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

Dated: 05/04/2018

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70722/2018-EX[DB] dated 04/04/2018

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/54002/2014	**Shri Abhishek Jain** S/o Shri Rajendra Jain, R/o 21/98, Bawli Road, Baraut, BAGHPAT UP
		Name and Address of Respondent
2		C.C.E. & S.T.-Meerut-i EXCISE CHOWK...UNIVERSITY ROAD,MANGAL PANDEY NAGAR, MEERUT, UTTAR PRADESH-250005

Copy To

3Advocate(s) / Consultant(s):

Vinod Kumar Baranwal
37/28, Mullah hata, Stanley Road, Allahabad

4 **M.B. Mathur (Advocate)**
D-60, GROUND FLOOR, SECTOR-2, NOIDA DISTRICT GAUTAM BUDDH NAGAR UP

5 Bar Association, CESTAT, Allahabad

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

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

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

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

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

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

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

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

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

15 C.D.R. 16 Office Copy 17 Second Folder Copy 18 Guard File

Asstt. Registrar

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

APPEAL No.E/54002/2014-EX[DB]

(Arising out of Order-in-Original No. 15/COMMR./MRT-I/2014 dated 30/03/2014 passed by Commissioner of Central Excise & Customs, Meerut-I)

Shri Abhishek Jain	**Appellant**
Vs.	
Commissioner of Central Excise, Meerut-I	**Respondent**

Appearance:

Shri M.B. Mathur, Advocate &	
Shri Vinod Kumar Baranawal, Advocate	for Appellant
Shri Rajeev Ranjan, Joint Commissioner (AR),	for Respondent

CORAM:

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

Date of Hearing : 25/01/2018
Date of Pronouncement : 04/04/2018

FINAL ORDER NO-70782/2018

Per: Anil Choudhary

The present appeal is arising out of Order-in-Original No. 15/COMMR./MRT-I/2014 dated 30/03/2014 passed by Commissioner of Central Excise & Customs, Meerut-I.

2. The issue in this appeal is whether the appellant have been rightly imposed with Central Excise duty of Rs.2,51,94,517/- for the period from 01/04/2011 to 06/09/2012 under the provisions of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 (for short PMPM Rules) read with Section 11

A(4) of the Act along with equal amount of penalty as well as order of confiscation of excisable goods valued at Rs. 53,100/- in terms of Rule 17(1) and Rule 18 of PMPM Rules, 2008 read with Rule 25 of Central Excise Rules, 2002 with option to redeem on payment of fine of Rs.15,000/-.

3. The appellant Shri Abhishek Jain, Proprietor of M/s S.S. Packers, District-Baghpat, was engaged in manufacture of Gutkha (Pan Masala Containing Tobacco) falling under Chapter Sub-heading No.24039990 of Central Excise Tariff Act, 1985. On intelligence that he is not discharging the due Excise duty liability and the unit is situated in the premises of Shri Leelu at Village-Dagarpur, Distt.-Baghpat, without obtaining the Central Excise Registration. The said premises were visited by the Central Excise preventive officers on 07/09/2012. During the search, it was revealed that the premises were given on rent to one Shri Rajendra Jain of Main Bazar, Baruat. Shri Leelu informed that as per his information Shri Rajendra Jain was using the said premises, as a godown, and it was not in his knowledge whether Gutkha was being manufactured there. Later on, Shri Leelu stated that he had let out the said premises to Shri Abhishek Jain S/o Sri Rajendra Jain for his sweet supari business against rent of Rs.6,000/- per month, which was paid in cash. Shri

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Abhishek Jain also arrived soon thereafter and introduced himself as Proprietor of M/s S.S. Packers. The search proceedings were recorded in the panchnama dated 07/09/2012. The officers also took photographs of the premises and the various machines installed there, in the presence of the Panchas and Shri Abhishek Jain.

4. During the search, a generator set was found installed inside the boundary wall along with its electricity distribution point. Further, betel nut cutting machine, one drying machine consisting of several drying plates was also found installed in the veranda. In some of the drying plates, there was some betel nut in cut condition. On the ground floor, there were two rooms besides the veranda. One single-track pouch packing machine was found installed in one of the rooms on which a roll of pouches was found loaded and Gutkha mixture was found filled in the feeder hopper of this machine. Further, one carton was found lying in the room, filled with finished goods, i.e. 110 packets, each containing 60 pouches of Gutkha. The word 'DOON GUTKHA' was printed upon each packet along with a list of the ingredients contained in the packed Gutkha. These ingredients were listed as Betel Nut, Tobacco, Catechu, Lime, Menthol, Spices and Fragrance. The name of the manufacturer was printed on these packets as 'M/s S.S. Packers, Sonipat, (H.R.)'. The number of pouches

contained in each packet was printed as 60, the MRP of each pouch, as Rs.1 and the net weight of Gutkha in each pouch as 2 gms. On opening of one such packet, it was found that it contained 60 pouches of the brand of 'Doon Gutkha' printed with MRP of Rs.1 and the name of the manufacturer as M/s S.S. Packers, Sonipat, (HR). One bag filled with prepared Gutkha Mixture was also found in the room, which was weighed and found to contain 92.36 Kg of Gutkha mixture. In addition, 9 rolls of Gutkha pouches were also found, the total weight of which upon weighment came to 54.66 Kg. In the other room, which was adjacent to the first room, the following goods were found: –

