

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. II

Excise Appeal No. 53602 of 2018-SM

(Arising out of order-in-appeal No. 874(CRM)CE/JDR/2018 dated 07.08.2018 passed by the Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Jodhpur).

M/s Vishnu Fragrance Pvt. Limited

Appellant

G-55-56, RIICO Industrial Area
Gopal Nagar, Semalpur
Chittorgarh-312001.

VERSUS

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

Respondent

142-B, Sector-11, Hiran Magari
Udaipur-313002.

APPEARANCE:

Shri N. K. Tiwari, Advocate for the appellant
Shri Pradeep Gupta, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 51577/2021

**DATE OF HEARING: 22.03.2021
DATE OF DECISION: 17.06.2021**

ANIL CHOUDHARY:

The issue in this appeal is whether demand for differential duty can be raised on assumptions and presumptions under the Chewing & Unmanufactured Tobacco Packing Machine (Capacity Determination & Collection of Duty) Rules, 2010, read with Section 3A of the Act.

2. Brief facts of the case are that the appellant was engaged in the manufacture of chewing tobacco and was registered with the

Department and paying duty under the compounded levy scheme under Section 3A of the Act read with Chewing & Unmanufactured Tobacco Packing Machine (Capacity Determination & Collection of Duty) Rules, 2010 (hereinafter referred to as CT Rules, 2010).

3. As the appellant was entitled to install a new automatic packing machine (form-fill-seal) w.e.f. 01.04.2010, as required under the CT Rules, 2010, filed the declaration in Form-1 in the last week of March, 2010. The Assistant Commissioner vide order dated 26.04.2010 determined the duty payable as Rs. 9,02,500/- p.m., which was duly paid by the appellant. As there was some technical issue with the said machine, the appellant at the end of April returned the machine to its manufacturer M/s Pakona Engineers (I) Pvt. Limited. The said manufacturer supplied another packing machine on 30.04.2010, which was by way of replacement, to be installed and operated w.e.f. 01.05.2010. The said machine was supplied by M/s Pakona Engineers (I) Pvt. Limited vide Invoice No. 003 dated 30.04.2010.

4. Accordingly, the appellant, due to replacement of the machine, filed fresh declaration in the prescribed form-1 on 03.05.2010 as required under CT Rules, 2010. Based on the declaration and pursuant to verification carried out by the Department, the Assistant Commissioner vide order No. 2/2010 dated 05.05.2010, determined the duty payable as Rs.14,25,000/- p.m. Subsequently, the Assistant Commissioner vide letter dated

02.06.2010 intimated the Superintendent (Technical), that the appellant have installed one FFS (PK-91ZP) packing machine. This machine is having almost same characteristics as mentioned in the office letter of the Commissioner, Central Excise, Meerut-I, which was endorsed to this Central Excise Division, wherein it has been intimated as under:-

- "1. The machine is manufactured by M/s Pakona Engineers (I) Pvt. Ltd., Vadodara (copy of invoice enclosed).
2. This machine is manufacturing chewing tobacco in 10 gms, Zipper Pouches.
3. This packing machine has single laminate roll used for making of the pouches alongwith single Zipper band (Photo enclosed).
4. The pouches cut through a cutting knife, therefore, two pouches are made at a time (photo enclosed).
5. There are two Hoppers provided in the machine to fill chewing tobacco in both pouches through two cut fillers at a time.
6. Two pouches (final product) come out from the pouch discharge unit at a time (photo enclosed)."

5. It appeared to Revenue, since the machine installed by the appellant in May, 2010, as to filling system two heaters and two pouches are manufactured at a time, the Commissioner has viewed that the machine should be treated as 'double track machine' and have directed to take necessary action. It further appeared that for the machine installed in May, 2010, the appellant deposited the duty as applicable to single track machine and have paid Rs. 14,25,002/- vide challan dated 05.05.2010. On the direction of the Superintendent that the machine is treated by the Department as double track machine, the appellant deposited differential duty of Rs.14,25,000/- vide challan dated 20.12.2010. For the subsequent

month from July, there is no dispute as the appellant deposited the duty amount of Rs.28,50,000/-.

6. Under the aforementioned facts, it appeared to the Department that as the machine installed in May, 2010 have been accepted as 'double track machine' by the appellant, and duty paid accordingly new machine, which was installed in the Month of April, 2010 (which was returned to the manufacturer being defective on 30.04.2010) and further as the new machine has been bought from the same manufacturer and at the same price or assessable value of Rs.15 lakhs, and further that the description in both the invoices dated 31.03.2010 and 30.04.2010 being similar – single track horizontal FFS (PK-91ZP) with volume that the pillar to pack 10 gms. Khaini and in four size sealed pouches with zipper. It further appeared to Revenue that the declaration made in Form-1 made on 30.03.2010 and 03.05.2010 are substantially the same.

