on the same machine was intimated to the department on 10-07-08 and capacity was assessed by order dated 17-07-08 on that basis without counting each machine as two machines for the reason that Pan Masala of two different RSPs being manufactured on each machine. When ER1 Returns were filed Revenue was of the view that they should have paid twice the duty liability as stated above in view of the fact that the Appellants were manufacturing Pan Masala of two RSPs namely Rs. 0.50 per pouch and Rs.1.00 per pouch and in view of the provisions in the first proviso to Rule 8 of the said Rules re-produced above. Differential duty is confirmed on such basis.

5. The facts of the second case for the months of Oct 2008 and November 2008 are very similar. For Oct 2008 one packing machines and for Nov 2008 two packing machines were taken into use. The duty required to be paid was assessed at Rs. 12,50,000 and 25,00,000 initially. But when ER-1 Returns were scrutinized Revenue was of the view that duty of Rs. 25,00,000 and 50,00,000 respectively were to be paid for Oct 08 and Nov 08 for the reason that Pan Masala of two different

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RSPs were being manufactured. Differential duty is confirmed on such basis."

3. The learned Counsel for the appellants submits that the similar issue come up before the Hon'ble Allahabad High Court in the case of M/s Trimurty Fragrances Pvt. Ltd. reported in 2015 (326) ELT 239 (All.) wherein the Hon'ble High Court have held that the provisions of Rule 8 of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 are not applicable on the facts of the present case, therefore, the impugned orders are to be set aside.

4. On the other hand, learned A.R. for revenue has reiterated the findings of the impugned order.

5. Heard the parties and considered the submissions.

6. I find that the facts of M/s Trimurty Fragrances Pvt. Ltd. (supra) recorded by the Hon'ble Allahabad High Court is as under:-

> "**3.** In the instant case, the assessee during the month of June, 2009, July, 2009, August, 2009, October, 2009 and November, 2009 filed the declaration as required under Rule 6 declaring its intention to manufacture certain kinds of pan masala pouches. The returns were also filed for these months which showed manufacture/clearances of pan masala with tobacco having RSP of 50 p. On the basis of this information provided by the assessee, the Department inferred that during the each of these months the assessee used the installed machines for manufacturing of pan masala with tobacco of having a retail sale price of Rs. 1 per pouch as well as having a new retail sale price of Rs. 0.50 and, on this basis, invoked the first proviso to Rule 8 of the 'PMPM Rules'. For facility, the said provision, Rule 8 and the provisos are extracted hereunder :-

Rule 8. Alteration in number of operating packing machines. - In case of addition or installation or removal or uninstallation of a packing machine in the factory during the month, the number of operating packing machine for the month shall be taken as the maximum number of packing machines installed on any day during the month.

Provided that in case a manufacturer commences manufacturing of goods of a new retail sale price during the month on an existing machine, it shall be deemed to be an addition in the number of operating packing machine for the month :

Provided further that in case of non-working of any installed packing machine during the month, for any reason whatsoever, the same shall be deemed to be operating packing machine for the month.

4. On the basis of the first proviso, the Department held that the assessees had also commenced manufacturing of the goods of a new retail sale price, i.e., 50 per pouch on an existing machine and, therefore, it would be deemed to be an addition in the number of operating packing machine for the month in question and, accordingly, levied duty. The assessees being aggrieved filed an appeal which was set aside by the Tribunal by an order dated 18 March, 2015 [2015 (329) E.L.T. 680 (Tri. - Del.)]. The Department being aggrieved has filed the present appeal."

7. In view of aforementioned set of facts, Hon'ble High Court has observed, as under:-

"**8.** In the light of the aforesaid, the expression "new retail sale price" has to be understood as contemplated under Rule 5 which specifies the deemed production per operating machine per month and this deemed production is specified for different RSP slabs. The rate of duty per machine specified in the Notification of 1st July, 2008 is on its production, namely, if pouches up to Rs. 1.00 is manufactured, its deemed production would be 37,44,000 pouches.

9. Therefore, in our opinion, even if the machine manufactures in a particular month pan masala or pan masala with tobacco pouches of 50.0 and Rs. 1.00, its deemed production would still be 37,44,000 pouches on which duty would be leviable. The proviso to Rule 8 would not be applicable nor can there be a supposition that there would be deemed to be an addition in the number of operating packing

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machines for the month in question on the strength that a new retail sale price has come into existence on an existing manufacturing machine.

10. In our view, for the purpose of Rule 5, pouches within a particular RSP slab would be the same for the purpose of determining the deemed production per month. When a RSP which is under a different slab, only then it would be treated to be a new retail sale price. In the instant case, there is no dispute that the assessee had ever manufactured pan masala with tobacco in pouches above Rs. 1.00, and, therefore, maximum deemed production as specified in Column 3 to the Table in Rule 5 could not exceed the figure indicated thereunder."

8. As the issue is squarely covered by the decision of Hon'ble High Court in the case of M/s Trimurty Fragrances Pvt. Ltd. (supra), therefore, I hold that the appellant is no liable to pay duty, as demanded in the impugned orders from the appellants in terms of Rule 8 of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008, which is not attracted to the facts of the case.

9. In these circumstances, the impugned orders are set aside and the appeals are allowed with consequential relief, if any.

(Dictated in Court)

Sd/-

(Ashok Jindal)

Member(Judicial)

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प्रमाणित प्रति/Certified True Copy
23/10/17

सहायक पंजीकार/Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
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