(i) Raw Material

S.No.	*Material*	*Qty.*	*Wight per qty.*	*Total Qty.*
1.	*Kattha*	*8 Packet*	*1 KG per packet*	*8 KG*
2.	*T. C. Paste*	*1 Bottle*	*6 KG per bottle*	*6 KG*
3.	*Gutkha flavoured Compound*	*2 Bottle*	*5 KG per bottle*	*10 KG*
4.	*Gutkha flavoured compound*	*2 Bottle*	*1 KG per bottle*	*2 KG*
5.	*Fragrance*	*6 Bottle*	*100 mili litre per bottle*	*600 mili litre*
6.	*Chuna Paste*	*1 Bag*	*8.10 KG per Bag*	*8.10 KG*
7.	*Menthol Flakes*	*1 Poly Pack*	*800 Gm per poly pack*	*800 Gm*
8.	*Tobacco*	*1 Bag*	*10.300 KG per Bag*	*10.300 KG*
9.	*Oleoresin Capsicum*	*1 Bottle*	*1 KG per bottle*	*1 KG*

(ii) ***Packing Material***

a. Packing Box *3080 piece*

(iii) ***Empty bottle/Container/Core***

a. 2 bottle (6 KG each) *Gutkha flavoured Compound*

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b. *1 container (capacity 10 KG) Ferrous Scorbate*

c. *1 bottle (capacity 1 KG) Elaichi 916*

d. *3 bottle (capacity 1 KG) Gutkha flavoured*

e. *1 bottle (capacity 1 KG) G-1 Chemical*

f. *34 piece core (core remaining after the use of main packing material)*

(iv) ***One Diary***
(v) ***One small writing pad***

5. Thereafter, the officers sealed the pouch packing machine. Three packets of 'Doon Gutkha' were drawn as representative samples, by sealing them under panchnama/signatures. The finished goods available at the spot i.e. Gutkha packets and Gutkha mixture were seized. One Diary and one writing pad, found in the premises were also seized. On enquiry, Shri Abhishek Jain stated that he used his private car having Registration No.DL.1 CJ-5769 for inward transportation of raw material and outward transportation of finished goods. Statement of Shri Abhishek Jain was recorded on the date of inspection, wherein he admitted that the officers found pouches of Doon Gutkha and machines for making Gutkha in his factory premises, during search on 07/09/2012. The name of his factory was M/s S.S. Packers, of which he was the proprietor. He further stated that in his factory there was a Supari Cutter, a 12 tray dryer and a 6 tray dryer in the veranda, that a single track FFS machine was installed in a room in the factory premises on which he used to pack

Gutkha pouches and approximately 90 pouches were packed in a minute. He further stated that the FFS machine was purchased by him from Mayapuri Kabari market and there was no serial number on the machine, an electronic weighment machine was installed in the second room of the factory premises which was used for weighment of raw material and Gutkha, all the machines installed in the factory were operated through the generator installed of Mahindra Brand having 15 KVA Capacity, which was also purchased from Mayapuri Kabari Market. He did not have any bill of the machine and the generator and the same was purchased on cash payment in February, 2012. He had taken on rent of Rs. 6,000/- per month, 2 rooms and veranda on the ground floor in the house of Shri Devkaran, since February, 2012 but there was no written rent agreement. He had started manufacturing operations in February, 2012 after installing the said machines in the said premises. In the beginning, he made DOON brand Sweet Supari in 1gm pouch packing and in March, 2012 began manufacturing DOON brand Gutkha 2gm pouch packing. This was carried on for 3 months only and was closed since the last 3 months as there were no orders from the market. Though he manufactured Gutkha of Doon brand but the said brand was not registered in his name and he did not have any approval or permission to use the said brand. He also did not know, as to who was the owner of this brand and whether Gutkha of this brand was being manufactured by anyone else. He admitted that he has not furnished any information to the Central Excise Department nor applied for registration. He further stated that he appointed a person named Rakesh of Etawa for the manufacture of Gutkha in his factory, who was on leave for last three months, that he himself carried out the purchase of raw material and packing materials and the manufacture and sale of finished goods and the factory did not have registration of any type. That he have not maintained any record regarding manufacture and sale of Sweet Supari and Gutkha. That some quantity was sold in Delhi through salesmen and some quantity of Gutkha was dispatched to Bihar, Chhatisgarh and Madhya Pradesh. That the raw material and packing material for Sweet Supari and Gutkha was purchased from dealers in Khari Baoli, Delhi, but he was unable to state their names etc. He further stated that there was no bank account in the name of M/s S.S. Packers. He being the proprietor and all transactions pertaining to manufacture and sale of sweet supari and Gutkha were done in cash. He had personal accounts with the Baraut Branch of the Union Bank, Canara Bank and ICICI bank. Further, Shri Abhishek Jain handed over to the officers on the spot, 2 cheques, no.851824 dated