7. Accordingly, it was alleged by Revenue vide show cause notice dated 07.04.2011, that apparently the declaration dated 30.03.2010 in Form-1 was incorrect as the new machine installed from 01.04.2010 also appears to be 'double track machine' based upon the aforementioned facts, and accordingly based on the presumption, differential duty was demanded for Rs. 9,02,500/- requiring the appellant to show cause as to why the machine which was installed and removed during the month of April, 2010, be not

treated as double track machine under the CT Rules, 2010. Further, penalty was also proposed under Rule 18.

8. The show cause notice was adjudicated on contest and the proposed demand was confirmed alongwith interest and further penalty of equal amount under Rule 18, by the Additional Commissioner vide order-in-original dated 05.12.2012. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals) who was pleased to dismiss the appeal agreeing with the Additional Commissioner. Being aggrieved, the appellant is before this Tribunal.

9. Learned Counsel for the appellant Shri N. K. Tiwari urges that the impugned order is fit to be set aside, being colourable exercise of power. There is no scope under the CT Rules, 2010 to demand duty based on assumptions and presumptions. Admittedly, the Department have never found the declaration wrong for the month of April, 2010. Admittedly, the duty for the month of April was determined vide adjudication order No. 1/2010 dated 26.04.2010 by the Assistant Commissioner, after physical verification of the machine. The said order dated 26.04.2010 have attained finality and have never been appealed against by the Department. The Department have made no enquiry from the supplier of the machine. Learned Counsel further draws my attention to the clarification issued by the machine manufacturer M/s Pakona Engineers (I) Pvt. Ltd., dated 14.06.2018 which reads as follows:-

"This has reference to your letter dated 12.06.2018 on the above subject.

In this connection, after verifying our records we would like to clarify that initially we had supplied a single track machine consisting of one hopper, one heater and one cutter vide invoice No. VRML0910063 dated 31.03.2010. You had informed that the said machine is not functioning properly and returned the same to us requesting to supply another machine. Subsequently, we had supplied another machine vide Invoice No. VRML1011003 dated 30.04.2010 having two hoppers, two heaters and two cutters known as single track machine and no additional amount was charged by us.

Transporter copy and Debit Note cum Despatch Advise of both invoices mentioned above are attached herewith for your needful.

Yours sincerely,
For Pakona engineers (I) PVT. LTD.,
Sd/- (AUTHORISED SIGNATORY)"

10. For the reasons as stated above, there being no difference in the price of machine, does not give the Department liberty to presume that both the machines are identical having same capacity. He further draws my attention to the show cause notice wherein admittedly for the first machine (April) the appellant have declared packing speed at 55 to 60 pouches per minute whereas for the second machine (May) the declaration made is packing speed 80 to 100 per minute. Thus, there is a material difference in the two declarations which have been conveniently ignored by the Revenue. He further urges that the entire activity of installing and uninstalling the machine was under the supervision of the Department and such wild allegation is based on assumptions and presumptions, cannot form basis for raising demand. He further urges that the whole demand have been raised by invoking the extended period of limitation which is not available to Revenue under the admitted facts and circumstances. Accordingly, he prays for allowing of the appeal with consequential benefits.

11. Learned Authorised Representative appearing for the Revenue has relied on the impugned order.

12. Having considered the rival contentions, I find that under the scheme of CT Rules, 2010 read with Section 3A of the Act, unless the declaration filed by a manufacturer is found to be untrue or false, no demand for additional duty can be raised. In Rule 18(2) of the CT Rules, 2010 - if it is found that goods have been manufactured or cleared from a unit which is not registered or the number of machine or the RSP of the pouches is contrary to the declaration, then the assessee can be subject to demand of the duty and levy of penalty. Admittedly, in the facts of the present case, the Department have not found any case of mis-declaration or any other misgiving on the part of the appellant. The whole case of Revenue is made out on the basis of assumptions and presumptions, based on the subsequent machine installed in the month of May, 2010, which is not permissible under the scheme of CT Rules, 2010. I, further find that the order determining duty liability dated 26.04.2010 has not been appealed, and as such the same is binding on the Department.

13. In view of the aforementioned findings, I set aside the impugned order and allow this appeal. The appellant shall be entitled to consequential benefits.

(Pronounced on 17.06.2021).

(Anil Choudhary)
Member (Judicial)