**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 2

Excise Appeal No. 20068 of 2014

(Arising out of Order-in-Original No. 58/2013 dated 31.10.2013 passed by Commissioner of Central Excise, Bangalore-I)

Dhariwal Industries Private Ltd
No.2,3 & 4, Singasandra, Hosur Road,
Bengaluru, Karnataka - 560068 **.......... Appellant**

VERSUS

Commissioner of Central Excise, Bangalore-I
P.B. No. 5400, CR Buildings,
Queens Road, Near Bangalore GPO
Bangalore, Karnataka - 560001 **....... Respondent**

AND

Excise Appeal No. 20600 of 2014

(Arising out of Order-in-Original No. 58/2013 dated 31.10.2013 passed by Commissioner of Central Excise, Bangalore-I)

Commissioner of Central Excise, Bangalore-I
P.B. No. 5400, CR Buildings,
Queens Road, Near Bangalore GPO
Bangalore, Karnataka - 560001 **.......... Appellant**

VERSUS

Dhariwal Industries Private Ltd
No.2,3 & 4, Singasandra,
Hosur Road,
Bengaluru, Karnataka - 560068 **....... Respondent**

Appearance:

Shri Hari Radhakrishnan, Advocate for the Appellant
Shri H. Jayathirtha, Authorised Representative for the Respondent

Coram:

Hon'ble Mr. P.A. Augustian, Member (Judicial)
Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order Nos. 21880-21881 /2025

Date of Hearing: 30.09.2024
Date of Decision: 27.03.2025

Per: P. A. Augustian

These 2(two) appeals were filed against the Order-in-Original No. 58/2013 dated 31.10.2013 passed by Commissioner of Central Excise, Bangalore-I by the Appellant and the Revenue, respectively.

2. The brief facts are M/s. Dhariwal Industries Pvt., Ltd., the Appellant is a manufacturer of Pan Masala and was discharging Central excise duty. In the month of May 2012, only one machine was operational and accordingly, Appellant calculated the duty liability and paid the duty in advance on 03.05.2012, well before the due date, i.e., 05.05.2012. Thereafter, Appellant received 6(six) new packing machines, and they were installed on 07.05.2012. The Assistant Commissioner re-determined the Annual Capacity of production on 11.05.2012. The duty for the newly installed machines was calculated and paid on 04.06.2012, before 5th of next month as per the provisions of Rule 9 of Pan Masala Packing Machines (Capacity Determination & Collection of Duty) Rules, 2008. However, show cause notice was issued proposing to demand duty along with interest from 01.05.2012 to 06.05.2012, alleging that Appellant failed to pay duty for deemed operation of the machines which were subsequently installed. Thereafter Adjudication authority confirmed the demand of Rs. 1,40,91,097/- along with interest for the period from 01.05.2012 to 06.05.2012 for the 6(six) machines which started operating from 07.05.2012 under the provisions of section 11A(1)(a) and 11AA of Central Excise Act, 1944 read with Rule 9 of PMPM(CDCD) Rules, 2008 and the amount paid along with the interest was appropriated. Further, penalty of Rs. 45,00,000/- was imposed under Rule 17 of PMPM(CDCD), Rules, 2008. Aggrieved by the impugned order the appellant filed Appeal No. 20068/2014 before the Tribunal.

3. Further, the demand of differential duty of Rs. 53,08,60,001/- proposed in the show cause notice (SCN) under the proviso 7 of Rule 9

of PMPM(CDCD), Rules, 2008 was dropped by the Commissioner. Revenue aggrieved by the order of the Commissioner dropping the demand of differential duty of Rs. 53,08,60,201/- along with interest and penalty for the period from May 2012 to January 2013 on Review vide Review Order No. 01/2014 dated 06.02.2014 by the Committee of Chief Commissioners filed Appeal No. E/20600/2014 before the Tribunal.