07/09/2012 for Rs.10 lakhs drawn on Punjab National Bank and another Cheque No.215 dated 07/09/2012 for Rs.10 lakhs drawn on ICICI Bank towards his liability for Central Excise duty, as stated in covering letter of even date. Soon thereafter, the appellant sent a letter, received by the Department on 17/09/2012 stating that the statement recorded from him by the inspecting officers on 07/09/2012 was not out of free will, the same was a dictated one. He was made to write the statement, as dictated by the officers. Originally, he had intended to manufacture Sweet Supari which was produced up to July, 2012, after which packing machine was purchased from scrap dealer, as he planned for production of Gutkha. However, immediately after installation of the packing machine, the officers of Central Excise visited on 07/09/2012. The copies of recovery memo/panchnama and his statement were not given to him, although, he was forced to acknowledge in that he had received copies of the same. Further, he stated that his original driving license and registration certificate of his car no.DC 1 CJ-5769 were taken away by the officers in original. Further, he was forced to handover 2 separate letters both dated 07/09/2012 wherein he was made to write that he was enclosing the cheque of ICICI Bank and another cheque of PNB Baghpat Road, Meerut. Both the cheques were made to handover in blank and undated condition, but signed by him under duress. The appellant further retracted to the effect that he was forced to write down that he had made sale of Gutkha whereas he wanted to write that he had only manufactured on te~~x~~st basis. Thus, the words sent and sale was inserted under duress and force, even though no sale was made at all and no commercial production had commenced. He was also forced to write down that he had made sale of Gutkha in the month of May and June 2012 even though no sale was made by him at the relevant time, as no packing machine was installed. Although, he had impressed before the officers that he had not started commercial production and whatever production was available, was only sample pieces, not for sale. But he was refrained from writing these facts in the statement dated 07/09/2012. Thus, he was deprived of stating the true facts.

6. Further, statement was recorded on 26/11/2012 of the appellant, wherein he presented a register stated to contain the sale record of Sweet Supari manufactured by him. Further, stated that he did not know anything about M/s S.S. Packers and it was not his firm, he was manufacturing Sweet Supari in the premises of Devkaran S/o Shri Dharampal which he had taken on rent, he had arranged Rs.80,000/- approximately for this work from his

own resources and no accounts were maintained, that for manufacture of Sweet Supari, one supari cutter and 2 dryers along with one generator were used which were purchased in cash from a scrap dealer in Mayapuri, Delhi. No invoice was issued by the scrap dealer and there was no name or signboard on the shop of scrap dealer. He had gone to scrap dealer shop along with an agent named Rashid, and was unable to specify the exact location of the shop of scrap dealer. Further, he stated that he had taken only one room on the ground floor from Shri Devkaran in February, 2012. He asked for the second room in August, 2012, and throughout he had only one room. He had appointed only one person named Rakesh who worked with him from February, 2012 till 05th September, 2012. No other person except Rakesh worked in the said premises and as per his knowledge, he never saw anybody else working in the said premises. He had purchased the pouch packing machine found installed in the premises, on which pouch roll as well as Gutkha mixture had been loaded, was purchased on 20/08/2012 and the same arrived at the site on 21/08/2012. He also enclosed the relevant invoice and freight payment receipt. This machine was got repaired and he also enclosed the invoice of the motor. This machine was got repaired, and roll of Doon Gutkha pouches were loaded on the machine. The unpacked Gutkha mixture was prepared on his direction by Rakesh for verifying the process. All these activities were done in order to start the business of Gutkha manufacturer. The Gutkha mixture prepared was not of the right quality. As soon as the repair was completed and the manufacturing processes started, premises were visited by the Central Excise Officers, therefore, he could not inform the Department. The raw materials, pouch rolls and cartons were purchased through an agent. There were no documents related to purchase, transportation and payment of packing material. The packing materials were procured between 1st and 5th September, after repairing of the pouch packing machine, it was operated for the first time on 2nd September, 2012. The Pouch Packing Machine was purchased through agent whose name and address is unknown. The agent purchased the machine on his behalf. For repair of machine one electric motor of 1 HP was purchased, the invoice of which was enclosed. On the same date i.e. 26/11/2012 Shri Abhishek Jain also furnished the documents namely invoice no.828 dated 20/08/2012 of M/s Shree Jee Enterprises, East Moti Bagh, Sarai Rohilla, Delhi, for one Pouch Packing Machine purchased in cash for Rs.17,500/-, invoice nos.1011 and 1012, both dated 1st September, 2012 of M/s Star Trading Company, Narela, Delhi-110040, for 30 Kg Supari and 8 Kg Katha, respectively, purchased by cash. Invoice No.922 dated 1st September, 2012 issued by M/s Nikhil Trading Company, Bawana Road, Narela, Delhi-40 for supari, Katha, Chuna and Menthol, invoice no.50 dated 1st September, 2012 issued by M/s Kapil Trading Company, Meerut for purchase of one single phase 1 HP Motor for total amount of Rs.4,370/-, one undated receipt given by one Shri Dinesh stating that he received Rs.1800/- for transporting one machine from Sarai Rohilla, Delhi to Village-Dagarpur, Baghpat on 21/08/2012.

7. Further, investigation-summons were issued to the concerned persons. So far the sample drawn on the date of search, the same were sent to CRCL, New Delhi for testing vide test memo dated 06/12/2012. As per the test report-the appellant was engaged in the manufacture of Gutkha, i.e. Pan Masala containing tobacco. Further, as per Revenue, the following points appeared to contradict, the stand taken by the appellant subsequently:-

> "No quantity of Sweet Supari either in loose or in packed condition, was found in his factory on day of search. No packing material of Sweet Supari was found. Manufactured Gutkha was found in loose as well as packed condition. Further, a single track FFS machine loaded with Gutkha mixture and pouch rolls for packing the Gutkha mixture was found. Loose packing material for Gutkha as well as different quantities of various raw materials, required for manufacture of Gutkha were found. Further, Shri Abhishek Jain had stated on 7th

