

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL

**REGIONAL BENCH-CHANDIGARH
COURT NO. III**

Excise Appeal No. 60404 of 2021

(Arising out of Order-in-Original No. 23/CE/COMMR/VMJ/RTK/21-22 dated 14.07.2021 passed by the Commissioner of CGST, Haryana.)

M/s Som Flavour Masala Pvt Limited

Appellant

Village- Nathpur,
Dist- Sonapat, Haryana

Vs.

C.G. & S.T-C.C.E. &S.T.-Rohtak

2nd Floor Pacific City Centre Mall
Near Jaat Bhawan, Delhi Road
Rohtak Haryana-124001

Respondent

WITH

Excise Appeal No. 60402 of 2021

(Arising out of Order-in-Original No. 23/CE/COMMR/VMJ/RTK/21-22 dated 14.07.2021 passed by the Commissioner of CGST, Haryana.)

M/s Ashok Mehta

Appellant

Som Flavour Masala Pvt Ltd.
Village- Nathpur,
Dist- Sonapat, Haryana

Vs.

C.G. & S.T-C.C.E. &S.T.-Rohtak

2nd Floor Pacific City Centre Mall
Near Jaat Bhawan, Delhi Road
Rohtak Haryana-124001

Respondent

AND

Excise Appeal No. 60403 of 2021

(Arising out of Order-in-Original No. 23/CE/COMMR/VMJ/RTK/21-22 dated 14.07.2021 passed by the Commissioner of CGST, Haryana.)

M/s Indra Dev

Appellant

Som Flavour Masala Pvt Ltd.
Village- Nathpur,
Dist- Sonapat, Haryana

Vs.

C.G. & S.T-C.C.E. &S.T.-Rohtak

2nd Floor Pacific City Centre Mall
Near Jaat Bhawan, Delhi Road
Rohtak Haryana-124001

Respondent**APPEARANCE:**

Ms. Seema Jain, Advocate for the Appellant
Mr. Rajiv Gupta & Ms. Swati Chopra & Mr. Munish Arya, Authorised
Representatives for the Respondent

CORAM:

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO. 60123-60125 / 2022

Date of Hearing: 07.07.2022

Date of Decision: 17.08.2022

AJAY SHARMA:

These appeals have been filed impugning the Order-in-Original No. 23/CE/COMMR/VMJ/RTK/21-22 dated 14.07.2021 passed by the Commissioner of CGST, Haryana by which the learned Commissioner confirmed the change of classification of the product as *zarda scented tobacco* and accordingly confirmed the demand of central excise duty alongwith interest and equal penalty and also imposed penalty of Rs. One crore on Shri Indra Dev Tripathi, Director and of Rs. Twenty five lakhs on Shri Ashok Nahata, Manager.

2. The issue involved in this appeal relates to classification of the goods as to whether that product is Chewing Tobacco classifiable under heading 24039910 as claimed by the Appellants

or its Jarda Scented Tobacco classifiable under heading 24039930 as claimed by the revenue?

3. The facts of the appeals in brief are as follows. The Appellant i.e. M/s. Som Flavour Malasa Pvt. Ltd. started manufacturing chewing tobacco (without lime tube) w.e.f. 23.7.2015 under various names and filed necessary declarations with the department i.e. Form-1 and continued to declare during the period August, 2015 to January, 2016. On perusal of the declarations filed in Form-I and Form-II in terms of Rule 6 of Chewing Tobacco & Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 as amended for the relevant period, it was observed that single track FFS pouch packing machine were to be installed/un-installed in the factory and were to be put into use for production/packing of the chewing tobacco without lime tubes in terms of Notification No.11/2010-CE(NT) dated 27.2.2010 as amended vide Notification No.04/2015-CE(NT) dated 1.3.2015. According to department, the appellants themselves declared that the maximum speed of all the pouch packing machines of chewing tobacco pouches are about 700 pouch per minute. In order to verify the correct classification of the product, a sample of *DB Royal Chewing Tobacco* was drawn from the factory premises of the Appellants under panchnama dated 24.7.2015 and the same was sent to Central Revenues Control Laboratory (CRCL), New Delhi for testing on 28.7.2015 specifically asking '*the party has classified the product as Chewing Tobacco. kindly confirm the correct classification of the product*' and Sh. P.K. Agarwal, Chemical Examiner Gr.-II, CRCL vide test report dated

26.8.2015 informed that *"the sample is in the form of brown cut pieces of vegetable matter (bits of leaves) with pleasant odour. It is mainly composed of tobacco and flavorant. Moisture content = 25.95% (Twenty five point nine five). It does not contain added lime"*. No classification was provided. The department vide letter dated 30.9.2015 again requested the CRCL to confirm the specific and correct classification of the samples submitted and the Chemical Examiner Gr.-II, CRCL vide communication dated 7.10.2015 opined that *'the sample analyzed under reference has the characteristics of Zarda Scented Tobacco. Accordingly the classification may be decided at your end.'* As per records the aforesaid test report was supplied to the Appellants on 1.12.2015 and thereafter the department recorded the statements of Mr. Ashok Nahata, Manager and Mr. Indra Dev Tripathi, Director of the Appellants.

