CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 1816 of 2011

(Arising out of Order-in-Original No. 6/2011 dated 31.03.2011 passed by the Commissioner of Central Excise and Service Tax, Mangalore.)

Sri. Pradeep S. Naik
Kulave Post,
Sirsi Taluk,
Uttara Kannada District.

Appellant(s)

VERSUS

Commissioner of Central Excise and Service Tax,
V floor, Trade Centre,
Bunts Hostel Road,
Mangalore – 3.

Respondent(s)

APPEARANCE:

Mr. Sathya Vageeswaran, Advocate, for the Appellant

Mr. H. Jayathirtha, Superintendent (AR), for the Respondent

CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS R BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 21138 /2024

DATE OF HEARING: 29.05.2024
DATE OF DECISION: 20.11.2024

PER : DR. D.M. MISRA

The present appeal is filed against Order-in-Original No.6/2011 dated 31.03.2011 passed by the Commissioner of Central Excise, Mangalore. The learned Commissioner ordered as follows:-

ORDER

Order in respect of Shri Pradeep S. Naik, Post Kulave, Sirsi, Uttara Kannada – 581403.

i) I confirm and demand the Central Excise duty amounting to Rs. 6,37,50,000/- (Rupees six crores thirty seven lakhs fifty thousand only) (consisting of Basic Excise duty, Additional duty of Excise, NCCD, Education cess and Secondary and Higher Education Cess), under Rule 17 (2) of Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008 read with Rule 7 and Rule 9 of the said Rules and Notification No. 42/2008 dated 0 1.07.2008 read with Section 3A of Central. Excise Act, 1944 and proviso to Section 11A(1) of Central Excise Act, 1944 from Shri Pradeep S Naik, Post Kulave, Sirsi, Uttara Kannada -581403.

ii) I confirm and demand the interest, as applicable rates, from Shri Pradeep S Naik, on the amount of Central Excise duty quantified at (i) above, under 11 AB of the Central Excise Act, 1944 read with Rule 9 Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008;

iii) I confiscate the seized Gutkha packing machines (3 nos.) with the description mentioned as PHOTO ELECTRIC CONTROL valued at Rs.60,000/- each mentioned at Sl.No.2 of the Annexure to the Mahazar dated 09.12.2009. I give an option to redeem the same on payment of fine of Rs. 18000/- for three machines.

iv) I find that the 1872720 pouches of gutka seized under Section 118 of Customs Act, 1962 read with Section 12 of Central Excise Act, 1944 are liable for absolute confiscation. However since these were destroyed with the order of Hon'ble Divisional Magistrate Karwar, no further action sustains.

v) I absolutely confiscate other seized items viz One bag of plastic covers(Quantity-half bag), One bag of plastic covers with marking of 'RAJA KOLHAPURI GUTKHA' One bag of advertising papers (Quantity-half bag), 16 bundles of plastic ribbons used to pack Gutkha in pouches, 3 bundles of blue coloured bags to the Central Government under the provisions of

Central Excise Act, 1944 read with the provisions of Customs Act, 1962.

vi) I impose penalty of Rs. 6,37,50,000/- (Rs. Six Crore thirty seven lakhs fifty thousand only) on Sri Pradeep S Naik under Rule 17(1) of Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008 read with Section 11AC of the Central Excise Act, 1944 and Rule 25 of Central Excise Rules, 2002; and

vii) Since penalty of Rs. 6,37,50,000/- has been imposed under Rule 17(1) of Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008 read with Section 11AC of the Central Excise Act, 1944 and Rule 25 of Central Excise Rules, 2002; Rule 17 (1) penalty which is equivalent to duty, I drop the proposal to impose penalty under Rule 26 and 27 of the Central Excise Rules, 2002.

viii) I hereby order confiscation of lorry with Registration No. DN. 09 F 9111 valued at Rs.4,00,000/- to the Central Government under Section 115 of Customs Act, 1962 read with Section 12 of Central Excise Rules, 2002. Further I give an option to redeem it on payment fine of Rs. 40,000/- to Shri. Ramdas Mahadev Shetty, Yellapur Road, Sirsi

ix) Regarding proposal to impose penalty on Shri Ramdas Mahadev Shetty, Yellapur Road, Sirsi, shri Shivaji Krishna Bhote, Sathevadi, Wadoos P.O., Katau Taluk, Satara District, Maharastra, Shri Mukesh Khanaram Mundel, Bhavasi, Paravarsar, Neniya P.O. 341 512, NAGAUR District and Sri. Ramkishore, Jakida, Degna Taluk, Nagaur District, Rajasthan, same is being dropped.

