

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

PRINCIPAL BENCH - COURT NO. II

Excise Early Hearing Application No. 50020 of 2021

(on behalf of the respondent) in

Excise Appeal No. 51730 of 2019

(Arising out of order-in-original No. Udz-Excus-000-Com-0083-18-19 dated 03.04.2019 passed by the Commissioner, Central Excise, Udaipur).

M/s Miraj Products Pvt. Ltd.,

Uper Ki Oden, Nathdwara
Distt - Rajsamand (Rajasthan)

Appellant

VERSUS

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

142-B, Hiran Magri, Sector-11
Udaipur (Rajasthan).

Respondent

AND

Excise Appeal No. 51521 of 2019

(Arising out of order-in-original No. Udz-Excus-000-Com-0083-18-19 dated 03.04.2019 passed by the Commissioner, Central Excise, Udaipur).

**Prakash Chand Purohit
Managing Director of**

M/s Miraj Products Pvt. Limited
Uper Ki Oden, Nathdwara
Distt - Rajsamand (Rajasthan)

Appellant

VERSUS

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

142-B, Hiran Magri, Sector-11
Udaipur (Rajasthan).

Respondent

APPEARANCE:

Sh. B. L. Narasimhan & Ms. Sukriti Das, Advocates for the appellant
Sh. S. K. Mathur, Special Counsel for the respondent

CORAM:

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

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

FINAL ORDER Nos. 50804 – 50805/2022

DATE OF HEARING: 16.08.2022
DATE OF DECISION: 02.09.2022

ANIL CHOUDHARY:

The issue in this appeal is whether Central Excise duty along with equal amount of penalty have been rightly demanded from the appellant company, and further whether penalty have been rightly imposed on Sh. Prakash Chand Purohit - Managing Director on the allegation of clandestine manufacture and clearance of chewing tobacco.

2. Brief facts of the case are that the appellant company is engaged in packing and clearance of branded lime mixed chewing tobacco falling under tariff item 2403 99 10 of the First Schedule of the Central Excise Tariff Act, 1985. Sh. Prakash Chand Purohit (Sh. Purohit in short) is the Managing Director of the appellant company. The appellant company is registered with the Central Excise Department and was operating under compounded levy scheme during the period of dispute from April, 2012 to April, 2013.

3. The Appellant has the following three manufacturing units:

- (I) Unit-I, located at Upar ki Oden, Nathdwara, and having Central Excise Registration No. AABCM4952DXM001, is engaged in packing of processed chewing tobacco in pouches, using automatic 'Form, Fill & Seal' (FFS) machines;
- (II) Unit-II, located at Khetan Road, Rabcha, Nathdwara, and having Central Excise Registration No. AABCM4952DXM002, is engaged in mixing of lime and tobacco upon receipt of raw tobacco and selling of entire semi-finished goods to Unit-III upon payment of Central Excise duty; and
- (III) Unit-III, located at Village Kheda Bhansole, Mavli, Udaipur, and having Central Excise Registration No. AABCM4952DXM003, is engaged in

processing of tobacco which includes drying, grading and coating and selling of entire processed tobacco to Unit-I.

The appellant company regularly deposits the duty in advance at the beginning of each assessment period (which is month to month) and also filed periodical return regularly.

4. The present appeal pertains to Unit-I, as mentioned above. The Appellant is operating under the Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 (**Chewing Tobacco Rules**) notified by virtue of Section 3A of the Central Excise Act, 1944 and was paying duty on the aforesaid final products based on the 'periodic capacity determination orders' passed by the jurisdictional Central Excise authority determining the annual capacity of production of the Appellant (**Determination Orders**) under Rule 6(2) of the Chewing Tobacco Rules. The appellant regularly deposits the duty & returns.

5. The officers of Income Tax Department (**IT Department**) conducted search proceedings in September 2013 at various premises of Miraj group and its personnel. During the such search on 25.9.2013 at the residential premises of Sh. Purohit under Panchnama dated 25/26.09.2013, the officers found *inter alia* one sheet (survey data).

5.1 Sh. Purohit in his statement dated 25.9.2013 and also vide letter dated 4.12.2013, explained the contents of the Survey sheet to the IT department which related to the Tobacco Market Survey Report, conducted by the Appellant for data comparison of sales by the

Appellant and other tobacco manufacturing competitors of Appellant. It was explained that column 'Green' category in the Survey Sheet contained data of sales of the Appellant during the relevant period, while the column 'Red' category contained data of products sold by the Appellant's competitors. The said information of the competitors were gathered by Appellant from various dealers, wholesalers and merchants (**dealers**) located across the country, vide telephonic surveys.