4. The Department again visited the appellants' premises on 30.10.2015 and drew sample of product and sent the same for testing at CRCL again asking that *'the party has classified the product as Chewing Tobacco. kindly confirm the correct classification of the product'*. The Chemical Examiner Gr.-II, CRCL reported that *'The sample is in the form of brown coloured cut pieces of vegetable matter (bits of leaves) with pleasant smell. It is composed of tobacco, added lime with flavorant. Moisture Content (as such) = 29.4% by Wt. (Twenty nine decimal four) and Ash Content (on dry basis)= 19.2% by Wt. (Nineteen decimal two). It is the formulation of 'Chewing Tobacco'.* So this report was in favour of the appellants.

5. Thereafter again the department visited the premises of the appellants on 3.12.2015 and drew 12 samples of the product and forwarded the same to CRCL for testing with the specific query that *'Party has classified their product as Chewing Tobacco (without lime tube) under CETH No. 24039910. Kindly confirm whether the party has correctly classified their product or the product is appropriately classified under CETSH 24039930 (Jarda Scented Tobacco).'* Ms.Purnima Mishra, Chemical Examiner Gr.-II, CRCL vide her 12 different test reports all dated 14.12.2015 opined that the *'sample has the characteristics of Jarda Scented Tobacco'*. One thing was common in the all the 12 reports that the report only mentioned about the *'content of calcium'* which varied between *0.18% to 0.21%* in all the test report. Content of *'slacked lime'* was not detected in any of the samples as per the test reports.

6. On the basis of the earlier test report of the samples drawn on 24.7.2015, the department issued two capacity determination orders both dated 4.12.2015, one for the months of July-September, 2015 and another from October-December, 2015. Since both the capacity determination orders were based on the test report dated 26.8.2015 of CRCL (*of sample taken on 24.7.2015*) the appellants after getting the test report on 1.12.2015 requested for re-testing of the aforesaid samples vide letter dated 11.12.2015. Although the samples were sent for re-testing to CRCL by the department but without waiting for the re-testing report show cause notice dated 1.7.2016 was issued to the appellants as to why –

- (i) Central Excise duty amounting to Rs.17,9972,033/- (Rupees seventeen crores, ninety nine lacs, seventy two thousand and thirty three only) should not be determined, demanded and recovered from them under the provisions of Section 11A of the Central Excise Act, 1944 read with Rules, 7,8,9 and 19 of Chewing Tobacco and un-manufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010.
- (ii) Central Excise Duty amounting to Rs.17,99,72,033/- deposited by the party under protest should not be appropriated against the duty proposed to be demanded above.
- (iii) Interest at an appropriate rate under Section 11AA of the Central Excise Act, 1944 should not be charged from them on the proposed demand of duty mentioned at (i) above.
- (iv) Interest amounting to Rs.41,43,757/- deposited by the party under protest should not be appropriated against the interest on the proposed demand of duty mentioned at (i) above.
- (v) Penalty under Section 11 AC of Central Excise Act, 1944 and Rule 25 of Central Excise Rules, 2002 read with Rule 18 of the Chewing Tobacco and un-manufactured Tobacco Packing machines (Capacity Determination and Collection of Duty) Rules, 2010 should not be imposed upon the party for contravention of Rules 6,7,8 and 9 of the Chewing Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 as amended.

7. The appellants filed interim reply to the show cause notice and requested for re-testing of the samples but they were directed to file final reply. Thereafter without supplying the re-testing report, the Adjudicating authority passed the Order-in-Original dated 28.1.2021 confirming the demand of central excise duty alongwith interest and penalty on M/s. Som Flavour Masala Pvt. Ltd. and also imposed penalty of Rs.1 crore on Shri Indra Dev Tripathi, Director and of Rs. 25 lakhs on Shri Ashok Nahata, Manager. The said Adjudication order was challenged by the appellants before the Hon'ble High Court of Punjab & Haryana at

Chandigarh being CWP No. 8034 of 2021 (O&M) and the Hon'ble High Court vide order dated 8.4.2021 disposed of the petition, set aside the order dated 28.1.2021 of the Adjudicating Authority and directed the department to transmit copy of the re-testing report to the appellants and thereafter to decide the matter afresh in accordance with law.