2.1. Briefly stated the facts of the case are that on the basis of intelligence, the Police Sub-Inspector of Banavasi Police Station seized 90 bundles containing Gutkha pouches and related materials along with three machines and one lorry from unauthorised Gutkha manufacturing unit viz. at House No.6, Plot No.21, Golikatta Village, Gudnapura – 581 318, Banavasi, Sirsi Taluk Uttara Kannada within the Banavasi Police Station limit on 03.11.2009. On the basis of FIR and Mahazar drawn by the Police, the Central Excise Department made an application on

06.11.2009 before the Hon'ble Principal JMFC, Sirsi seeking transfer of the seized goods and lorry so as to initiate further investigation in the matter under Central Excise Act, 1944. By order dated 30.11.2009, the court directed the Police to hand over the goods and lorry seized on 03.11.2009 to Central Excise Department. Consequently, the Police handed over the seized materials along with lorry bearing Registration No. DN 09/F 9111 to the Central Excise Department on 09.12.2009. In taking possession of the seized goods and lorry, the Central Excise Department once again seized the same under Central Excise Act under mahazar dated 09.12.2009 and initiated investigation in the matter.

2.2. It is noticed by the officers on investigation that pan masala containing Tobacco popularly known as 'Gutkha', an excisable commodity falling under Chapter 2403 9990 of the Central Excise Tariff Act, 1985 was manufactured and cleared from the premises at House No.6, Plot No.21, Golikatta Village, Gudnapura – 581 318, Banavasi, Sirsi Taluk Uttara Kannada without Central Excise Registration and also without payment of applicable duty and following the procedure laid down under the Central Excise Act. Further, it is noticed that levy of Central Excise duty on Gutkha falling under Chapter sub-heading 2403 9990 of CETA, 1985 is governed by Pan Masala Packaging Machines (Capacity Determination and Collection of Duty) Rules, 2008 notified under Section 3 of the Central Excise Act, 1944.

2.3. During the course of investigation, statements of various persons have been recorded. Also, samples were drawn on 07.01.2010 by the Department which were sent to the State Food Laboratory, Bangalore for testing. The Chief Chemist and Public Analyst, State Food Laboratory (Govt. of Karnataka), Bangalore in the test report dated 03.02.2010 opined that the samples contained tobacco and the samples are of Gutkha tested were adulterated and also misbranded. Consequently, Gutkha being a perishable item were proposed to be disposed by way of destruction in terms of provisions under Section 110 of the Customs Act, 1962. An application dated 24.05.2010 was filed before the SDJM, Karwar and on obtaining permission from the SDJM on 29.05.2010, the said goods were destroyed on 01.06.2010. On completion of investigation, show-cause notice was issued on 04.06.2010 proposing recovery of Central Excise duty amounting to Rs.6,37,50,000/- with interest and penalty and proposal for confiscation of the seized goods, machines and the lorry; proposal for penalty on the noticees. On adjudication, the learned Commissioner has confirmed the demand with interst and passed the order mentioned as above. Hence, the present appeal.

4.1. Learned advocate for the appellant has submitted that initially on 03.11.2009 under Police Mahazar by the Banavasi Police Station, 90 bundles of Gutkha pouches and related materials, 3 packaging machines and one lorry were seized and simultaneously three persons Mr.Shiviji S/o Krishna Bothe, the lorry driver, Mr. Mukhesh S/o Kanaram Nundel and Mr. Ramkishore alleged to be the labourers engaged in the clandestine manufacture and removal of Gutkha were arrested. The Police Mahazar dated 03.11.2009 described the goods as:

> a. 90 Blue colored bags unloaded from the Lorry bearing Registration no.DN-09/F-9111. Each Blue colored bag contained 06 plastic packs and each such plastic pack contained 17 plastic packets and in such plastic packet there were 3 packets and there were 68 small packets with Raj Kolhapur Gutka printed on it with rate mentioned as Rs.1/-. Total value of Gutkha was approx. Rs.18,70,000/-.
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> b. Lorry bearing Registration no.DN-09/ F-9111 valued at Rs.4,00,000/- 3 nos of blue colored plastic bags value Rs.300/-

c. 3 Nos of alleged to be Gutkha manufacturing machines each valued at approx. 60,000/-

d. half-filled bag with raw materials like arecanut and other mixtures and other miscellaneous packing materials and plastic materials of NIL value.