5.2 The Appellant further vide letter dated 4.3.2015 informed the IT Department that it had purchased 28,144.06 kg of packing material (viz. paper lamination rolls) valued at Rs. 92,12,154/- from M/s. Uma Polymers Ltd., (**Uma Polymers**), during the FY 2012-13 and 2013-14 under ten invoices. However, the same were found defective upon inspection, and was not replaced by the supplier despite repeated requests. This amount was unpaid liability in books of accounts. Accordingly, the Appellant voluntarily offered such amount for taxation, for the assessment year 2014-15 with a request not to initiate penal proceedings. The IT Department for the previous year 2012-13 and 2013-14 passed the Assessment Orders, both dated 12.3.2015.

Investigation by the Central Excise Department.

6. Pursuant to the information gathered from the IT Department during REIC meeting on 27.3.2015, the officers of the Central Excise Department (**CE Department**) requested for supply of relevant documents, which were made available by IT Department under their letter dated 14.9.2015. Thereafter, the CE Department conducted investigation against the Appellant by recording statement

of Sh. Purohit on 15.6.2016, wherein he reiterated the submissions which were already made before the IT Department regarding the contents of Survey sheet.

7. The Department also conducted verification from various tobacco manufactures and jurisdictional Central Excise authorities of such manufacturers, the details whereof were mentioned in the survey report. Some of the said manufacturers submitted letters and the authorities provided the reports regarding the investigation, the details of which are mentioned below:

- 1) Letter dated 28.3.2017 by Ld. Superintendent, Varanasi, regarding M/s Mala Zarda Industries;
- 2) Letter dated 28.3.2017 by Ld. Superintendent, New Delhi, regarding M/s Golden Tobacco Manufacturing Co. Pvt. Ltd.,
- 3) Letter dated 25.3.2017 by Ld. Assistant Commissioner, Ghaziabad, regarding M/s Kay Pee Khaini Pvt. Ltd.,
- 4) Letter dated 24.3.2017 by Ld. Superintendent, Sonipat, regarding M/s Vaneet Sales Corporation;
- 5) Letter dated 16.3.2017 by Ld. Assistant Commissioner, Anand, regarding M/s Patel Products.
- 6) Letter dated 10.3.2017 by Ld. Assistant Commissioner, Jaipur, regarding M/s Goyal Tobacco Co.;
- 7) Letter dated 14.3.2017 by M/s Malpani Group.
- 8) Letter dated 9.3.2017 by Ld. Superintendent, Howrah, regarding M/s Angel Products;
- 9) Letter dated 6.3.2017 by Ld. Deputy Commissioner, Ambala, regarding M/s SMC Products;
- 10) Letter dated 15.3.2017 by M/s Anas Enterprises;
- 11) Letter dated 24.3.2017 by M/s Praveen Kumar & Sons;
- 12) Letter dated 28.3.2017 by M/s Lok Nath Prasad Gupta; and
- 13) Letter dated 5.4.2017 by Ld. Deputy Commissioner, Ambala, regarding M/s Sugandhi Snuff King Ltd.;.

8. Sh. Purohit vide letter dated 29.4.2017, further intimated the Excise Department, that since the packing material of 28,144.06 kg purchased from Uma Polymers was defective, therefore out of such quantity, 10,854.110 kg. was destroyed under internal permission letter dated 30.3.2015 and the remaining quantity of 18289.95 kg was put to use and subsequently discarded as waste in routine manner. In support of this, Sh. Purohit submitted copy of the Appellant's stock ledger and A/c of Uma Polymers maintained by the Appellant .

Show Cause Notice dated 03.05.2017

9. In the above factual background, a Show Cause Notice dated 03.05.2017 was issued to the Appellant proposing to recover Central Excise duty amounting to Rs. 163,06,00,000/- under Rule 19 of the Chewing Tobacco Rules read with with Section 11A of the Central Excise Act, 1944 along with interest, and penalty, by solely relying on the data mentioned under the 'Red' column of 'Survey sheet' alleging that such figures depicts clearances of the final products manufactured discreetly by the Appellant in a clandestine manner, from presumed undeclared machines installed at a secret place. The aforesaid reports/letters relating to competitor manufacturers, were also relied upon to allege that the Appellant's explanation regarding the Survey sheet was false and baseless.

9.1 Placing reliance on the appraisal report pursuant to search by the IT Authority, wherein it was presumed that the figures appearing in the red column in the survey sheet are the unrecorded figure of turnover, outside the books of accounts.

