CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Excise Appeal No. 52962 of 2018-SM

(Arising out of order-in-appeal No. 117-118 (AK) CE/ JPR/2017 dated 04.05.2018 passed by the Commissioner (Appeals), Central Excise & Central Goods, Service Tax, Jaipur).

M/s Maa Santoshi Tobacco Co. **Appellant**
76, RIICO Industrial Area
Basni Road, Nagaur, Rajasthan.

VERSUS

Commissioner, Central Goods and Service Tax, **Respondent**
G-105, New Jodhpur Industrial Area
Jodhpur (Rajasthan).

APPEARANCE:

Shri O. P. Agarwal, C. A. for the appellant
Shri Pradeep Gupta, Authorised Representative for the respondent

CORAM:

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

FINAL ORDER NO. 51616/2021

DATE OF HEARING: 12.03.2021
DATE OF DECISION: 01.07.2021

ANIL CHOUDHARY:

The appellant, M/s Maa Santoshi Tobacco Co. Nagaur, Rajasthan, the manufacturer of cigarettes is in appeal against confirmation of confiscation and penalty vide the impugned order-in-appeal, on the main allegation of clandestine production and clearance.

2. Brief facts of the case are that in pursuance of information indicating that the appellant was indulging in evasion of Central

Excise duty by resorting to clandestine manufacture and clearance of their finished goods, a search operation was conducted on 24.05.2013, wherein searches were conducted by the officers of DGCEI at the factory of the appellant and related premises.

2.1 During the course of search at the factory premises of the appellant, in presence of two independent witnesses and Sh. Pukhraj Acharya, employee of the appellant, some incriminating documents/ records were recovered and resumed from the factory under panchnama dated 24.05.2013. During search, statutory records being Form-IV and RG-I registers were not found. Physical stock verification of the finished goods and raw materials was also conducted. Sh. Pukhraj Acharya was asked to produce authorised documents relating to stock found during physical verification but he could not produce the same. As neither any document relating to production or stock of finished goods (RG-I) and of raw material (Form-IV) were found during the physical stock verification, nor were the same produced on being called for. The finished goods, i.e. cigarettes of different brands, totally valued at Rs. 37,23,000/- were seized under Section 110 of the Customs Act, 1962 as made applicable to the Central Excise matters vide Section 12 of the Central Excise Act, 1944. The raw materials were also detained. A panchnama dated 24.05.2013 was drawn on the spot. The seized and detained goods were handed over on 'Supurdginama' dated 24.05.2013 to Sh. Pukhraj Acharya, employee of the appellant for safe custody.

2.2 The Proprietor of appellant was asked, vide summons dated 02.07.2013, 12.07.2013 and 05.08.2013 to provide (i) copy of statutory documents related to finished goods and raw materials seized/ detained at factory premises of the appellant under panchnama dated 24.05.2013 and (ii) to produce documentary evidence regarding ownership of warehouse situated at Basni Road, Nagaur and documents related to the tobacco found lying in the said warehouse, which was seized under panchnama dated 24.05.2013 by the officers of DGCEI. However, no reply was received from the appellant.

2.3 The Prop. of the appellant was again asked vide summons and letter dated 26.09.2013 to produce original RG-1 and Form-IV registers/ statutory documents related to finished goods and raw materials seized/ detained at factory premises of the appellant on 24.05.2013 and to appear to tender statement. In response, Sh. Vimal Kishore Agarwal, Authorised person of the appellant, appeared on 03.10.2013 to tender his statement.

2.4 Statement of Vimal Kishore Agarwal, authorised person of the appellant was recorded on 03.10.2013 under Section 14 of the Central Excise Act, 1944 wherein he inter-alia, stated that the appellant was a Proprietorship firm engaged in manufacture of different brands of cigarettes since July, 2010 and its proprietor – Rajesh Agarwal is his cousin brother; that presently TUFF 10 and MIDLAND brand cigarettes were being manufactured; that till past 4-6 months, JORDAN brand cigarettes were also manufactured by their firm; that the appellant did not undertake any other work, except manufacturing of cigarettes; that the Proprietor did not have any other work; that he (Sh. Vimal Kishore Agarwal) has a trading firm in the name of M/s Maa Santoshi Trading Co., in Gandhi Chowk, engaged in trading of general goods; that his other brother, Sh. Kamal Kishore Agarwal has a shop namely M/s Daulat and Company, Sadar Bazar, Nagaur, engaged in trading of cosmetic and general goods, that in their family, they have another shop namely M/s Prem Sukh Bherrudaan (Rangwala), which was owned by his mother, Smt. Sushila Devi and the same was engaged in trading of zarda, supari, Goli, biscuit etc.