September, 2012 at the time of search, that he commenced manufacture of Gutkha in March, 2012, which continued for 3 months. The boxes in which pouches were found packed, described the goods as Gutkha and listed the ingredients contained. Further, the retraction by the appellant was found not tenable on the ground that the search proceedings were conducted in the village, in presence of several persons, particularly in presence of Shri Leelu Pahalwan who was the 'Block Pramukh' of Khekhra Block, where the appellant was running his factory. Shri Jain was issued summons on 07th September, 2012 itself for appearance on 10th September, 2012 but he requested for time on health ground and did not make any retraction vide his hand written letter dated 10th September, 2012, which was his first communication after search. Shri Jain had handed over the two cheques for Rs.10 lakhs each towards his Central Excise duty liability. Firstly the retraction is not supported by any evidence and secondly, even if it is correct that he gave the blank cheques, the gravity of such an act is even greater, than that of giving cheques of a different amount. Shri Jain had sent a letter by Speed Post booked at Haridwar on 14th September, 2012 and received by revenue on 17th September, 2012 which besides containing his aforementioned retraction, also stated that the two blank cheques were got signed and taken away from him forcibly by the officers. Although the appellant had several opportunities to retract and/or bring the highhandedness of the officers, in the knowledge of senior officers after 7th September, 2012, but he failed to do so and the said retraction was sent only on 14th September, 2012, i.e. after a week from the date of search. Thus, the retraction of appellant appeared an afterthought and an attempt to scuttle the investigation. Further, Shri Jain also sent a typed letter by messenger on 17th September, 2012 wherein he made no reference to his said retraction or the alleged forcible submission of cheques and only stated that the date of summons be fixed after return of original registration certificate of car and his driving license."

8. It appeared to Revenue that Shri Abhishek Jain in his subsequent statement dated 26/11/2012 was not stating true and correct facts. Further, it appeared that he did not have a proprietary relationship with M/s S.S, Packers and he had installed and made operational the pouch packing FFS Machine in February, 2012 and commenced manufacturing Gutkha packed in pouches at that time with the aid of this machine. Further, it appeared that the appellant was manufacturing Gutkha with the help of FFS Machine without applying for registration and without paying duty leviable thereon. Further, appeared that he had no intention to pay the duty and was giving false and misleading statements with the aim to escape the liability to pay the duty. It further appeared that the appellant is liable to pay duty under Section 3A of the Central Excise Act read with the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 which came into effect vide Notification No.30/2008-CE dated 01/07/2008. It further appeared that the packing machine

was installed in February, 2012 and was sealed on 07th September, 2012, the period for which duty is leviable would be from 01/04/2011 to 06/09/2012 in accordance with Rule 17 (2) read with Rule 7 and Rule 10 of PMPM Rules and read with Clause 2 of Notification No.42/2008-CE. Accordingly, vide show cause notice dated 01/03/2013 the appellant was required to show cause, why not Excise duty amounting to Rs.3,26,99,999/- be not demanded for the period from 01/04/2011 to 06/09/2012 @ Rs.19 lakhs per machine per month with further proposal to imposition of penalty.

9. The appellant contested the show cause notice, by filing interim reply dated 14th March, 2014 wherein he requested to allow cross-examination of the Central Excise officers, who conducted the search operation/other persons whose statements like documents have been relied upon. It was further urged that the statement dated 7th September, 2012 is not reliable, as the same was recorded under duress, coercion and threat of arrest by the officers. The officers had seized only one Carton of 110 packets containing 6600 pouches in total of the Gutkha and 92.360Kg of semi finished goods valued at Rs.46,500/- and in the Supurdnama it was mentioned that the duty involved on the seized goods is about Rs.95 lakhs. Further, the statement recorded on 07/09/2012 was a dictated one

and the same was retracted soon thereafter. In support of the same appellant also filed joint affidavit of the two panch witnesses dated 04/10/2012, as well as affidavit of Shri Leelu Pahalwan, who was present during the search operation. It was further alleged that from the perusal of the affidavit, it is evident that the appellant was compelled to write the statement, as dictated by the officers and also the officers took two blank cheques, signed by the appellant. The obtaining of blank cheques under duress from the appellant does not amount to admission of duty liability. The giving of cheques by the appellant under duress is also evident from the fact that he was just forced to sign the checks without filling the amount tendered, as well as authority to which cheque is issued. That there was no correlation between the signed cheques and the two letters both dated 7th September 2012, as per the letters, the cheque were of Rs.10 lakhs but in true sense they were blank and not filled at all, except signature taken under duress. It was also urged that the appellant had not commenced commercial production, and had manufactured Gutkha by way of trial production and/or a few samples for testing. There is no evidence on record that the appellant have ever sold any stock of the Gutkha. In addition to the stock of Gutkha, Semi finished goods, raw materials, packing materials, etc. one diary and one small writing pad were recovered and sealed by the officers from the premises. However, these documents nowhere indicate manufacture and sale of Gutkha by the appellant. The said diary and small writing pad have not been made relied upon documents. That the Gutkha Packing Machine was operated only on and from 02/09/2012 for manufacturing of Gutkha, which had been subsequently, seized and sealed on 07/09/2012. Further, in the statement dated 26/11/2012 the appellant never stated that he ever manufactured any Gutkha other than the Gutkha, which was seized on 07/09/2012. That the offence of the appellant was limited, to the extent of manufacture of stock of Gutkha which was lying under the seizer and further default by appellant being failure to inform the Department. That neither a single pouch of Gutkha was ever recovered from the market, nor a single buyer of the Gutkha manufactured by the appellant, have been found by the Department. If the period of manufacture, as per revenue, of Gutkha is taken as correct for argument purpose, then the appellant would have manufactured 9,65,95,200/- pouches during the period from April, 2011 to 06th September, 2012. In spite of such huge quantity of manufacturer, the Department had not recovered any stock or consignment of the Gutkha from the market. It is further urged that at best the appellant is liable to pay duty under the PMPM Rules for the period from 02/09/2012 to 06/09/2012. It was further urged that the semi finished goods were valued at Rs.46,500/- but not liable for seizer, as the same was not marketable and did not classify as 'off-ending' goods. Accordingly, the stock of seized semi finished goods- 92.360Kg is not liable for confiscation. It was further urged that the same is not sustainable in absence of finding that the appellant had commenced commercial production. Rule 6 (1) proviso of PMPM Rules provides that a new manufacturer shall file such declaration at least 7 days, prior to the commencement of commercial production of notified goods in his factory. Reliance was placed on the ruling of Hon'ble Gauhati High Court in the case of M/s Rail Track Concrete Production (p) Ltd. Vs Commissioner of Customs & Central Excise, Guwahati reported at 2012 (286) ELT 30 (Gau.) wherein it have been held that for commercial production- both manufacture and sale is essential. Admittedly, officers did not find the packing machine in operation on 07/09/2012 and admittedly, the officers seized the packing machine on the date of inspection and thus, no production could take place on or after 07/09/2012. In absence of commercial production the appellant was not required to file the requisite declaration under Rule 6(1) of the PMPM Rules and accordingly, have not violated the provisions of the