9.2 In order to examine the veracity of the survey report as submitted by Sh. Purohit, the Department made further enquiries by issuing letters to the jurisdictional Assistant / Deputy Commissioner of such units/ manufacturers to verify whether the manufacturer names appearing in the survey report are engaged in manufacture of tobacco product with the brand name as divulged by Sh. Purohit and to provide their production and clearance figures and accordingly the reports were received as aforementioned. As per the reports received, there appeared to be variation in the brand name as Sh. Purohit was recording the data in the name of the manufacturing company, instead of the brand name. It appeared that the contention of Sh. Purohit is wrong and misleading. For example, as per the report of Range Superintendent having jurisdiction over M/s Golden Tobacco Manufacturing Co. Pvt. Limited, it was informed that they are engaged in manufacture of branded chewing tobacco under the brand name 'Bengali Spit Tobacco'. However, in the survey report the appellant has claimed the brand name of the said manufacturer as 'Golden' , which is actually not their brand name. Similar discrepancy, mismatching with respect to report received from other Range Superintendents with respect to some other manufacturing unit, the names which are appearing in the said report.

9.3 Thus, it appeared to Revenue that Sh. Purohit is trying to mislead the Revenue and the said survey report resumed from his premises during search by the IT Department, is not a survey report but also contains the data of clandestine clearance by the appellant company. It further appeared that the data appearing in the green column in the said report matches with the returns filed with the

Department, whereas the data appearing in the red column (claimed to be the data of other manufacturers) is actually the clandestine clearance of the appellant.

9.4 Revenue further worked out the number of pouches which the appellant could manufacture from the declared machine(s) for manufacture of chewing tobacco, and thereafter on the said basis worked out, the number of cartons required for packing and despatch (1600 pouches can be packed in one carton having RSP of Rs.3/-) and similarly worked out as regards pouches manufactured having RSP Rs.5/-. Accordingly, on comparison of the data as per the ER-1 returns for the period under dispute, found that the declared production in the returns matches with the production capacity of the declared machine. Thus, it appeared to Revenue that the figures appearing in the red column of the sample survey sheet, is not the data of survey, but is the data of clandestine manufacture and clearance by the appellant. Accordingly, the Revenue has adopted the method of reverse calculation and arrived at the number of machine(s) required for manufacture of such quantity. Thereafter, calculated the duty on such presumed packing machines (which were never found admittedly), on the basis of compounded levy for the period of dispute and accordingly demanded the duty with penalty, as per the aforementioned show cause notice.

9.5 On receipt of the show cause notice the appellant vide letter dated 20.12.2017 requested the Adjudicating Authority to allow cross-examination of various persons/ officers whose reports/ letters have been relied upon in the show cause notice. Such permission was

denied by the Adjudicating Authority vide order dated 08.06.2018. Being aggrieved, the appellant challenged the said order in appeal No. E/51687/2018 before this Tribunal, vide Final Order reported at **2018**

(9) TMI 821 disposed of the appeal with the following observations:-

"15. In view of entire above discussion, it is held that the request of the appellant in question was a premature request before the Commissionerate hence the Order under challenge needs no interference. However, the Commissioner is hereby required, irrespective of the appellants filing any reply to the Show Cause Notice or not, to follow the principles of adjudication as far as the examination of the witness and cross examination thereof is concerned, as discussed above. The adjudicating authority-Commissioner is required to reconsider the request of the appellant at the appropriate stage. However, keeping in view that the basic concept behind the cross examination is fair play, it being the most effective of all the means for extracting truth and exposing falsehood. It is clarified that above observations shall have no effect on the discretionary power of the adjudicating authority below exercised with reasonable care and caution but at the appropriate stage for the same. Appeal accordingly stands disposed of."

9.6 Thereafter, the appellant filed detailed reply to the show cause notice filed on 29.10.2018 disputing all the allegations and also filed additional submission dated 19.02.2019. However, the Adjudicating Authority rejecting the contention of the appellant was pleased to confirm the proposed demand with penalty against the appellant company, and also imposed penalty on the Managing Director Sh. Purohit. Being aggrieved, the appellants are in appeal before this Tribunal.

10. Being aggrieved with the impugned order, the Appellant has filed the present appeal on the following grounds.

SUBMISSIONS ON BEHALF OF THE APPELLANT

11. COMPOUNDED LEVY SCHEME PRESCRIBED UNDER SECTION 3A READ WITH THE CHEWING TOBACCO CAPACITY DETERMINATION RULES IS A SELF-CONTAINED CODE, WHERE DUTY IS PAYABLE BASED ON NUMBER OF PACKING MACHINES OPERATING/ INSTALLED, AND NOT ON ACTUAL PRODUCTION OF GOODS. THUS, DEMAND BASED ON CHARGES OF CLANDESTINE MANUFACTURE AND CLEARANCE IS NOT SUSTAINABLE.

11.1 The Appellant was operating under the Compounded levy scheme, thus, duty demand cannot be confirmed on the absence of any undeclared packing machine found operating at the Appellant's premises during the relevant period.