2.5 On being asked to provide original RG-1 and Form-IV registers, he stated that after closing the factory on 23.05.2013, they had kept the Form-IV, RG-I registers and documents relating to raw materials in their factory premise and had gone to Ganganagar in a marriage of relative on 24.05.2013; that on being informed that officers had visited, they immediately came back and reached the factory premises, but till then the officers conducting search had concluded the proceedings and left the premises and RG-I and Form-IV registers were not found; that they were told that the officers had also not found the same. He further stated that on not finding the old RG-I and Form-IV, new registers have been started by them which have been confirmed by the Range Officer. On being asked as to how they got photocopy of the RG-I and form-IV registers, as submitted by them vide their letter dated 03.10.2013, he stated that on 20.05.2013, the Audit wing of Jaipur-II Commissionerate had visited their factory for audit and at that time they got two sets of photocopy, one copy remained with the officers and one copy of the same was kept by them. As the photocopy of RG-I register also has entries of 21.05.2013 to 23.05.2013, he was asked to clarify the same. He stated that the photocopy of RG-I register submitted bear entry upto 23.05.2013, wherein the entries for 21, 22 and 23.05.2013 were made later on by them. It is understood that these entries were made, as stated above, by pen on the xerox copy of RG-I register, which was kept by them after audit and they have submitted a photocopy of the said copy of RG-I register. However, on demand, they failed to produce the original of the said copy of the RG-I register. On being asked about suppliers of their raw materials and dealers of their finished goods, he stated that he will submit the said information after 2-4 days. He, however intimated that mainly they purchase biri patta tobacco, cigarette paper (CP), Filter paper (PCT), Filter Rod, Aluminium paper, Cell and slider (dibbi), Wrapper as raw materials and that their cigarettes are mainly sold to dealers such as M/s HARSHIN Enterprises, Tirur and M/s Daulat and Company, Nagaur.

2.6 He further stated that godown/ warehouse situated at RIICO Ind. Area, Basni Road, Nagaur, which was sealed during search on 24.05.2013, does not belong to them and the same belonged to one Sh. Praveen Kumar Pitti, Nagaur, who has General Store shop in Sadar Bazar. On being asked, whether they print packing date on the packing of the cigarettes, he stated that while they purchase packing material they get month and year printed on the same. This printed material is used for about 3 – 4 months.

2.7 During recording of statement, Sh. Vimal Kishore Agarwal committed to provide documents such as (i) copy of new RG-I and Form-IV registers, started from 25.05.2013 as confirmed by Range Officer, (ii) the original photocopy of RG-I kept by them after audit on 20.05.2013, on which entries for 21.05.2013 to 23.05.2013 have been made, (iii) names and addresses of raw material suppliers and (iv) name and addresses of their cigarette dealers, but the said documents/ information were not provided by them. As the aforesaid information/ documents was not received from the appellant, a letter dated 17.10.2013 was issued to them calling for the same, but no reply, from the appellant has been received.

2.8 The Prop. of appellant vide e-mail dated 24.05.2013 and letters dated 14.07.2013 and 03.10.2013 has cited discrepancies, especially in physical verification of cigarettes, in drawing the panchnama on 24.05.2013. In his claim, he stated that calculation of seized cigarettes was wrong in the panchnama as the same was calculated @ 12,000 cigarettes/CFC for all brands, whereas the packing of only MIDLAND and TUFF-10 brands of cigarettes was @ 12,000/CFC and packing of HARBOUR and '50-50' brands was 10,000/CFC and 16,000/CFC, respectively. The appellant also provided copies of few bills in support of their claim.

