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: 22/11/2017

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/71511-71513/2017-SM[BR] dated 13/11/2017

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/70157/2017	**Kesarewani Zarda Bhandar** Sahson ALLAHABAD UP
2	E/70158/2017	**Krishna Chandra Kesarwani Partner** C/o Kesarewani Zarda Bhandar,Sahson ALLAHABAD UP
3	E/70159/2017	**Manoj Kumar Srivastava Clerk** C/o Kesarewani Zarda Bhandar ,Sahson ALLAHABAD UP
		Name and Address of Respondent
4		C.C. & C.E. & S.T.-Allahabad 38...M G MARG...CIVIL LINES, ALLAHABAD, UTTAR PRADESH-211001
5		C.C. & C.E. & S.T.-Allahabad 38...M G MARG...CIVIL LINES, ALLAHABAD, UTTAR PRADESH-211001
6		C.C. & C.E. & S.T.-Allahabad 38...M G MARG...CIVIL LINES, ALLAHABAD, UTTAR PRADESH-211001

Other Appellants and Respondents as per Annexure

Copy To

7Advocate(s) / Consultant(s):

S. P. Ojha
299, Baghambari Housing Scheme, Allahpur,
Allahabad,
Uttar Pradesh

8 Bar Association, CESTAT, Allahabad

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

10 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

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

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

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

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

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

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

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

18 C.D.R. 19 Office Copy 20 Second Folder Copy 21 Guard File

Asstt. Registrar

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

Ex.Appeal Nos.70157-70159/17

Arising out of O/A No.753-755/CE/APPL-ALLD/LKO/2016 dated 19.12.2016 passed by Commr. (Appeals) of Central Excise, Customs & S.Tax, Lucknow.

(1) M/s Kesarewani Zarda Bhandar
(2) Shri Krishna Chandra Kesarwani, Partner
(3) Shri Monoj Kr. Srivastava, Clerk

...APPELLANT(S)

VERSUS

Commr. of Central Excise, Customs & S.Tax, Allahabad

RESPONDENT (S)

APPEARANCE

Shri S.P.Ojha, Consultant for the Appellant (s)
Shri Pawan Kumar Singh, Supdt. (A.R.) for the Revenue

CORAM:

MRS. ARCHANA WADHWA, HON'BLE JUDICIAL MEMBER

DATE OF HEARING : 13.11.2017
DATE OF PRONOUNCEMENT :

Final ORDER NO 71511 – 71513/2017

Per Mrs.Archana Wadhwa :

All the three appeals are being disposed of by a common order as they arise out of the same impugned order passed by the authorities below, vide which demand of duty of Rs.4.43 lakhs (approx.) has been confirmed against M/s Kesarewani Zarda Bhandar along with penalty of Rs.1,10,962/-. In addition, penalty of Rs.10,000/- stands imposed upon Shri Krishna Chandra Kesarwani, Partner and Rs.5,000/- on Shri Monoj Kr. Srivastava, Assistant Clerk, in terms of the provisions of Rule 26 of the Central Excise Rules, 2002.

2. As per facts on records, M/s Kesarewani Zarda Bhandar (hereinafter referred to as Kesarewani Zarda Bhandar) are engaged in the manufacture of Branded Chewing Tobacco falling under Chapter Sub-heading No.24 of the First Schedule to the Central Excise Tariff Act, 1985.

3. The officers of Central Excise under the supervisions of the Assistant Commissioner (Prev.) visited the unit of the appellants at 9.00 hrs on 24.01.2014 and took in their possession all the statutory records and verified the stock of finished goods, coloured tobacco, raw material with reference to closing balance of 23.01.2014. The stock of different verities of branded tobacco, raw tobacco and coloured tobacco received from cold storage premises were found correct. Coloured tobacco weighting 630 kgs received in the premises for manufacture of branded chewing tobacco was found short. Duty amounting to Rs.4,43,848/- and penalty amounting to Rs.1,10,962/- were realized by the officers, on the grounds that 630 kgs of coloured tobacco has been converted into branded chewing tobacco and cleared without the payment of duty.

4. The appellants vide letter dated 07.02.2014 and dated 24.03.2014 informed the Assistant Commissioner (Preventive) Central Excise that 18 bags containing 630 kgs of coloured tobacco being moist was cleared for drying vide chit number 23+9 dated 24.10.2014, as such, there was no shortage in stock of coloured and entire stock of tobacco was lying within the factory premises.