Central Excise Act read with the PMPM Rules. There is no investigation at the end, of the supplier of the pouch packing machine or the supplier of raw materials. Specific request to cross-examine the officers namely Shri Srinivas S/o Shri Ranvir Pradhan, Shri Dharmraj S/o Shri Muni Ram, Shri Leelu S/o late Shri Brahmapal, Shri Anadi Shukla, Inspector, Central Excise, was made.

10. On the next date of hearing i.e. 14th of March, 2014 the appellant appeared with this counsel and again reiterated the request for cross-examination of the witness. Without allowing the opportunity to cross-examine and any further Opportunity to file a final reply to show cause notice, the learned Commissioner has passed the impugned Order-in-Original, confirming Central Excise duty of Rs.2,51,94,517/- for the period from 01/04/2011 to 06/09/2012 in terms of provisions of Rule 18 of PMPM Rules read with Section 11 AC of the Act and further imposed equal amount of penalty under Rule 17 (1) and Rule 18 of PMPM Rules read with Rule 25 of CER, 2002. The Learned Commissioner was pleased to drop the demand of Rs.75,05,482/- on account of application of correct applicable rate of Central Excise duty, as per Notification No.42/2008-CE and was further, pleased to confiscate Excisable goods, seized vide panchnama dated 07/09/2012 valued at Rs.53,100/- with option to redeem

on payment of redemption fine of Rs.15,000/- and further imposed penalty of Rs.5,000/- only upon the appellant, in lieu of confiscation under Rule 25 of CER, 2002.

11. As regards the prayer made for cross-examination of various persons noted herein above, it was observed that the panchnama proceedings were conducted in the premises owned by brother of Shri Leelu namely Shri Devkaran and was conducted in presence of panch witnesses namely Shri Shrinivas and Shri Dharmraj. Further, the appellant were also present at the time of Panchnama proceedings, who had joined later on. None of these persons and/or witnesses had never raised any objection for the manner/methodology of the search and the facts recorded in the panchnama/statement tendered on the spot. As regards retraction received by the Department vide speed-post on 17/09/2012, it was observed that the rebuttal is nothing but an afterthought to avoid the tax liability and the penal provisions. It was further observed that the retraction had been made after, about more than a week, is not sustainable. The cross-examination of Shri Anadi Shukla, Inspector, Central Excise, in respect of search warrant dated 14/09/2012 at the registered premises, it is evident that due to absence of the appellant at the residence, the same was returned and executed. It was further observed that in view of the

documentary evidence the statements are only by way of corroboration and according there, no need allow cross-examination.

12. As regards, the demand of duty, it was observed that it is evident that the appellant was engaged in manufacture of excisable goods namely Gutkha without obtaining Central Excise registration. During the search, a generator set with electricity distribution point, one betel nut cutting machine, one drying machine consisting of several drying plates, one single track pouch packing machine, etc. was found installed there. Further, these machines were containing cut betel nut, various inputs, pouch roll, Gutkha mixture, etc. in filled condition therein evidencing that the manufacturing activity was going on and these machines were in working condition. Further, at the time of search, finished stock of Gutkha was 110x66=6600 pouches having weight 2 grams each having MRP of Rs.1 only, bearing a brand name and the name of the manufacturer- M/s S.S. Packers, Sonipat, (H.R.) was found. As per list of ingredients, it was mentioned that it contains Betelnut, Tobacco, Catechu, Lime, Menthol, Spices and Fragrance. Further, in the premises at the time of inspection, one bag filled with prepared Gutkha mixture weighing 92.36 Kg and 9 roles of Gutkha pouches weighing 54.66Kg were recovered. Thus, the manufacturing activity