2.9 In order to verify the above submissions of the appellant, officers of DGCEI visited factory premises on 29.10.2013 and checked the seized/ detained goods alongwith the packing dates mentioned on the finished goods (cigarettes) seized under panchnama dated 24.05.2013. During verification, it was found that the packing of '50-50' brand of cigarettes was in 1 CFC =16,000 cigarettes and HARBOUR brand was in 1 CFC =10,000 cigarettes. Further, the date of packing of HARBOUR brand was printed as 7/10.

2.10 As the appellant has claimed that the Audit wing of the Central Excise Commissionerate, Jaipur-II had taken photocopies of the RG-I and Form-IV at the time of audit of their firm, the Deputy Commissioner (Audit), Central Excise Commissionerate, Jaipur-II was requested to provide the said copies. In reply the Deputy Commissioner (Audit), Central Excise Jaipur-II vide his letter C. No. 246/IAR/Gr. IX/JP-IJ/12-13/1194 dated 20.11.2013 has informed that the Audit group has neither obtained original nor photocopies of Form-IV and RG-I registers of the appellant, at the time of audit.

3. In view of the aforementioned facts it appeared to Revenue that-

(a) Original RG-I and Form-IV registers were neither submitted by the appellant nor were the same found during search conducted at their factory premises on 24.05.2013. They were requested vide different summons and letters but they were unable to produce the same.

(b) The appellant, however, have submitted photocopy of RG-I and Form-IV registers claiming that the same were done at the time of audit conducted by the Audit wing of Jaipur-II Commissionerate on 20.05.2013. But authenticity of the photocopies submitted by them has not been established.

(c) The Deputy Commissioner (Audit), Central Excise Jaipur-II has also denied that the Audit wing had obtained any such copies at the time of the audit.

(d) During recording of panchnama, 96,000 cigarettes of '50 – 50' brand (non-filtered) were seized. That the appellant has claimed that the officers calculated 12,000 cigarettes in 1 CFC whereas the packing of '50-50' brand was 16,000 cigarettes in 1 CFC. In their support, the appellant has provided copy of bill mentioning packing of cigarettes.

(e) During recording of panchnama 1,68,000 Nos. of HARBOUR brand (filtered cigarettes) shown in 7 bags mentioning that 1 CFC 12,000 cigarettes were seized. The appellant has claimed that HARBOUR brand cigarettes were packed actually 1 CFC = 10,000 cigarettes and accordingly, the stock was total 1,26,530 cigarettes (6 bags x 2CFC x 10,000 = 1,20,000 + 6530 cigarettes). The appellant has pointed out that the said stock of 1,26,530 filtered cigarettes was seized on 24.09.2010 by the Anti Evasion wing of Central Excise Division, Ajmer and has provided a copy of 0.1.0 No. 01/2012-CE dated 23.02.2012 issued under F. No. V(15)Off/Maa Santoshi/54/10/1487 passed by the Deputy Commissioner, Ajmer.

4. Thus, it appeared to Revenue that the appellant have not been able to provide the statutory records i.e. RG-I required as per Rule 10 being the day to day stock accounts of finished goods showing details of production and clearance. It appears that they were required to maintain RG-I register for lawful possession of excisable goods. Further, the authenticity of the photocopies of RG-I was not established. The said photocopy of RG-I consisted of stock only for the month of April and May, 2013. It also contains a remark

dated 20.03.2013 of the Supdt. (Audit) "conducted audit for the period July, 2010 to March, 2013". Further, as per report from the Audit Wing they had not obtained any photocopies of RG-I register at the time of audit. Thus, the disappearance of RG-I register as well as the Form-IV register appears suspicious and by way of evil design of the appellant to evade duty. Further, the version of the appellant that they had prepared two photocopy of RG-I register on 20.05.2013 and delivered one copy to the Audit Section of the Department and one copy kept with them, appear dubious and not believable. Further, the Xerox copy of RG-I register produced only reflected production data, no data of clearance during the month of May, 2013. This abnormality has also makes the photocopy so produced, unreliable.