5. On the above basis, show cause notice dt. 27.06.2014 was issued demanding duty amounting to Rs.4,43,848/- and proposing for imposition of penalty under section 11 AC of the Central Excise Act 1944 read with Rule 25 of the Central Excise Rules, 2002. Since the duty amounting to Rs.4,43,848/- and penalty amounting to Rs.1.10.962/- were already realized, it was proposed to appropriate it against the duty and penalty.

6. The learned Assistant Commissioner decided the case vide Order-in-Original dated 03.06.2015 and confirmed the demand of Rs.4,43,848 and imposed of penalty of Rs.4,43,848/- and gave an option to deposit 25% of the penalty. He appropriated Rs.4,43,848/- towards duty and penalty of Rs.1,10,962/- already deposited by the appellants and observed that the issue of chit in respect of coloured tobacco for sending the same on the roof for drying was on afterthought.

7. On appeal, Commissioner (Appeals) decided the issue involved in the case vide common Order-in-Appeal and upheld the Order-in-Original.

8. After hearing both sides and after going through the impugned order, I find that the entire case of the Revenue is based upon the shortages of coloured tobacco detected at the time of their visit in the appellants' factory. The appellants have contended that the process of conversion of coloured tobacco into branded chewing tobacco takes at least 5 days, provided the season is dry. Coloured tobacco weighing 3500 kgs was brought in

the premises for manufacture of branded chewing tobacco in the evening of 21.01.2017. 22.01.2014 was weekly holiday. The officers visited the unit at 9 hours on 24.01.2015. It was not possible to convert 630 kgs coloured tobacco into marketable final product i.e. branded chewing tobacco and remove it within one day. It is settled law that he who asserts must prove his assertion by producing cogent evidence and/or producing witness. No evidence has been adduced to prove allegation of clandestine removal, therefore, even otherwise, the demand of duty and imposition of penalty are not justified. The appellants refer to the following decisions _

(i) CCE Kanpur Vs. Terla Footwear Exports Ltd. [2014 (306) ELT 629 (Tri.-Delhi)

(ii) Raj Ratan Industries Ltd Vs. CCE Kanpur [2013 (292) ELT 123 (Tri. Delhi)] Annexure-II

(iii) Final Order No. A/70087/2015

11. 630 kg of coloured tobacco being moist was issued for drying vide chit No. 239 dated 24.01.2014. This fact was bought to the notice of the Assistant Commissioner (Prev). Appellants expressed their predicament that duty and penalty has been collected from them on 24.01.2014 and they will again have to pay duty on 630 kgs of coloured tobacco when it is converted into branded chewing tobacco and cleared for home consumption. Thus they have to pay duty twice on the same goods. Since the shortage was not real therefore, they

are entitled to refund of Rs.4,43,848/- and Rs.1,10,962/- collected from them without the authority of law.

12. Apart from the shortages, I find that there is virtually no evidence on record to show the clandestine activities of the appellants. Apart from the decision relied upon by the ld.Consultant, I find that the Hon'ble Allahabad High Court in the case of Minakshi Castings reported at 2011 (274) ELT 180 (Allahabad), has held that such shortages cannot lead to inevitable conclusion of clandestine manufacture and removal of the final product. The Revenue's entire effort is to prove the charge of clandestine removal on the basis of assumption and presumption, especially, when shortage has been explained by the appellants by addressing a letter to their jurisdictional officers indicating that such coloured tobacco was lying at the roof for the purpose of drying. Revenue did not make any effort to verify the said facts and have simplicitor dismissed the assessee's claim as an after-thought. They have also not considered the manufacturing process of the appellant, which requires drying of the coloured tobacco for a period of three to five days. In such a scenario, to hold that the appellants have used the coloured tobacco in the manufacture of their final product, which stands cleared by them without payment of duty, is entirely on the basis of surmises and conjectures. In the absence of any identification of the buyers, transporters, receipt of consideration etc., the findings of the clandestine activities cannot be upheld.

13. In view of the foregoing, I find that no justifiable reason to uphold the impugned order. The same are accordingly, set aside and all the appeals are allowed with consequential relief to the appellants.

(Pronounced in the open Court on.....17/11/17)

Sd/-
(Archana Wadhawa)
Member(Judicial)

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