of Gutkha was going on. Further, in the premises raw materials namely Kattha, T.C. Paste, Gutkha Flavor Compound, Fragrance, Chuna Paste, Menthol Flakes, Tobacco, Oleoresin Capsicum, etc. were also recovered. Further, the appellant had informed on being asked that he was using his private car for inward transport of raw materials and outward transportation of finished goods. Thus, both the manufacturing and clearance of notified goods- Gutkha was going on without Central Excise registration and filing of the required declaration with the Department under the PMPM Rules. Further, as per the panchnama- finished goods, semi finished goods and raw materials were seized. Further, the appellant tendered detailed statement along with two cheques for Rs.10 lakhs each dated 07/09/2012 against the duty liability. Further, samples were drawn and sent for testing to CRCL and the report confirms that the product manufactured by the appellant was Gutkha. The appellant had stated that he was manufacturing Gutkha since February, 2012 on the FFS machine. The contention of the appellant are that this statement was recorded under duress on 07/09/2012 is not reliable. Further, machinery required for Gutkha manufacturing namely pouch packing machine, cutting machine, generator (source of power), different raw materials, packing material, semi finished goods, finished goods and remnants of used raw materials/packing materials were found, as recorded in Annexure-A to the panchnama. As regards the affidavit of the panch witnesses and Shri Leelu, brother of the owner of the rented premises, relied upon by the appellant in support of its contention that he was compelled to write under duress and pressure of the officers, he wrote according to the desire of the officers. The said contention was rejected by observing that the panchnama proceedings were conducted in presence of independent witnesses, who never raised any objection at the material time. The contents of the proceedings are duly supported by other evidences including recovery of manufactured goods, semi finished goods, raw materials, packing materials, etc.

13. So far the obtaining of two blank cheques from the appellant in support of the contention of duress and pressure, the learned Commissioner have observed that Shri Abhishek Jain had admitted in his statement that he was not holding Central Excise registration to manufacture the excisable goods and accordingly, he provided the said cheques with view to discharge his duty liability, accruing as Section 3A of the Act which provides for compounded levy on notified goods– Gutkha. Further, Shri Abhishek Jain also promised to apply for registration by 10/09/2012. It was further observed that in the retraction

letter received on 17/09/2012 there is no reference of alleged forcible submission of cheques. Thus, the allegation of forcible collection of cheques was only by way of afterthought. It was also observed that from perusal of the cheques it is noticed that they are not blank they have been drawn for Rs.10 lakhs each in favour of Chief Accounts Officer, Central Excise, Meerut-I. So far the non presentation of the cheques for collection by the Department and the consequent submission of the appellant, that the Department did not send the cheques for collection, as they were guilty of collecting the cheques by duress and pressure, it was observed that non-realization of the cheques do not effect demand of duty evaded by the appellant. So far the argument that under the PMPM Rules the appellant is required to file declaration at least 7 days prior to commencement of commercial production of the notified goods, and as the appellant had manufactured Gutkha from the 2nd September, 20~~08~~12 on trial basis, in order to test the functioning of the Pouch Packing Machine and to launch the brand of Doon Gutkha, by supplying the free samples to the market, and accordingly, for want of commercial production, no declaration was required to be filed. The said contention was also rejected observing that as per the panchnama the appellant was found to have indulged in manufacture and clearance of Gutkha by using the Pouch Packing Machine. It was also observed that the scheme of the Central Excise Act read with the rules do not provide for clearance of free samples for testing in the market. It was also observed that the contention of trial production is flimsy, as at the time of panchnama, Printed Wrapper having full details, List of Ingredients, Brand Name, M.R.P., Manufacturer's name, were found present. Thus, there is no force, in the contention of appellant indulging only in test production. Accordingly, it was held that the appellant have contravened the provisions of the PMPM Rules read with Section 3A of the Central Excise Act. So far the contention that the Department had not found a single person or dealer who had purchased the Gutkha from the appellant, stated that the said fact is not required under the provisions of Section 3A of the Act read with the PMPM Rules, 2008.

14. The contention of the appellant that initially he started manufacturing Sweet Supari and packing the same on the FFS machine and subsequently, he had employed one person namely Shri Rakesh for manufacture and sale of Gutkha, who worked with him for 3 months and thereafter, there is no production of Gutkha. Such facts are not reliable, as the appellant even failed to provide the proper address of the said Rakesh. Further, the claim of

manufactur of Sweet Supari prior to 02/09/2012 is also not correct, as no Sweet Supari in loose or pack condition was found at the time of panchnama proceedings, wherein sufficient quantity of manufactured and semi finished Gutkha in loose condition was found. The single track FFS machine was found loaded with Gutkha mixture and pouch roll for packing of Gutkha was found. Loose packing material for Gutkha and different quantities of various materials for manufacture of Gutkha was found. Further, in the 1st statement of Shri Abhishek Jain, had stated that he commenced Gutkha manufacturer in March, 2012 which continued for 3 months. It was further observed that the appellant is the proprietor of M/s S.S. Packers, as he introduced himself on 07/09/2012 to the officers as proprietor of M/s S.S. Packers. Further, he signed the letter dated 17th September, 2012, as proprietor of M/s S.S. Packers and in the letter dated 10th October, 2012 requesting for photocopy of the panchnama and statement, had signed the letter as Abhishek Jain, S.S. Packers, Village-Bawli Road, Distt.-Baghpat (UP). Further, the appellant had led evidence of procuring of FFS Machine vide Invoice No.828 dated 20/08/2012 from M/s Shree Jee Enterprises, East Moti Bagh, Sarai Rohilla, Delhi for one Pouch Packing Machine purchased in cash for Rs.17,500/- and also invoice nos.1011 & 1012 both dated 1st

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September, 2012 of M/s Star Trading Company, Delhi for 30 Kg Supari and 8 Kg Kattha respectively, for cash and another invoice no.922 dated 1st September, 2012 issued by M/s Nikhil Trading Company, Narela, Delhi-44 for Supari, Kattha, Chuna and Menthol all purchased in cash for Rs.3,325/-. The Commissioner issued summons to these parties through speed-post and the same were returned by the postal authorities with the remark 'unclaimed', 'incomplete address' and 'this firm is not found at the given address on enquiry', respectively. The appellant had contended that the issuance of summons is not sufficient and attempt should be made through the jurisdictional officers of the concerned parties. The learned Commissioner relied on the remarks of the postal authority observing that the remarks clearly establish that the said firms were not existent at the given address. The learned Commissioner have also observed that issuing of summons by speed post satisfy the requirement of issue of notice under Section 37 of the Act. The appellant had contended that all the aforementioned firms are in existence and active dealers which is also confirmed from the "Department website/Tax Information Exchange System". Thus, the Department had failed to conduct proper investigation and locate the said persons.