5. Copy of monthly return (ER-I), of the appellant was also resumed during search. But in absence of RG-I register the closing stock could not be verified, if the same has been lying in stock. Thus, there was a strong possibility in view of the huge stock of finished goods and raw material found, that the appellant have been indulging in clandestine manufacture and clearance. Thus, the stock of raw material and finished goods seized under panchnama dated 24.05.2014 seems to have been manufactured subsequent to the last return filed, and have been kept or stocked without recording in the statutory records, with intent to clear clandestinely evading the duty. It also appears in the circumstances that the appellant was manipulating and concocting statutory records of the stocks, i.e. RG-I, as per their convenience.

6. It further appeared from the Xerox copy of RG-I for April, 2013 that appellant was manufacturing much more quantity than they have cleared in the said month. The Proprietor of the appellant failed to appear before the Authority inspite of three summons. Further, they submitted Xerox copy of RG-I only on 03.10.2013 about five months after the date of search and requisition by Revenue, when the authorised person of the Prop. appeared for recording of statement. Thus, this late submission of the Xerox copy of RG-I also supports the strong suspicion of clandestine production and clearance by the appellant. No reasons have been assigned for late submission of the Xerox copy of RG-I register. Thus, it appears that appellant was not maintaining the statutory record as required under law in the normal course of business. Further, it appeared that the appellant was not putting the exact date of packing on the finished goods but they were getting the month of packing printed by the printer on the packing material. As the month and year were pre-printed on the packing material, it appeared that the appellant was using the same for clearance for a longer period then one month for clandestine removal. In this mode it is practically impossible for the Department to see or know the exact date or month of manufacture of the cigarette.

7. Further, during the course of search in the factory premises, no purchase documents in support of the stocks of raw material was recovered. Further, the appellant failed to produce original form-IV register nor any other documents in respect of details of stock of raw material as per panchnama. The stock of raw material

consisted of duty paid inputs. Further, the Xerox copy of the register filed after five months is not reliable under the facts and circumstances, as no cogent explanation was given for late production/ filing. Further, the contention of the appellant that they have lost or misplaced, both registers, was also found to be unbelievable. There being no cogent reasons for missing of these statutory registers. Thus, the stock of finished goods and raw materials seized during inspection on 24.05.2013, appeared to be in violation of the provision of Central Excise Act read with Rules, and thus liable to confiscation under Rule 25(1)(b). Accordingly, show cause notice dated 22.11.2013 was issued with proposal to confiscate the unexplained finished goods and raw material, with further proposal to impose penalty, by the Additional Director, DGCEI, New Delhi.

8. The show cause notice was adjudicated on contest and the proposed confiscation of finished goods was confirmed, amounting to Rs.34,60,200/- with option for redemption on payment of fine of Rs. 8,65,050/-. Further, the raw material as per Annexure-III to panchnama valued at Rs.9,76,400/- was also confiscated with option to redeem on fine equal to 25% of their value i.e. 2,44,100/-. Further penalty of Rs. 20,00,000/- was also imposed under Rule 25 on the appellant.

9. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals) who agreed with the finding of the Additional Commissioner and was pleased to dismiss the appeal of the

appellant company, but was pleased to allow the appeal of the Prop. as penalty cannot be imposed both on the Proprietorship firm and Proprietor.

10. Being aggrieved, the appellant is before this Tribunal on the following grounds:-

i) The entire case of the Revenue is under Rule 25 of CER, 2002. Provisions of said Rule 25 can be invoked only subject to provisions of Section 11AC of the Central Excise Act, 1944, which has not been invoked in the notice. In the case of CCE vs. Shubh Metals -2015 (318) ELT 282 (Tri.) it has been held by the Hon'ble Tribunal that Rule 25 is not invocable as Section 11AC has not been invoked and resultantly, confiscation and consequential penalty and fine were set aside. Similar decision has been given in the case of CCE vs. GAL Aluminium Extrusions Pvt. ltd. -2011 (274) ELT 582 (Tri.)