Later, the Central Excise Department with the permission of the Hon'ble Principal JMFC, Sirsi got the goods transferred by order dated. 30.11.2009 and again seized the goods and lorry under Mahazar dated 09.12.2009. in the Police mahazar dated 03.11.2009, it was mentioned the premises from where the machines and lorry were seized.

4.2. The summary of submissions of the learned advocate assailing the impugned order confirming demand of duty and confiscation of the goods seized are as follows:-

- There is no evidence about the procurements and purchase of raw material used in the manufacture of Gutkha and the entire demand of duty and penalty based merely on 3rd party statements without any iota of evidence of clandestine manufacture and clearance of Gutkha.
- The requirement of raw materials, machineries, packing materials and manufacturing process of Gutkha was not examined; hence the demand cannot be sustained. In support, they referred to the judgment in the case of ***CCE, Hyderabad Vs. Dhariwal Industries*** [2012(283) ELT 113 (Tri. Bang.)].

- The demand has been confirmed on the allegation of clandestine manufacture and removal of Gutkha based on confessional statements / statements of various persons including the appellant, lorry driver, labourers, owner of the premises and other 3rd parties, but no corroborative evidences in form of receipt and utilisation of raw materials, consumption of electricity, transporter's documents, receipt of consideration etc. were not investigated and adduced as evidence by the Department. In support, they have referred to the judgment in the case of ***Goyal Tobacco Co. Pvt. Ltd. Vs. CCE &ST, Jaipur-I*** [2017(348) ELT 720 (Tri. Del.)].

- Since the entire demand is based only on Police Mahazar, statements made by various 3rd parties and the retracted statements of the appellant, charge of clandestine manufacture and clearance of goods is not sustainable without corroborative proof or positive evidence. In support, they have referred to the decision of this Tribunal in the case of ***CCE, Delhi-I Vs. Kuber Tobacco India Ltd.*** [2016(338) ELT 113 (Tri. Del.)].

- The statement made before the Central Excise officer cannot be straightaway relied upon in the adjudicating procedure without following the procedure prescribed under Section 9D of the Central Excise Act, 1944. In support, they have referred the following judgments:-

  Hi-Tech Abrasives Ltd. Vs. CCE&ST, Raipur [2018(362) ELT 961 (Chhattisgarh)]
  Jindal Drugs Pvt. Ltd. Vs. UOI [2016(340) ELT 67 (P&H)]
  G-Tech Industries Vs. UOI [2016(339) ELT 209 (P&H)]

- Assailing the Police Mahazar dated 03.11.2009, it is submitted that the same does not provide details regarding the sealing of premises, sealing/marks by which the seized Gutkha, other materials, machineries and vehicles were secured tamper proof; hence cannot be relied upon.

- Duty demand confirmed based on inadmissible documents and Mahazars i.e. Police Mahazar dated 03.11.2009 or any material document relating to Police investigation as recorded in the impugned order.

- The identity of the seized goods in the Police Mahazar was not established.
- Appellant's connection with the premises from where the goods were seized and the act of manufacture was not established.

- The impugned order is based on the alleged letter dated 28.10.2009 written by the appellant to the owner of the premises in which the alleged Gutkha, machineries and other materials and vehicles were seized by the Police under Mahazar dated 03.11.2009. The adjudicating authority has rightly observed that nobody can provide the premises on rent for one month without any agreement and fixing rent.

- The actual manufacturer of the Gutkha, the proprietor of M/s. Shree Ganesh Industries, Sirsi was not made as part to the proceeding despite evidence against him.

6. Learned AR for the Revenue reiterated the findings of the learned Commissioner.

7. Heard both sides and perused the records.

8. The issues involved in the present appeal for determination are whether:-

i. The 90 bundles containing 1872720 Gutkha pouches and related materials, three packaging machines seized by the

Police / Central Excise Department on 03.11.2009 / 09.12.2009 respectively are liable for confiscation;

ii. Duty demanded from the appellant with interest and penalty is sustainable.