15. As regards the contention of the appellant that the FFS machine was not in working order, when it was purchased and the same was repaired and made workable, by changing the motor, which was purchased from M/s Kapil Trading Company, Meerut on 01/09/2012. The learned Commissioner has relied on the statement of Shri Kamal Gupta, proprietor of M/s Kapil Trading Company dated 17/01/2013 wherein he stated that he had issued the document to one Shri Rajeev Jain, who was known to him, without delivery of any goods. Shri Kamal Gupta on the one hand admitted that he had received the payment of Rs.4,370/- and on the other hand he stated that he had given the bill without supplying the goods. The learned Commissioner has observed that it is evident that Kamal Gupta have not supplied the Single Phase Motors, nor obtained any cash from Shri Abhishek Jain.

16. The contention of the appellant regarding the transportation receipt given by Shri Dinesh for transport of the FFS Machine from Delhi to "District-Baghpat on 21/08/2012. It was observed that there is no address of the said Shri Dinesh. It was observed that the said document appears to be fictitious. So far the calculation of duty liability, the learned Commissioner observed that Sub-rule (2) of Rule 17 of PMPM Rules provides that if it is found that goods has been manufactured in or cleared from

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a unit which is not registered with the jurisdictional Central Excise Office, then the duty liability of such unit shall be determined on the basis of number of Packing Machines found available in the premises of the unit and the retail price of the pouches manufactured with the aid of packing machines and unless evidence to the contrary is provided or led to the satisfaction of the Central Excise Officer, such machines shall be deemed to have been in operation since 1st April of the financial year in which unit was found to be not registered and shall be construed as operating packing machine for the purposes of Rule 7 and dealt with accordingly. Further, observed that as it is found that the appellant had taken the premises on rent in February, 2012 and installed the Pouch Packing Machine and other machine, since then he remained in manufacture of Gutkha, notified goods since February, 2012 and accordingly, he is liable to duty for the period from 1st April, 2011 to 6th September, 2012. The learned Commissioner has further observed that as the contention of the appellant that duty is leviable @ Rs.12.50 lakhs per month and not, as demanded @ Rs.19 lakhs per month, as duty was leviable till 16th March, 2012 and the same was enhanced to Rs.19 lakhs per machine per months from 17/03/2012 vide Notification No.13/2012-CE. Accordingly, the learned

Commissioner accepted the said contention and recalculated the duty at Rs.2,51,94,517/-.

17. The learned Counsels for the appellant urges that the impugned order is vitiated due to ignoring of the relevant facts on record. Moreover, the learned Commissioner have erred in not considering the affidavit of the panch witness Shri Shrinivas and Shri Dharmraj wherein they have stated- that the officers started sealing the documents and also prepared some documents on the spot and got them signed from the appellant. The officers also seized the Original Registration Certificate of the car and Driving License of the appellant. Although the officers took the signatures of Shri Abhishek Jain by way of acknowledgement that he had received the copy of Panchnama and other documents but the copies were not given to him. Further, he stated that the appellant Shri Abhishek Jain was forced to write the statement, as dictated to him by the officers. The officer also collected two blank cheques from the appellant. Further, Shri Leelu was also present at the time of search and was given the safe custody of the seized goods, have also stated in his affidavit dated 25/10/2012 that he was called by the officers and after they started the search till end of the search he was present there and they handed over the seized goods to him. The officers also seized the documents of Car No.DL-

01 CJ-5769 of Shri Abhishek Jain and collected the original registration certificate and original Driving License of Mr. Jain. Although, the officers were requested by Shri Abhishek Jain to give back the original copies of documents but such copies were not given. During the recording of statements the officers forced to write the statement, as dictated by the officers. At the closer of the Panchnama proceeding, Shri Abhishek Jain again requested for return of his Driving License and the registration certificate of the car, but the same not given to him and officers were also collected two blank cheques. The learned Counsel states that the learned Commissioner was required to cross-examine to the panch witnesses and Mr. Leelu, who had given affidavit in support of the appellant. The learned Counsel have also relied on the ruling of Hon'ble Supreme Court in the case of M/s Parle Beverages Pvt. Ltd. Vs CCE, Bombay reported at 1998 (98) ELT 585 (SC) wherein it was held that affidavit is not to be brushed aside solely on the ground of delay. Affidavit in the said case was filed after lapse of two years with invoices. The Tribunal erred in refusing to consider affidavits. Delay may be a factor with some relevance as to the probative value of the statement made in the affidavit, but it cannot be totally brushed aside without going into the genuineness of the invoices. In case of doubt Tribunal could have called the Deponent for cross-

examination or allowed the cross-examination by the Department. The learned Counsel further stated that this Tribunal also in the case of Kulbhushan Jain Vs CC, Delhi reported at 1999 (111) ELT 906 (Tribunal) have held that affidavit by way of evidence is not dismissible straightaway as an afterthought without proper enquiry and examination of the deponent, referring to Section 33 of the Central Excise Act read with Section 122 of the Customs Act, 1962. Thus, the impugned order is vitiated, as the learned Commissioner have refused to examine the deponents and simply rejected the affidavits. Further, in view of the affidavits of the panch witnesses and Shri Leelu, it is evident that the officers used duress and pressure in recording the statement and collecting the cheques from the appellant on the day of search. Thus, such a statement and/or delivery of cheques have got no evidentiary value.