8. Somewhere in the month of April, 2021 re-test report issued by Jt. Director, CRCL was supplied to the appellants whereas the same was forwarded to the department much earlier vide communication dated 9.12.2016. The said re-test report dated 9.12.2016 reads as under:-

"REPORT: The sample is in the form of brownish, dried cut pieces of leaves having characteristic pleasant odour in unit packing. It is composed of Cut bits of tobacco leaves and flavourant. It does not contain added lime. It is a preparation containing Chewing Tobacco. It is other than Jarda Scented Tobacco."(emphasis supplied)

After getting the re-test report, the appellants filed their final reply on 7.7.2020 to the show cause notice. After supply of copy of re-testing report, the adjudicating authority vide impugned Order-in-Original dated 14.7.2021 once again confirmed the demand of Central Excise duty alongwith interest and equal penalty on M/s. Som Flavour Masala Pvt. Ltd. and also imposed penalty of Rs.1 crore on Shri Indra Dev Tripathi, Director and of Rs. 25 lakhs on Shri Ashok Nahata, Manager.

9. Aggrieved the appellants filed instant Appeals. Learned counsel for the appellants state that there is no statutory definition of 'zarda' or 'chewing tobacco' in the Central Excise Tariff whereas Indian Standard "Glossary of Terms for Tobacco and Tobacco

Products" (2nd and 3rd Revision) issued by Bureau of Indian Standard ("BIS") defines tobacco products therefore recourse has to be taken to the definition as provided by BIS. She submits that Moisture and Nicotine are the relevant factors which distinguished *zarda* and *chewing tobacco* and that these are the two determining factors as per BIS to decide whether the product is *zarda* or *chewing tobacco*. According to learned counsel test result of all samples stated that the sample has *pleasant odour, flavourant* and it did not mention about present of *any scent* in it therefore it cannot be termed as *zarda scented tobacco*. She also questioned the authority of the Chemical Examiner, Gr.-II of CRCL to give opinion about classification whereas she supported the opinion given by the Joint Director, CRCL in re-testing of sample which categorically states that *the sample is of chewing tobacco, other than zarda scented tobacco*. She further submits that the opinion of Jt. Director, CRCL is final and binding unless set aside in Appeal by the Director, CRCL. She submits that the show cause notice dated 1.7.2016 has been issued solely on the basis of the opinion of the Chemical Examiner, CRCL and that the learned Commissioner by recording the finding in the impugned order that he is not relying upon the opinion of the Chemical Examiner, has gone beyond the show cause notice. It has also been submitted on behalf of the appellants that the product in issue is known as chewing tobacco in Trade Parlance and that it is settled legal position that in the absence of statutory definition, goods have to be taxed as they are known in common parlance as they have been sold as *chewing tobacco* to the consumers. Burden of proof is on

the department to prove that the items in issue are taxable as *zarda scented tobacco* and that mere assertion by the department is not sufficient. According to learned counsel there was no mis-declaration or suppression of facts and therefore the adjudicating authority erred in imposing penalty on the appellants. Per contra learned Authorised Representatives appearing on behalf of Revenue supported the findings recorded in the impugned order and prayed for dismissal of appeals filed by the appellants. According to learned Authorised Representative it is wrong to imply that the opinion of Chemical Examiner in the test reports of samples is based on the presence/absence of lime as both the chemical examiners have stated in their respective cross-examination that the test for lime is conducted as a routine manner for such commodity. He further submits that *chewing tobacco* is a broader term used which includes various forms of tobacco namely, surti, zarda, quiwam, dokta and sukla and that depending upon the contents in the tobacco, the product would be classified. Learned Authorised representative further submits that the appellants are comparing two alien things and that nicotine percentage was not there in any of the test reports. According to learned Authorised Representative in the decisions relied upon by the appellants it has been observed that zarda in common parlance is nothing but tobacco flakes without any other ingredient. It has also been submitted that zarda without scent would come out of the purview of 24039930, similarly chewing tobacco with scent would also come out of the ambit of 24039910 and would fall under 24039930 and the test report duly mentioned that the sample has *pleasant odour*

which confirm to the facts divulged by Director, Manager/ Production Supervisor of the appellants that *compound (scent)* is added to their product. According to revenue even BIS has given different characteristics for zarda (flake type chewing tobacco) and its central excise classification under different categories would depend upon whether it is scented/perfumed or not. Learned authorised representative denied that the department is bound by the opinion of Jt. Director, CRCL that the sample is of *chewing tobacco*. On the argument about common parlance test, learned authorised representative submits that since the test reports confirmed use of perfumery, details of raw materials used by the appellants, process of manufacture and statement of their key persons are sufficient to infer that the product in dispute is *zarda scented tobacco* therefore there is no need to resort to common parlance test and if the appellants are selling it as chewing tobacco or using the packing material mentioning it as chewing tobacco, it does not change the classification.