ii) In the case of Camex Intermediates Ltd. vs. CCE -2008 (221) ELT 588 (Tri) it has been held that confiscation of raw materials, which was not found entered in register, is legally not sustainable under Rule 25 ibid, which has been upheld by Hon'ble Gujarat High Court as reported in 2015 (320) ELT A203 (Guj.).

iii) Even otherwise also, the stock of finished goods of cigarette was lying within the factory premises. When the officers visited the factory, there was no attempt to clear the same from the factory, as the goods were lying on floor of the factory, and there was no vehicle waiting for the goods to be loaded. Further, the audit was also conducted by the officers of the department on 20.05.2013, as is evidenced from copy of RG-I register, bearing signature of the audit officer. Therefore, the officers who conducted the audit, have verified the stock with RG-I register and have put their signature in token of having conducted the audit. Therefore, the RG-I register was complete as on that date, i.e. at least upto 20.05.2013. Further, the huge stock of cigarette found on 24.05.2013 could not have been manufactured during 21.05.2013 to 23.05.2013 (3 days); therefore, the stock found on 24.05.2013 was part of stock (RG-I register) as on 20.05.2013. Therefore, it could not be said that the stock found on 24.05.2013 was unaccounted for. They have also produced photocopies of RG-I register as the original could not be traced. The photocopies of RG-I register was taken on 20.05.2013, so as to give to the audit and therefore, same was available with the appellant, and entries were made in the photocopy of RG-I register from 21.05.2013 to 24.05.2013. In any case, the stock as on 20.05.2013 as per photocopy of RG-I register bearing signature of audit, is not liable for confiscation, as the same is duly accounted for in the statutory register.

iv) The Larger Bench of this Tribunal in the case of **Bhillai Conductors Pvt. Ltd. -2000 (125) ELT 781 (Tri.LB)** has held that confiscation is not attracted by mere non accountal of goods in RG-I register, when there is no evidence that such non-accountal of goods in factory was with intent to evade duty. The appeal filed against this has been dismissed by Hon'ble Chhattisgarh High Court reported as 2014 (307) ELT A81. Similar decision was taken in **CCE vs. B.M.W. Steels Ltd. -2011 (272) ELT 315 (Tri.).**

v) Even otherwise also, Cigarettes are excisable items where the representative of the Excise Department has the physical control as per the Central Excise law. Thus, the Central Excise Officer is posted in the factory, so that no cigarettes can go outside, without his approval. Therefore, unaccounted finished goods could not have gone without payment of duty. An identical case has been decided by the Tribunal in the case of CCE&ST vs. Desire Tobacco Pvt. Ltd., whereby Revenue's appeal was dismissed vide Final Order No. 50387/2018 dated 25.01.2018.

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

12. Having considered the rival contentions, I find that only for not finding the statutory register being RG-I and Form-4 at the time of inspection by the Officers of DGCEI, adverse inference have been drawn without reference to the records of the appellant available with the Department, being the various returns filed from time to time and the inspection reports available on record. Admittedly, the audit has taken place in the factory premises of the appellant on 20.05.2013, which is four days before the date of search or inspection by the DGCEI. There is no adverse report on record by the Officers of the Audit team nor there is any whisper of any discrepancy in the stock of finished goods and raw material with respect to the quantity entered in the statutory register. I further find that no instance of clandestine clearance or attempt to clear clandestinely have been brought on record. Thus, there is absence of *mens rea* or any attempt by appellant to clandestinely clear the finished goods lying in the factory as on the date of inspection or at any point of time. I

further find from the copy of Xerox copy of RG-I register filed in the appeal paper book, the stock of finished goods is partly lying in the finishing room and it is transferred to the inbond store room on completion. As per panchnama, I find that there is no such break-up of the finished goods. Admittedly, cigarette cannot be sold without it is being finished and packed. Thus, apparently there is discrepancy in the stock taking on the date of inspection. This discrepancy is also evident from the facts on record being – as per panchnama the cigarettes found and detained is 16,25,750 whereas as per the order-in-original confiscated quantity is 14,89,750. On the discrepancy being pointed out by the appellant Revenue has corrected the quantity as 14,89,750 which is recorded in para 4.5 to 4.8 of the order-in-original. Admittedly, there is no allegation by the Audit team which visited the factory on 20.05.2013 as to not finding of the statutory register(s). Rather the Audit team has made an endorsement on the RG-I register, that they have audited the records for the period July, 2012 to March, 2013.