4. When the appeals came up for hearing, the Learned Counsel for the Appellant draws our attention to proviso 3 to Rule 9 of PMPM(CDCD), Rules, 2008, where it is specifically provided that in case of increase in the number of operating packing machines in the factory during the month on account of addition or installation of packing machines, the differential duty amount, if any, shall be paid by the 5th day of following month. The said Rule was further amended by amendment dated 27.02.2010, where it is stated that in case the manufacturer does not pay the duty payable by the due date and continue to operate any packing machine till the time such non-payment continue, he shall be liable to pay the monthly duty based on the number of operating packing machines declared in the month for which duty was last paid by him or the total number of packing machines found available in his premises at any time thereafter whichever is higher. Learned Counsel for the Appellant submits that it is therefore clear that the liability to pay differential duty, if any, in case of increase in the number of operating packing machines during the month falls by the 5th day of the following month. The appellant has correctly discharged the duty by paying the same before the due date and consequently, there can be no demand of interest. It is submitted that an identical issue came up for consideration before the Delhi Bench of the Hon'ble CESTAT in the case of **Rajat Industries Pvt. Ltd., Vs. Commissioner of Central Excise-I** reported in **[2012 (284) ELT 581 (Tri-Del.)].** The issue in the said case was whether the assessee, who had installed the machines in the factory w.e.f. 04.05.2009 was required to discharge duty for the first 3(three) days of the month of May 2009, when admittedly the machines were not operational. The Hon'ble Tribunal held that the demand for the first three days of May

2009 cannot be sustained since the production has not commenced. The Hon'ble Tribunal relied upon the decision of the Hon'ble High Court of Punjab & Haryana in the case of **Godwin Steels Pvt., Ltd. Vs. Commissioner reported in 2010 (254) ELT 202 (P&H).**

5. The Learned Authorised Representative (AR) draws our attention to the finding in the impugned order wherein it stated that; in April 2012 the assessee was engaged in the manufacture of Guthka of RSP Rs. 4/-, Rs. 6/- and Rs. 10/-; 'Guthka' of the above RSPs were the existing RSP line products of the appellant and hence no new RSP products were introduced by them in May 2012; the manufacture of the goods of the said RSPs were not permanently discontinued in May 2012 and there was no revision in the rate of duty during the month of May 2012, and the appellants were not a new manufacturer commencing production of notified goods in May 2012; in the above circumstances, there was no provision available to the appellant to pay duty on pro-rata basis on 6(six) Nos. of packing machines installed in the factory on 07.05.2012. The learned AR also submits that under Rule 10 of PMPM (CDCD) Rules, 2008, pro-rata abatement for payment of duty is allowed only in such cases when there is non-production of notified goods during any continuous period of 15(fifteen) days or more in a month. The provisions of said Rule are inapplicable to the instant case as non-production of goods, in respect of 06(six) Nos. of packing machines, was only for 06(six) days and not for continuous period of 15 days or more and hence the abatement on 06 Nos. of packing machines, installed in the factory on 07.05.2012, is not available to the appellant. Considering the same, the Appellant is liable to pay excise duty for the relevant period as confirmed by the Adjudication authority.

6. The Learned Authorised Representative (AR) as regards the Appeal filed by the Revenue reiterated the grounds of appeal in the appeal memorandum.

7. Heard both sides and perused the records.

8. The issue in Appeal No. E/20068/2014 is whether the Appellant, who had installed 6(six) Pan Masala Packing Machines on 07.05.2012 is liable to pay duty for the period from 01.05.2012 to 06.05.2012 as per

proviso 3 of Rule 9 of Pan Masala Packing Machines, (Capacity Determination & Collection of Duty) [PMPM(CDCD)] Rules, 2008.

9. As regards the issue in Appeal No. 20600/2014, apart from the above, the notice proposed to re-determine the total duty liability of the appellant for the period from May 2012 to January 2013 as Rs. 124,95,60,000/- under proviso 7 to Rule 9 of PMPM (CDCD) Rules, 2008 based on the allegation that there was non-payment of duty of Rs.1,40,91,097/- relating to the month of May, 2012 which continued during the period from 05.05.2012 to 09.01.2013 (the same being paid on 10.01.2013 along with interest) and since during this period the appellant continued to operate the packing machines, the provisions of 7th proviso to Rule 9 are attracted, by which the appellants are required to pay the monthly duty based on the number of operating packing machines declared in the month for which duty was last paid by them or the total number of packing machines found available in the premises at any time thereafter, whichever was higher. Considering the month for which duty last paid by them as 'April, 2012' and based on the number of machines declared by them for the said month (12 Nos. of machines), total duty payable by the appellant for the period from May 2012 to January 2013 was quantified as Rs. 124,95,60,000/- (Annexure I to the SCN refers). The appellant, on the other hand, based on the number of machines actually declared by them in Form-1 for each month during this period have paid the duty of Rs.71,86,99,999/-. Hence, the notice proposed to demand differential duty of Rs.53,08,60,001/- (Rs.124,95,60,000-Rs. 71,86,99,999) re-determined under the proviso 7 to Rule 9 of PMPM (CDCD) Rules, 2008.