10. We have heard learned counsel for the appellants and learned Authorised Representatives for the Revenue and perused the case records including the case laws and the written submissions submitted by the respective sides. *Chewing Tobacco* and *Jarda scented tobacco* are classified under separate sub-headings of Chapter 24 of the Central Excise Tariff as they are different goods/products. But neither the said chapter 24 nor the notifications issued under Section 3A of the Central Excise Act define these two products, therefore we have to look into "Glossary of Terms for Tobacco and Tobacco Products" (2nd and 3rd Revision)

issued by Bureau of Indian Standard ("*BIS*") which defines tobacco products and recourse has to be taken to the definition as provided by BIS. Indian standard of BIS prescribe testing of four parameters for chewing tobacco and jarda scented tobacco viz. Moisture, Nicotine, Total ash and Acid Insoluble ash. These are the relevant and determining factors which distinguished *zarda* and *chewing tobacco* and decide whether the product is *zarda* or *chewing tobacco*. In order to appreciate it we are reproducing hereunder in tabular form the contents of moisture etc. as provided by BIS and the contents found in the product in issue as per the test/re-test reports of CRCL:-

Contents as prescribed by BIS

S.No.	Criteria	Minced Type Chewing Tobacco	Flake Type Chewing Tobacco (Zarda)
1.	Moisture content by mass Max	27	15
2.	Nicotine (on dry basis) percent by mass, Max	8	4
3.	Total Ash (on dry basis) percent by mass, Max	25	28
4.	Acid Insoluble ash (on dry basis), percent by mass	5	4

The summary of the test reports of samples taken on 24.7.2015 and 2.12.2015 issued by CRCL are as under:-

1.	Date of sample drawn & its description	Test report of sample drawn on 24.7.2015 of DB Royal Chewing tobacco	Test report of 12 samples drawn on 2.12.2015 of all brands of chewing tobacco and loose samples
2.	Physical Characteristics	Brown cut piece of vegetable matter (bits of leaves) with pleasant odour.	Yellowish brown coloured cut piece of leaves having pleasant odour
3.	Main Composition	Tobacco and Flavourant	Processed tobacco leaves with flavouring agent.
4.	Moisture content	25.95%	-
5.	Content of	-	0.18 to 0.21%

	calcium		
6.	Lime	Does not contain added lime	Does not contained slaked lime
7.	Chemical Examiner's opinion	It is formulation of/chara-cterstic of Jarda Scented Tobacco	It is formation of/char-actic of Jarda Scented Tobacco
8.	Report issued by	Mr.P.K. Agarwal, Chemical Examiner Gr.-II, CRCL	Dr. Purnima Mishra, Chemical Examiner Gr.-II, CRCL

Summary of report of re-test by Jt. Director, CRCL on the samples taken on 24.7.2015, which was issued after the issuance of SCN dt. 1.7.2016 is as under:-

1.	Details	Re-test report dt. 9.12.2016 of sample drawn on 24.7.2015 of DB Royal Chewing tobacco	Analytical Report dt. 30.1.2017 of re-test
2.	Physical Characteristics	Brownish, dried cut pieces of leaves having characteristic odour..	Brown coloured cut pieces of vegetable matter having pleasant odour
3.	Main Composition	Cut bits of tobacco leaves and flavourant	-
4.	Lime	Does not contain added lime.	Test for lime negative
5.	PH (5% aqueous extract of sample)	-	6.0
			Free from Silver Foil
6.	Moisture content at 105 degree centigrade		19.9%
7.	Ash content (on dry basis)		10.4%
8.	Opinion	It is a preparation of chewing tobacco. It is other than Jarda Scented Tobacco.	
9.	Report issued by	Dr.T.A. Sreenivasa Rao, Jt. Director, CRCL	Dr.T.A. Sreenivasa Rao, Jt. Director, CRCL

11. Although lime is not an essential ingredient of chewing tobacco but still the samples in issue have been tested for it. As per BIS, chewing tobacco is a broad term which includes preparations of tobacco chewed as such and also the tobacco preparations taken with betel leaf (paan). *Surti* and *Zarda* are preparations of tobacco taken with betel leaf whereas other

preparations of chewing tobacco are for chewing directly as such by putting the chewing tobacco in the mouth and to chew it in order to get its juices. Preparations of chewing tobacco may contain various ingredients like spices, quiwam, flavourants, lime glycerine and other substances which impart the specific taste and flavour to the chewing tobacco. Khaini is the only preparation made from chewing tobacco which contains lime. Learned Commissioner agreed that lime is not the deciding component which distinguishes *chewing tobacco* from *zarda scented tobacco*. According to him, it is the *scent or perfume* which makes the distinction. But we are afraid that the aforesaid finding/opinion of the learned Commissioner is misplaced and is not as per the BIS standard. Jarda is unmanufactured tobacco which is in the form of flakes and is obtained by crushing or beating dry tobacco leaves. The Indian Standard issued by BIS describe Flake Type Chewing Tobacco (Zarda) and Minced Type Chewing Tobacco is as under:-

“FLAKE TYPE CHEWING TOBACCO (ZARDA)

3. Requirement

3.1 Description

Flake type chewing tobacco (ZARDA) shall be prepared from mould free tobacco lamina in the form of dry flake. It may be coloured and perfumed.