18. Further, the appellant led evidence by filing invoices for purchase of the packing machine– FFS machine, that it was purchased only on 20/08/2012 from M/s Shri Jee Enterprises, Delhi vide invoice no.828. Appellant have also led further evidence with regard to purchase of inputs for the manufacture of Gutkha from M/s Star Trading Company, Delhi vide invoice dated 01/09/2012 and from M/s Nikhil Trading Company, Delhi vide invoice of even date. The appellant also led evidence by filing invoice no.50

dated 1st September, 2012 issued by M/s Kapil Trading Company, Meerut, which states that M/s Kapil Trading Company had sold to the appellant one Single phase 1 HP Motor for Rs.4,370/-. Further, the Proprietor of M/s Kapil Trading Company Shri Kamal Gupta who was examined by the Commissioner have admitted that he received the sum of Rs.4,370/- and have issued the said invoice. The learned Commissioner has failed to exercise the jurisdiction vested in him in enforcing the attendance of the witnesses. He has shrugged responsibility by only issuing summons by speed-post which were returned by the postal department with the remark– 'unclaimed', incomplete address', 'this firm not found at the address on enquiry'. The learned Counsel have drawn the attention of the Tribunal to the said invoices, filed in the appeal paper book, which bear the Tin number of the respective parties. Shri Jee Enterprises is registered with the Sales Tax Department and they also charged VAT on the sale of the Pouch Packing Machine. Further, appellant have also filed a downloaded copy of the status report, as regards a registered dealer from the Tax Information Exchange System, website of the Sales Tax Department, as on 13th of March, 2013 which shows that Shri Jee Enterprises is an 'active dealer' and their address is the same as given on the invoice. Similarly, the downloaded report with respect to M/s Star Trading

Company and M/s Nikhil Trading Company states all of them are active dealer as on 13th of March 2013, have also been filed in the appeal paper book. The fact of purchase of ingredients for manufacturing of Gutkha on 01/09/2012, purchase of motor on 1st September, 2012 for repair of the Pouch Packing Machine are reliable piece of evidence and have been wrongly rejected by the learned Commissioner, vitiating the impugned order.

19. In view of the errors committed by the learned Commissioner, it may be held that the appellant is liable to pay Central Excise duty under the compounded levy scheme only for the period from 02/09/2012 to 06/09/2012, as admittedly the packing machine was sealed in the morning of 07/09/2012, by the officers of the Department. The learned counsel further states that under the facts and circumstances that the appellant was not doing commercial production and was doing only the process of testing the machine and the finished product in the market, the duty liability is fit to be set aside. Accordingly, the learned counsel prays for setting aside the impugned order, with consequential relief.

20. The learned A.R. for revenue have relied on the impugned order.

21. Having considered the rival contentions and on perusal of records, we find that there is no abnormal delay in

retracting the statement dated 07/09/2012 by the appellant. Such retraction was done in about 10 days time from the date of search. We further find that the contention of the appellant that the officers used duress and pressure upon the appellant in writing the statement during panchnama proceedings have also been supported by the affidavit of the panch witness and Shri Leelu who had witnessed the panchnama proceedings. They also supported the fact that the appellant was pressurized to write, as per the dictation of the officers, as well as made to deliver two blank signed cheques to the officers. They further stated that the officers seized the original registration certificate of the car of the appellant as well as Driving License and had refused to return the same inspite of repeated plea of the appellant. Thus, we hold that the statement of the appellant dated 07/09/2012 is not a valid piece of evidence and also hold that the same is bad under Section 9D of the Central Excise Act. We further find that the appellant have led cogent evidence that he had acquired the packaging machine– FFS only on 20th of August, 2012 and the same was transported to the factory premises on 21/08/2012 and further the said machine was repaired and/or put in working order on 01/09/2012 when the new single phase motor was purchased for the said machine. Such evidence have not been found to be untrue and the learned Commissioner have erred in rejecting the evidence without any proper enquiry and oppertunity of hearing. We further

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find that the appellant have led sufficient evidence that he had purchased the inputs or ingredients for manufacture of Gutkha on or about 01/09/2012 and thereafter, started production with effect from 02/09/2012. Thus, we hold that the appellant is liable to Central Excise duty under Section 3A of the Act read with the PMPM Rules for the period 02/09/2012 to 06/09/2012. We further hold that the appellant is liable to penalty equal to the amount of duty. So far the personal penalty of Rs.5,000/- imposed on Shri Abhishek Jain is concerned, we set aside the same, as separate penalty is not impossible on the proprietorship firm and its proprietor. We also set aside the confiscation of seized goods, valued at Rs.53,100/-, being not dutiable, and not removed from the factory of manufacturer. We further hold that if the appellant have not taken release of the said goods, the value of the same shall be adjustable from the amount of duty and penalty.

22. Accordingly the appeal is allowed in part as indicated hereinabove.

(Pronounced in Court on 04/4/2018)

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

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

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