10. We find that the learned Commissioner had held that;

> *"19.2 Proviso 7 to Rule 9 of PMPM (CDCD) Rules, 2008 reads as follows-*
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> > *"provided also that in case a manufacturer does not pay the duty payable by the due date, and continues to operate any packing machine, then till the time such non-payment continues, he shall be liable to pay the monthly duty based on the number of operating packing machines declared in the*

month for which duty was last paid by him or the total number of packing machines found available in his premises at anytime thereafter, whichever is higher".

I find that, in the instant case, for the month of May, 2012 the assessees had paid duty of Rs. 1,05,00,000/- in respect of one number of machine on 03.05.12 and Rs.5,87,12,902/- in respect 6 nos. of machines on 04.06.2012. There was delay in payment of duty of Rs. 1,40,91,097/- on 6 Nos. of machines for 6 days due to interpretational issues relating to pro-rata payment of duty under proviso 4 of Rule 9 of PMPM(CDCD) Rules, 2008. The said disputed amount of duty has been paid by them under protest on 10.01.2013 along with interest. As per the records, for the months of June 2012 to January 2013, the assessees had discharged their duty liability as detailed below. The number of machines declared in each of the following months and duty payable thereon was known to the Department and said duties also have been paid by the assessee without any delay.

Sl. No	Month	No of Machines	Amount of duty payable	Due date	Amount of Duty paid	Paid date
1	June, 2012	8	90304000	5.6.2012	90304000	4.6.2012
2	July, 2012	9	97304000	5.7.2012	97304000	5.7.2012
3	Aug, 2012	7	69536000	5.8.2012	69536000	4.8.2012
4	Sept, 2012	7	69536000	5.9.2012	69536000	4.9.2012
5	Oct, 2012	6	72804000	5.10.2012	72804000	5.10.2012
6	Nov, 2012	5	55536000	5.11.2012	55536000	4.11.2012
7	Dec, 2012	6	72804000	5.12.2012	72804000	5.12.2012
8	Jan, 2013	9	107572000	5.1.2013	107572000	5.1.2013

In the instant case, the month of 'April, 2012' cannot be considered as the month for which duty was last paid by the assessees, since the assessees have continued to declare the number of machines to be operative in each month thereafter and have paid the duties as per the said declarations during the subsequent period as detailed above. I find that, 7th proviso to Rule 9 of PMPM(CDCD) Rules, 2008 is applicable only in those cases, where duty is not paid. The wordings used in 7th proviso viz. "he shall be liable to pay the monthly duty based on the number of operating packing machines declared in the month for which duty was last paid by him" make this proviso applicable to the situations when the assessees default in payment of duty for a particular month and continue to operate the machines without payment of duty. The proviso stipulates that, under such circumstances, the assessees shall be liable to pay the monthly duty for the period for which duty was not paid based on the number of operating packing machines declared in the month for which duty was last paid by him. In the instant case no such continuous default is noticed during the period subsequent to May 2012 and from June 2012 to January 2013 the assessees have discharged their duty liability without any delay. Even for the month of May 2012, assessees have paid the duty on one machine @ Rs. 1,05,00,000 on 03.05.2012 before the due date. Hence I hold that, 7th proviso of Rule 9 is not applicable in the instant case.