MINCED TYPE CHEWING TOBACCO

3. Requirement

3.1 Description

The minced type chewing tobacco (in the form of shreds) shall be prepared from mould free tobacco leaves. It may be coloured and perfumed.”

In view of the above description as per the Indian Standard issued by BIS '*perfume*' is not the deciding factor for deciding whether the product is *chewing tobacco* or *zarda scented tobacco* as both can have perfume. One thing is clear from the above that *chewing*

tobacco could be with or without perfume and therefore the learned Commissioner's finding that since the product is perfumed/scented, it can only be classified as *zarda scented tobacco*, is completely incorrect.

12. The statements of Director, Manager and Production supervisor of the Appellant, which have been relied upon by the learned Commissioner in changing the classification, stated they used compound/perfumery compound and the test results of CRCL which have been relied upon by the learned commissioner also stated that the sample had flavourant/pleasant odour. As per learned counsel, in the statements relied upon by the department the word '*compound*' has been mentioned but the word *scent* has been added by the department in the bracket. According to us there is a difference between scent and pleasant odour/flavourant. The Indian Standard Glossary of Terms for Tobacco and Tobacco Products (3rd Revision) defines '*flavourant*' as:-

"2.56 *Flavourants* – The odoriferous substances that are added to tobacco products."

In our opinion if any odoriferous substance is added to chewing tobacco it cannot change the classification from *chewing tobacco* to *zarda scented tobacco*.

13. Now we are examining the test reports in the light of BIS standards. As per the table of 'Contents as prescribed by BIS' (supra) 'Moisture content' and 'Nicotine Content' are the two factors out of four, which are widely different in *Chewing Tobacco* and in *Zarda* and Total ash and Acid Insoluble ash are more or less same in both. The maximum moisture content in *zarda* is 15%

whereas the maximum Nicotin is 4% in zarda. In *Chewing Tobacco* it is 27% and 8% respectively. Because flake type chewing tobacco (*zarda*) is made from tobacco flakes, it has lesser moisture whereas minced type *chewing tobacco* is made from various methods in which other substances like water, glycerine, quiwam, lime can be added which convert it into a higher moisture content. It means that if the moisture content in any product is more than 15% but less than 27% then as per BIS standard it will be *Chewing tobacco* and similarly if the Nicotine in any product is more than 4% less than 8% then also it will be termed as *chewing tobacco*. In the samples drawn on 24.7.2015 as well as on 30.10.2015 the moisture content as per the report of CRCL was 25.95% and 25.4% respectively which is much more than 15% which is the maximum moisture content as per BIS, therefore the sample can safely be termed as *chewing tobacco*. The sample of 24.7.2015 when re-tested in December, 2016 i.e. after 16 months, had the moisture content of 19.9% on account of moisture loss during those 16 months but still it was more than the maximum moisture content prescribed for zarda. In the samples drawn on 2.12.2015, moisture content was not tested and only calcium content was examined which was varied between 0.18% to 0.21% in all the 12 samples. Although as per BIS specifications the tests for Moisture content, Nicotine, Total Ash and Acid Insoluble Ash are mandatory but the test reports issued by the Dr. (Ms.) Purnima Mishra, Chemical Examiner, CRCL nowhere refer to those four characteristics. As we discussed earlier, the test for *moisture content percentage and Nicotin percentage* are very essential to

arrive at the conclusion whether the sample is of *chewing tobacco* or of *zarda*, but none of these characteristics have been referred to or dealt with by the Chemical Examiner, CRCL in her report although she had referred to the characteristics given in the Table given in BIS specification in her statement. The only content dealt with in the report is '*calcium*' which is of no relevance as per BIS specification in order to determine whether a product is Chewing tobacco or not. Therefore in our view the conclusion arrived at by the Chemical Examiner, CRCL that '*sample has the characteristics of Jarda Scented Tobacco*' in the twelve reports of the 12 samples drawn on 3.12.2015 which have also been relied upon by the department while demanding higher rate of duty from the appellant, is without any basis. There is also no indication in the test report as to what is the definition of *jarda scented tobacco* and *chewing tobacco* and under which parameter test of sample conducted. The BIS specifications for chewing tobacco and zarda scented tobacco have also been taken note by the Tribunal in the matter of *Kaipan Pan Masala Pvt. Ltd. vs. CCE, Bhopal; 2020 (372) ELT 145 (T)*. In our considered view since the CRCL report dated 14.12.2015 for the 12 samples which has also been relied upon by the revenue for changing the classification is not as per the BIS specification and therefore the reliance placed on it by revenue as well as by the adjudicating authority for changing the classification is totally misplaced.