9. Undisputed facts of the case are that Gutkha pouches brand-named "Raj Kolhapuri" along with other related materials, three packaging machines and one lorry were seized by the Banavasi Police on 03.11.2009 which was later, with the intervention of the Central Excise Department, on direction by the Hon'ble Principal JMFC was handed over to the Central Excise Department for further investigation. The said materials were again seized on 09.12.2009 and statements of persons were recorded again to ascertain the quantum of offence. From analysis of the statements, it revealed that the Gutkha and three packing machines were seized from the premises viz. House No.6, Plot No.21, Golikatta Village, Gudnapura – 581 318, Banavasi, Sirsi Taluk Uttara Kannada which was given on rent by the owner of the said premises Shri Dhananjaya Krishna Hegde for a period of one month to the appellant by an understanding recorded on 28.10.2009 was manufactured in the said premises and cleared without payment of duty. The appellant however did not accept the said statement of the owner of the premises of taking the said premises on rent for a period of one month; he has stated on the contrary that the letter dated 28.10.2009 was signed by him at the behest of the owner Shri Dhananjaya Krishna Hegde on 03.11.2009; but no evidence has been adduced to support the said claim. The lorry driver as well as the labourers Mr. Shiviji, Mr. Mukhesh and Mr. Ramkishore in their statements initially categorically stated before the Police as well as before the Excise authorities that they were approached by the appellant for production of the Gutkha in the said premises and accordingly the Gutkha seized by the Department were manufactured during the period 28/10/2009 to 03/11/2009

in the said premises. Even though later, they have retracted their statements but no material evidence had been provided in support of their retraction, hence these evidences cannot be discarded. The appellant from the very beginning expressed his ignorance about the said labourers and undertaking the manufacture of Gutkha in the said premises. However, no request for cross-examination of the witnesses was requested by the appellant before the adjudicating authority. Neither the appellant nor Mr. Dhananjaya Krishna Hegde, the owner of the said premises has claimed before the authorities that the Gutkha packed in the plastic pouches having mark of 'Raj Kolhapuri Gutkha' belongs to them or the seized machineries have been claimed to belong to them and requested for its release to them. On the other hand, both of them denied being involved in the manufacturing of Gutkha in the said premises.

10. Since duty paid character of the Gutkha has not been established and on the basis of the statements given by the labourers and lorry driver and retrieving the three machineries from the manufacturing premises, it is clear that the said Gutkha bearing name 'Raj Kolhapuri' manufactured in the said premises and cleared without following procedure and discharging duty payable on the same. Consequently, the Gutkha as well as the three packaging machines and other related materials seized by Police on 03.11.2009 and later by Central Excise Department on 09.12.2009 are liable for confiscation and hence the order of the Commissioner directing the confiscation of the same does not require any interference.

11. As far as the duty demand confirmed in the order, we find that the learned Commissioner only on the basis of the date of connection of electricity to the said premises assumed that the machineries have been installed and same were used for manufacture of Gutkha from the date of installation of electric

meter i.e. 29.03.2007; consequently, the duty liability has been computed w.e.f. 01.07.2008 when Gutkha attracted levy based on production capacity of the machines. We do not find merit in the said finding of the learned Commissioner as no investigation has been carried out by the Department to ascertain the purchase of raw material, its consumption, electricity used for manufacture of the said quantity of Gutkha, transportation particulars about the finished goods as well as receipt of raw materials at the factory premises, purchasers of the finished goods during the said period. Also, there is not an iota of evidence that the premises had been leased to the appellant from 01.07.2008 onwards or the manufacturing carried out by any other person, when the letter dated 28.10.2009 relied by the Revenue reveals that the lease was for a period of one month only, which also could not be established against the appellant and in absence of collecting rent and lease deposit from the appellant. Even though the learned Commissioner doubted the period of lease and the letter dated 28.10.2009, he has proceeded to confirm the demand. Hence, the demand confirmed by the learned Commissioner cannot be sustained. More or less, similar views expressed by the Tribunal in a series of cases, including the cases ***CCE, Hyderabad Vs. Dhariwal Industries***; ***Goyal Tobacco Co. Pvt. Ltd. Vs. CCE &ST, Jaipur-I*** and ***CCE, Delhi-I Vs. Kuber Tobacco India Ltd.*** Hence, the demand in absence of evidence of the nature narrated above being not adduced by the Department, hence cannot be sustained, only on the basis of the date of installation of electricity meter at the said premises. In these circumstances, the demand confirmed by the learned Commissioner is liable to be set aside. Accordingly, the same is set aside and consequently penalty imposed on the appellant under Section 11AC of the Central Excise Act, 1944 also set aside.

12. In the result, the impugned order is modified to the extent of upholding confiscation of the seized goods, three machines and related materials; however, confirmation of demand, interest and imposition of penalty on the appellant is set aside. Appeal is disposed of accordingly.

(Order pronounced in Open Court on 20.11.2024)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R BHAGYA DEVI)
MEMBER (TECHNICAL)

Raja…