19.3 It is also pertinent to note that, in this case there is no outright non- payment of assessed duties. The delay is on account of issues relating to interpretation of statute and consequent partial non-assessment and non- payment of duty for May, 2012. The assessed duties of excise for the month of May, 2012 where there was no confusion as to the duty liability have been paid by the assessees within the due date and the delay in payment of duty was in respect 6 Nos. of machines, due to interpretational issues relating to provisos under Rule 9. For the subsequent period covered in the show cause notice i.e. from June 2012 to

January 2013, the assessees have discharged their assessed duty liability without any delay. The above fact is also considered in holding that, the delay in payment of duty for May, 2012 is not covered under 7th proviso to Rule 9 of PMPM(CDCD) Rules, 2008. On the other hand I hold that, the delay in payment of duty for May, 2012 is covered under 2nd proviso to Rule 9 of the said Rules, which provides that "if the manufacturer fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with the interest at the rate specified by the Central Government vide notification under Section 11AA of the Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount". Accordingly, I hold that, re-determination of duty liability under proviso 7 to Rule 9 of PMPM(CDCD) Rules, 2008 and consequent demand of differential duty of Rs.53,08,60,001/- is not warranted in this case for the period from May, 2012 to January 2013."

11. We find that the issue against which the appellant has filed the Appeal No. E/20068/2014 is no more *res-integra*. The Tribunal in the case of **M/s Rajath Industries** (Supra), it was categorically held that:-

"9. The issue involved in this appeal is whether the revenue with the aid of Rule 9 of PMPM Rules, 2008 framed under Section 3A of the Central Excise Act, 1944 can levy and charge excise duty from the assessee for the period before the commencement of production in the unit?

10. In order to find answer to this question it would be useful to have a look on the relevant provisions of the Central Excise Act, relating to levy and collection of excise duty. Section 3 of the Excise Act is the main charging section which provides that there shall be levied and collected excise duty on excisable goods which are produced or manufactured in India. From this, it is evident that excise duty is an incidence of tax on production or manufacture of the goods. That being the case, it is difficult to *sustain the plea that the appellant assessee can be charged excise duty for the period during which his unit had not even commenced the production. The department is seeking to justify the impugned order under Rule 9 of PMPM Rules of 2008 framed under Section 3A of the Central Excise Act. Section 3A confers power on the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. The basic object of conferring such power on the Central Government is to prevent evasion of excise duty in respect of certain excisable goods with a view to safeguard the interest of revenue. This does not mean that Section 3A confer power on the Government to frame the rules to charge excise duty for the period prior to the commencement of production. Therefore, in our view the impugned order confirming demand for first three days of May 2009 when the production had not even commenced cannot be sustained. In our aforesaid view, we find strength from the judgment of Punjab & Haryana High Court in the matter of Godwin Steels (P) Ltd. wherein while dealing with the similar issue of compounded levy scheme in relation to steel manufacturing unit it was held thus :-*

> *3. After hearing the learned counsel for the parties, we are of the considered opinion that as the petitioner's factory started production with effect from 17-11-1997, therefore, it was wholly unjust for the department to recover the duty for the whole month of November, during which, its factory had not commenced production. When the factory of the petitioner was not in production, then obvious, it is not liable to pay the duty during the period of non-production.*

11. In view of the above discussion, we find it difficult to sustain the impugned order. Accordingly, the appeal is accepted and the impugned order confirming the demand is set aside."

12. In in view of the above discussion and since the ratio of the decision in **M/s Rajath Industries** (Supra) is squarely applicable to the facts of the present case, the impugned order confirming the

demand for 6(six) days (01.05.2012 to 06.05.2012), is not sustainable and liable to be set aside and is set aside. The penalty imposed under Rule 17 of PMPM (CDCD) Rules, 2008 is also set aside.

13. Accordingly, Appeal No. 20068 of 2014 is allowed with consequential relief, if any, in accordance with law.

14. As regards Appeal No. 20600 of 2014 filed by the Revenue against order of the Commissioner dropping the demand of differential duty of Rs. 53,08,60,201/- along with interest and penalty for the period from May 2012 to January 2013. We find that the provisions of the proviso 7 of Rule 9 of PMPM(CDCD), Rules, 2008 are not attracted and the Learned Commissioner has rightly dropped the demand and the other adjudication levies.

15. Accordingly, Appeal No. 20600 of 2014 filed by the Revenue is dismissed.

(Order pronounced in open court on 27.03.2025)

(P.A.Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

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