14. The learned Commissioner in the impugned order has denied that the show cause notice was issued only on the basis of CRCL report and recorded a finding that it is based upon investigations of

the department including statements of the persons associated with the appellants, CRCL reports etc. Whereas the show cause notice states otherwise and relevant extract of para of the show cause notice is reproduced hereunder for better understanding:-

*"7.2 The test report of the samples of the products drawn from the factory premises of the party under panchnama dated 24.7.2015 (RUD-supra) and Panchnama dated 03.12.2015 (RUD supra) being declared by the party as chewing tobacco without lime tube were reported by the Chemical Examiner, CRCL, New Delhi as being **Jarda Scented Tobacco**. Therefore, in view of the above, it appears that the party had deliberately and fraudulently mis-declared the products being manufactured and packed by them as chewing tobacco without lime tube instead of Jarda Scented Tobacco so as to avoid the incidence of payment of higher Central Excise Duty on Jarda Scented Tobacco....."*

A bare perusal of the show cause notice and in particular the aforesaid paragraph would make it clear that the show cause notice is mainly based upon the test reports, opinion of Chemical Examiners, CRCL and also of the statements which uses the words '*compound*'. Whereas the learned commissioner while changing the classification substantially relied upon the statements of Director/Production Manager/Manager and came to the conclusion that since the appellants uses scent in their product therefore it can only be classified as *zarda scented tobacco*, which in our view is totally contrary to the description by Indian Standard issued by BIS. Otherwise also the word '*scent*' has not been used by the appellants and secondly even if they uses this words, then if the classification has to be based only on the basis of statements then there is no need of any testing laboratories. Perfumery compound is not '*scent*' and the same has been held as chewing tobacco or preparation for

chewing tobacco by the Hon'ble Supreme Court in the matter of *Gopal Zarda Udyog vs. CCE, New Delhi; 2005(188) ELT 251 (SC)* and also in the matter of *Dharam Pal Satyapal vs. CCE, New Delhi; 2005(183) ELT 241 (SC)*. From the facts and records of the case we are of the view that the department has failed to discharge its burden of proof and mere presence of scent or pleasant odour in the product without any other supporting evidence that 'jarda scent' has been used in the product as an ingredient, cannot be said to be sufficient for classifying the product as 'jarda scented tobacco'. The learned commissioner has erred in holding that 'scent' is the only ingredient which differentiates chewing tobacco from jarda scented tobacco in addition to fitness of the tobacco leaves as scent is not used in chewing tobacco. The learned commissioner failed to appreciate that 'scent' is different from 'jarda scent'. 'Jarda scent' is available in market which establishes that 'jarda scent' is used for manufacturing the jarda scented tobacco and the same has been held by the Tribunal in the matter of *Urmin Products vs. CCE; 2010 (26) ELT 597(T)*. The relevant paragraph of the same is reproduced as under:-

"16.....The appellant never used the Zarda Scent. He drew our attention to the price list of M/s. Gupta & Co. (P) Ltd. submitted by them in their appeal paper book from where it can be seen that zarda scent as such is available in the market and therefore the product zarda scented tobacco would mean that the zarda scent has been used in the manufacture of the same. Since the appellants have never used the zarda scent, the product cannot be classified as zarda scented tobacco."

15. In the instant matter neither in the show cause notice nor before the adjudicating authority or before us it is the case that the appellant have used 'jarda scent' in their product. Even the statements relied upon by the department nowhere mention that 'jarda scent' has been used by the appellant in their product. The learned commissioner mistook the *pleasant odour* as mentioned in CRCL test report as scent which is totally different from '*jarda scent*', an essential ingredient for manufacturing *jarda scented tobacco*.

16. For the purpose of Central Excise Tariff, jarda scented tobacco and chewing tobacco are different products as they have been specifically covered under two separate sub-headings viz. 24039910 (chewing tobacco) and 24039930 (jarda scented tobacco). Further, the glossary of the terms for tobacco and tobacco products (Third revision of IS 10335) ICS 65.160 for BIS use in para 2.185 defines the term 'Zarda' as a "chewing tobacco product made of highly scented and flavours tobacco flakes, chewing along with betel nuts & pan (betel leaf)". Thus, the BIS defines zarda as a chewing tobacco product which would only mean '*a product containing chewing tobacco*' and not chewing tobacco per se. If both the products are treated as *jarda scented tobacco* then the same would make the heading 24039910 as redundant.