13. I further take notice that the factory of the appellant was under physical supervision of the Officers of Central Excise Department. During the period of inspection Shri S. K. Lavasia, Superintendent and Shri Nathu Lal Jain, Inspector were posted at the factory of the appellant. As per Rule 6 of the Central Excise Rules, in case of cigarette the Superintendent or Inspector of Central Excise is required to assess the duty payable before removal by the assessee. Further, Rule 11 stipulates that no excisable goods shall be removed from the factory or a warehouse except under an invoice signed by

the owner of the factory or his authorised agent and in case of cigarette, each such invoice shall be countersigned by the Inspector or Superintendent of Central Excise before the cigarettes are removed from the factory. I find that there is no allegation on the appellant of having removed any finished goods clandestinely without informing the Superintendent / Inspector. The arrangement of posting of Central Excise Officers round the clock was modified by the CBIC vide Circular No. 1055/4/2017-CX. dated 01.05.2017. The Board taking notice of limited number of officers posted in the Range and problem being faced in posting the Officers round the clock, and also by the cigarette manufacturing units, observed that in view of Rule 6 and 11 read together, the presence of Central Excise Officer is required for discharging the twin function of assessment of duty payable and countersigning the invoices before the cigarettes are removed from the factory. It was also observed that the view taken by some of the Officers in the Department that production in cigarette factory can take place only when the Central Excise officer is physically present is not correct. Further, observed that under the GST regime there is no such requirement of round the clock posting of Officers. It was thus clarified by the Board that round the clock posting is not mandatory but directory. Thus, evidently, round the clock posting of Officers in the cigarette factory have been modified only from 01.05.2017. Admittedly, at the time of inspection in the factory of appellant, there was round the clock posting of the Central Excise Officers. There is no allegation of any collusion between the Officers of Central Excise and the appellant in the show cause notice. Further, there is no allegation or suggestion in the show cause notice of any misgiving on the conduct of the Central Excise Officers posted during the relevant time. Further, I find that show cause notice is also defective for non joinder of necessary parties.

14. I further take notice that this Tribunal have repeatedly held that any finished goods found not entered in the RG-I register on the date of inspection, are not liable for confiscation in absence of any finding of attempted clandestine removal of the excisable goods. Further, raw material which was found lying in the factory of the appellant was admittedly not manufactured by the appellant and as such the same is not dutiable in the hands of the appellant. Thus, there is no requirement of confiscation of raw material in the facts and circumstances. I find that similar view has been taken by this Tribunal in catena of judgement, to name a few –

i) CCE vs. Shubh Metal-2015 (318) ELT 282 (Tri.Del.)

ii) CCE, Aurangabad vs. GAL Aluminium Extrusion Pvt. Ltd., 2011 (274) ELT 582 (Tri. Bom. SB)

iii) Camex Intermediates Ltd., vs. CCE, Surat 2008 (221) ELT 588 (Tri. Ahm.)

iv) Bhillai Conductors Pvt. limited vs. CCE, Raipur 2000 (125) ELT 781 (Tri. Del.)

v) CCE, Lucknow vs. BMW Sales Limited 2011 (272) ELT 315 (Tri. Del.)

15. I further find on a bare reading of Rule 25 read with Section 11AC of the Act, the order of confiscation and penalty can be made only in case of fraud, collusion, wilful mis-statement, suppression of facts or any contravention of the provisions of the law with intent to evade duty. There is no such allegation in the facts of

the present case save and except non finding or non production of the statutory register RG-I and Form-IV for the reasons that the same were missing and could not be located.

16. Accordingly, I hold that the impugned order is bad under the facts and in law. Accordingly, the appeal is allowed and the impugned order is set aside. The appellant shall be entitled to consequential benefits, in accordance with law.

(Pronounced on 01.07.2021).

(Anil Choudhary)
Member (Judicial)

Pant