

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. II**

Excise Appeal No.53603 of 2018 (SM)

[Arising out of Order-in-Appeal No.863(CRM)CE/JDR/2018 dated 6.8.2018 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jodhpur (Raj.)]

M/s. Vishnu Fragrance Pvt.Ltd.

G-55-56, RIICO Industrial Area, Gopal Nagar,
Semalpur, Chittorgarh.

Appellant

VERSUS

**Commissioner of Central Goods & Service Tax,
Central Excise and Customs,**

142-B, Sector-11, Hiran Magri,
Near Shahi Bagh,
Udaipur-313 002.

Respondent

APPEARANCE:

Shri N.K. Tiwari, Advocate for the appellant.

Shri Pradeep Gupta, Authorised Representative for the respondent.

CORAM: HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.51175/2021

DATE OF HEARING/DECISION:22.03.2021

ANIL CHOUDHARY:

The appellant is engaged in the manufacture of chewing tobacco and is registered with the Department. The appellant admittedly falls under the Compounded Levy Scheme vide notification no.11/2010-CE (NT) dated 27.02.2010 read with Section 3 A of the Central Excise Act.

2. The issue in this appeal is whether penalty of Rs.3,89,660/- has been rightly imposed under Rule 18 read with Rule 16 of Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) (hereinafter called as '2010 Rules') read with Section 11 AC of Central Excise Act, for alleged contravention of Rule 10.

3. The brief facts are that the Compounded Levy Scheme was implemented w.e.f. 1.4.2010. For the period December, 2010, the appellant

deposited the duty on 5th December and for Jan. 2011 deposited the duty on 5th Jan. Thereafter the appellant by letter dated 27.01.2011 requested the Department that they want to suspend the production and all the pouch packing machines may be sealed on 31.01.2011. The packing machines were accordingly sealed by the jurisdictional Superintendent on 31.01.2011. By letter dated 13.04.2011, the appellant requested that they want to start the manufacture of their product having brand name of VIMAL APNA", manually, instead of automatic machine. Therefore, the factory be de-sealed but without de-sealing of the automatic machines. The appellant informed the Department vide letter dated 6.5.2011 that they have started the production manually w.e.f. 6.5.2011. Thereafter, again by letter dated 8.5.2011, they informed the Department that they have suspended the production due to restrictions imposed by the Hon'ble Supreme Court for use of plastic packaging for tobacco products. The appellant again requested the Department by letter dated 7.6.2011 to de-seal the machines on 10.06.2011 (midnight). Further, as prayed by the appellants, machines were finally de-sealed on 18.6.2011 at 00.05 hrs. As such, the said pouch packing machines remained sealed w.e.f. 31.01.2011 to 17.06.2011.

4. It was observed by the Department that the appellant have cleared their final products during the month of May, 2011 (total quantity - 14325 packets containing 429750 pouches having MRP Rs.2/- per pouch, valued at Rs.4,97,776/-, (which was manufactured during the month of December, 2010 and January, 2011). It appeared to Revenue that the appellant have violated the provisions of Rule 10 of the 2010 Rules by clearing the stock of finished goods relating to December, 2010 and January, 2011, admittedly, cleared during May, 2011. As the proviso to the Rule 10 (Abatement) of the said Rules, provides that –

"During such period, no manufacturing activity, whatsoever, in respect of notified goods shall be undertaken and no removal of notified goods shall be effected by the manufacturer except that notified goods already produced before the commencement of said period may be removed within first two days of the said period."

5. It was further proposed to impose penalty under Rule 18 read with Rule 16 of 2010 Rules read with Section 11 AC of the Act. Accordingly, the duty was calculated at the tariff rate along with cess, under the admitted fact that the appellant has already discharged duty for the month of December and January under the Compounded Levy Scheme. Accordingly, the show cause notice dated 12.10.2011 was issued proposing to impose penalty of Rs.3,89,660/- under Rule 18 read with Rule 16 of 2010 Rules read with Section 11 AC of the Act.

6. The appellant contested the show cause notice, *inter alia*, on the ground that Rule 10 of the 2010 Rules provides for –

"Abatement in case of non-production of goods – In case a factory did not produce the notified goods during any continuous period of fifteen days or more the duty calculated on a proportionate basis shall be abated in respect of such period provided the manufacturer of such goods files an intimation to this effect with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, with a copy to the Superintendent of Central Excise, at least three working days prior to the commencement of said period, who on receipt of such intimation shall direct for sealing of all the packing machines available in the factory for the said period under the physical supervision of Superintendent of Central Excise, in the manner that the packing machines so sealed cannot be operated during the said period."

The appellant further contended that admittedly they have not asked for any abatement, and hence, the provisions of Rule 10 are not attracted.

7. Vide an Order-in-Original, the Asstt. Commissioner was pleased to confirm the show cause notice on contest, and imposed a penalty of Rs.3,89,660/- under Rule 18 read with Rules 16 of the 2010 Rules read with Section 11 AC of the Act.

8. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals), who was pleased to dismiss the appeal agreeing with the findings of the Asstt. Commissioner.

9. Being aggrieved, the appellant is before this Tribunal.

10. Ld.Counsel, Shri N.K. Tiwari for the appellant urges that it is an admitted fact that the appellant have not sought for any abatement in terms of Rule 10 of 2010 Rules. Admittedly, the appellant have paid the duty for the month of December, 2010 and Jan. 2011 under the Compounded Levy Scheme. Thus, the goods, which were admittedly manufactured during the period December, 2010 and January, 2011 are duty paid. It is further urged that under the Compounded Levy Scheme, the assessment is month to month and each month is an assessment period. All references to such period under the Compounded Levy Scheme under Notification No.11/2010, refers to calendar month. Thus, Revenue has mis-conceived the clause **"such period"**, which refers to the period starting from the day of suspension of production till the resumption or end of the month. He further urges that it may be held that under the facts and circumstances, the provisions of Rule 10 of the said Rules, 2010 are not attracted, and accordingly, prays for allowing their appeal.

11. Ld. Authorised Representative, Shri Pradeep Gupta for the Revenue relies on the impugned order.

12. Having considered the rival contentions and on perusal of the records, I find that Rule 10 of 2010 Rules, provides for abatement in case of non-production of goods (in case of factory did not produce the notified goods during for continuous period of fifteen days or more). I find from the admitted facts on record that the appellant, being engaged in production during the period December, 2010 to 31.01.2011, admittedly have not sought for any abatement, and are not entitled to any abatement under Rule 10 of 2010 Rules. Thus, the view of the Department, first proviso of Rule 2010 is attracted is misconceived. Where a Rule is not attracted, the proviso thereunder does not attract. Under the Rules of Interpretation, a proviso is sub-servient to the Rule, and does not override the provisions of the Rule, of which it is a proviso.

13. Accordingly, I hold that Ist proviso to Rule 10 of 2010 Rules is not attracted under the admitted facts and circumstances. Accordingly, the impugned order is set aside and the appeal is allowed. The appellant is entitled to consequential benefit in accordance with law.

[Operative part of the order already pronounced in open court]

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)