17. We are also of the view that the learned commissioner has grossly erred in completely ignoring the opinion of Jt. Director, CRCL in re-test of the same samples whose earlier test reports were relied upon by the revenue in changing the classification. The

appellants objected to the authority of the Chemical Examiner Gr.-II to give opinion, since as per powers and duties of officers and employees posted at CRCL, as prescribed, Chemical Examiner can only issue test reports, they cannot give any opinion. Whereas the Jt. Director, CRCL is the head of the laboratories and supervises the overall functioning of Laboratory and offers technical opinion. We also do not find the conduct of the department proper. As per the request of the appellant, re-testing was got done by the department of the samples taken on 24.7.2015 but its report was not made available to the appellants nor the department waited for the re-test report/opinion of Jt. Director, CRCL while issuing the show cause notice and the adjudicating authority confirmed the demand despite making specific plea by the appellants about the non-supply of re-test report. When the appellants approached the Hon'ble High Court challenging the earlier adjudication order, the Hon'ble High Court set aside the said order and directed the department to supply copy of re-test report to the appellants and to adjudicate the matter thereafter. In the said re-test report the Jt. Director, CRCL gave his opinion that *the sample is of chewing tobacco*. Even when a clarification was sought by the department from the Jt. Director he stated that the *sample is preparation containing chewing tobacco other than Jarda Scented Tobacco*. The Director, CRCL is the only appellate authority in respect of re-test of samples and as per records no appeal has been made to the Director, CRCL against the opinion given by the Jt. Director, CRCL and therefore the opinion of Jt. Director, CRCL is final and it cannot be brushed aside just because it is not in favour of the department.

In our view, the opinion of Jt. Director, CRCL is in line with Indian Standard prescribed by BIS. He did not classify the goods but gave his technical opinion that the sample is of *chewing tobacco*.

18. The learned Commissioner has also erred in not resorting to common parlance test. In the facts of these appeals, since the Chemical Examiner Gr. II, CRCL although not empowered, but still gave their opinion against the classification adopted by the Appellants whereas the Jt. Commissioner, CRCL in the re-test of the same sample gave his opinion in favour of the Appellants, therefore the common parlance test would have been adopted. Hon'ble Supreme Court in catena of decisions has laid down that classification of commodity cannot be made on its scientific and technical meaning and it is only the *common parlance* meaning of the term which should be taken into consideration for the purpose of determining the tax liability. In the absence of statutory definition in precise terms, entries and items in taxing statutes must be construed in terms of their commercial or trade understanding or according to their popular meaning. It is the specific case of the appellants that they are packing and selling the product in issue as *chewing tobacco* and so has been stated by the Director, Manager/Production Supervisor of the appellants.

19. Recently on somewhat similar facts the issue about not applying the *common parlance test* came up for consideration before this Tribunal in the matter of *Excise Appeal No. 60336 of 2021 titled as M/s. Tej Ram Dharam Paul vs. Commr. CGST, Rohtak* and this Tribunal vide its order dated 8.8.2022 while allowing the appeal filed by the appellant therein held as under:-

"14. Neither *jarda scented tobacco* nor chewing tobacco have been defined in the Central Excise Act and therefore in order to find out whether the product of the appellant is *jarda scented tobacco* or chewing tobacco, the department ought to have conducted market enquiries with the persons in this trade in order to find out how this product is treated in the market or we can say *Trade Parlance test*. The Hon'ble Supreme Court also in the matter of *Indian Aluminium Cables Ltd. vs. UOI & Ors.*; (1985) 3 SCC 284 has laid down that in determining the meaning or connotation of words and expressions describing an article in a tariff schedule, one principle which is fairly well settled is that those words and expression should be construed in the sense in which they are understood in the trade, by the dealer and the consumer. The reason is that it is they who are concerned with it and it is the sense in which they understand it which constitutes the definitive index of the legislative intention. Similarly in the matter of *Reliance Cellulose Products Ltd. vs. CCE, Hyderabad*; (1997) 6 SCC 464 the Hon'ble Supreme Court has laid down that if word used in a fiscal statute is understood in common parlance or in the commercial word in a particular sense, it must be taken that the Excise Act has used the word in the commonly understood sense. The sense cannot be taken away by attributing a technical meaning to the word. But if the legislature itself has adopted a technical term, then that technical term has to be understood in the technical sense. In other words, if in the fiscal statute, the article in question falls within the ambit of a technical term used under a particular entry, then that article cannot be taken away from that entry and placed under the residuary entry on the pretext that the article, even though it comes within the ambit of the technical term used in a particular entry, has acquired some other meaning in market parlance. However, in the present case, revenue has not brought on record any evidence in the form of market enquiries to support its case for classification under *jarda scented tobacco*...."

Since there are conflicting opinions given by CRCL regarding the same sample, therefore we are of the considered view that the learned Commissioner ought to have asked for the *Trade Parlance Test*. In Trade parlance i.e. from packaging and presentation, sales and distribution and till its consumption by the ultimate consumer the product in issue is known as chewing tobacco only. Admittedly the pouches of the products including presentation, sales,

distribution and usage issue described the product as '*chewing tobacco*' and in Trade Parlance it is known as 'Chewing Tobacco' only. The manufacturer, distributor and the consumer, everyone understands and consume the product as chewing tobacco only. The Tribunal in the matter of *Flakes-N-Flavours vs. CCE; 2015 (327) ELT 435(Tri.-Del)* has held that in the absence of anything to the contrary, the product in question has to be treated as per the description given by the manufacturer on outer cover of pouch, common parlance and established practice as the *chewing tobacco* or *zarda scented tobacco* have not been defined in the tariff. The relevant para of the said decision is reproduced as under:

"48. In the Tariff the expression chewing tobacco and zarda scented tobacco are not defined as the product has to be classified based upon the description of the product given by the manufacturer on the pouch as well as on the basis of common parlance and established practice. In the present case, as the product in question as per the description of the product is flavor chewing tobacco and it is bought and sold in the market as chewing tobacco. Further the appellant from the beginning classifying the same as chewing tobacco and after the period in dispute also classified the same as chewing tobacco. Hence, I find merit in the contention of the appellant that the product in question is chewing tobacco and classifiable under heading 24039910 of the Tariff."

A similar view has been by the Tribunal in the matter of *Kaipan Pan Masala Pvt. Ltd. vs. CCE, Bhopal; 2020 (372) ELT 145 (T)*.

20. The finding by the learned commissioner is totally misplaced that this Tribunal in the matter of *Flakes-N-Flavour (supra)* has

observed that jarda scented tobacco was different from chewing tobacco on the ground that it contains 'scent' which is not there in chewing tobacco and that since the assessee therein was not using perfume/scent during manufacturing therefore it was held to be chewing tobacco. In that matter the issue whether Zarda can be classified as Jarda scented tobacco has been considered by the Tribunal. There was originally a difference of opinion between the Members of the Division Bench which was resolved by the Third Member. As per the majority decision in that matter Zarda was held to be a preparation of chewing tobacco distinct and different from Jarda scented tobacco. It was observed that there was admittedly a difference between flavour and scent and it has been held therein that assessee's product remains a chewing tobacco even after addition of flavouring substance. As the appellant in that case was marketing their product as "Flavoured Chewing Tobacco", the Tribunal agreed with the assessee that the same cannot be held to be a scented product. It has been further observed therein that the expression "Chewing Tobacco" or "Jarda Scented Tobacco" are not defined anywhere in the taxing statute and as such, in the absence of same, the product has to be classified based upon the description of the product given by the manufacturer on the outer cover of the pouch as also on the basis of common parlance and established practice. As such by taking into account the decisions in the matter of *Prabhat Zarda Factory v. Commissioner* [2004 (163) E.L.T. 485 (Tribunal)] as also the decisions of Hon'ble Supreme Court decision in the matters of *Gopal Zarda Udyog v. Commissioner*; 2005 (188) E.L.T.251(S.C.) and *Dharampal*

Satyapal v. Commissioner; 2005(183) E.L.T. 241 (S.C.) even the intermediate products like admixture of Kiman, Paraphion, Menthol were held to be 'chewing tobacco'. Further the Tribunal in the said case also referred to the decision of the Hon'ble Supreme Court in the matter of *CCE, Nagpur v. Shree Baidyanath Ayurved Bhawan Ltd.*; 2009 (237) E.L.T. 225 (S.C.) laying down that resort should be had to popular meaning and understanding attached to such product by those people using the product and not to scientific and technical meaning and expressions.

21. We have also find that in this case the department has failed to discharge its burden for changing the classification by adducing/ producing some material evidence. The Hon'ble Supreme Court in the matter of *HPL Chemicals Ltd. vs. CCE, Chandigarh*; 2006(197) *ELT 324(SC)* has laid down that classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the revenue. If the department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assessee, the department has to adduce proper evidence and discharge the burden of proof. In the matter of *UOI & Ors. vs. Garware Nylons Ltd. & Anr.*; (1996)10 *SCC 413* it has been laid down by the Hon'ble Supreme Court that mere assertion in that regard is of no avail. There should be material to enter appropriate findings in that regard and the material may be either oral or documentary. In the matter of *Hindustan Ferodo Ltd. vs. Collector*; (1997)2 *SCC 677* the Hon'ble Supreme Court has gone to the extent of laying down that in a case where the department has not discharged its burden for justifying classification under the heading

different from the heading claimed by the assessee, even though the assessee failed to prove its case by cogent evidence justifying its stand on classification, still the case of department should failed for want of discharging the onus which is exclusively on the department.

22. In view of the discussions made in the preceding paragraphs we are of the opinion that the Revenue has not produced any material evidence on record to support the change of classification by them from '*Chewing Tobacco*' under heading 24039910 to '*Jarda Scented Tobacco*' under heading 24039930. The learned Commissioner has also not applied his independent mind in confirming the change in the classification and rather ignored the re-test report of the Jt. Director, CRCL which is in line with the parameters prescribed by BIS and accordingly the impugned order is set aside and the three appeals filed by the appellants herein deserve to be allowed with consequential relief, if any as per law.

(Order pronounced in the open court on 17.08.2022)

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

(AJAY SHARMA)
MEMBER (JUDICIAL)