11.2 The duty demand has been confirmed solely on Survey sheet recovered by the Income Tax Department from the residence of Sh. Purohit, alleging that the data mentioned in the Survey sheet under column 'Red' contains the data of clearances of goods manufactured clandestinely by the Appellant from the undeclared machines installed at a secret place. In this regard, it is submitted that the said observation of the Ld. Commissioner is ex-facie erroneous and not sustainable for the reasons elaborated below.

11.3 Section 3 of the Central Excise Act, 1944 (**Excise Act**), provides that Central Excise duty is levied on the manufacture of excisable goods in India. However, making an exception thereto, Section 3A *ibid* provides for charging duty on the basis of 'capacity of production' in respect of goods notified thereunder, having regard to the nature of manufacturing process, production of excisable goods of any specified description, extent of evasion or any such other relevant factor.

11.4 Accordingly, the Central Government in exercise of the powers conferred under Section 3A(1), vide Notification No. 10/2010-CE (N.T.) dated 27.2.2010, specified *inter alia* 'chewing tobacco' falling under Tariff Item 24039910 of the First Schedule to the CETA, which is manufactured with the aid of packing machine and packed in pouches by FFS (Fill, Form and Seal) machines, as notified goods, on which duty shall be levied and collected in accordance with Section 3A. Simultaneously, in terms of Section 3A(3), the Central Government specified the rate of duty applicable in respect of the said notified goods vide Notification No. 16/2010-CE dated 27.2.2010 according to per packing machine per month, depending on different RSP's fixed for per pouch, manufactured in the factory.

11.5 For providing the manner of determination of the 'Annual Capacity of Production' of the factory, factor relevant to such production, collection of duty, etc., Central Government notified the Chewing Tobacco Rules in exercise of the powers conferred under sub-sections (2) and (3) of Section 3A of the Excise Act.

12. In the present case, admittedly, the Appellant is engaged in the manufacture of chewing tobacco falling under Tariff Item 24039910 with the aid of packing machine (FFS) and packed in pouches. Thus, the Chewing Tobacco Rules are applicable in respect of final products manufactured by the Appellant, and there is no dispute in this regard.

12.1 Under the compounded levy scheme, excise duty is imposed on the 'factor' relevant for production of the notified goods and in case of Chewing Tobacco Rules, the factor relevant for

production of the notified goods is the 'number of packing machines' in the factory of the manufacturer as provided in Rule 4 *ibid*. Whereas Rule 5 provides for the quantity which is deemed to have been produced by use of one operating packing machine.

12.2 The provisions of Rule 6(1) states that a manufacturer of notified goods shall file a declaration, providing the comprehensive details in respect of packing machines. Under sub-rule (2), on the basis of such declarations, jurisdictional Central Excise authority shall, after making necessary inquiry including physical verification, approve the declarations and determine the annual capacity of production by passing Determination Orders. Sub-rule (3) states that the annual capacity of production shall be calculated by applying the deemed quantity under Rule 5 to the number of operating packing machines in the factory during the month. The number of operating packing machines during any month shall be equal to the number of packing machines installed in the factory, as per sub-rule (4). Whereas the machines not intended to be operated, shall be uninstalled and sealed by the Department in terms of sub-rule (5).

12.3 Under Rule 7 of the Chewing Tobacco Rules, duty is payable on the notified goods on the basis of annual capacity of production, i.e. the number of packing machines operating in the factory of assessee.

12.4 Rule 8 provides for alteration in number of operating packing machines, while Rule 13 deals with addition or removal of packing machines.

12.5 Rule 9 provides the manner of payment of duty and interest, as per which the duty on notified goods is payable in advance on monthly basis by the 5th day of the same month. Whereas, Rule 10 deals with abatement of duty in case of non-production of goods. Rule 16 entitles a manufacturer to avail Cenvat credit on notified goods in bulk packs.

12.6 Rule 18 deals with imposition of penalty for contravention of any of the provisions of Chewing Tobacco Rules. And, Rule 19 borrows all the provisions of Excise Act and the Central Excise Rules, 2002, except for those provided under the Chewing Tobacco Rules itself, including relating to recovery of dues.

13. From the above, it clearly transpires that the Compounded levy scheme prescribed under the Chewing Tobacco Rules, is a self-contained code which not only provides for the manner in which duty is levied, but also for calculation of such duty. Thus, duty on notified goods is required to be determined strictly within the four corners of the Chewing Tobacco Rules and in no other manner whatsoever.

14. It is further submitted that duty is leviable on notified goods only on basis of number of operating packing machines installed in factory, meaning thereby that payment of duty under the compounded levy scheme in terms of the annual production capacity determined, is not relatable to actual clearance and sale of goods. Assessee working under the said scheme is bound to pay a particular quantum of duty irrespective of actual production/ clearance of such goods.

15. The appellant relies on the following decisions:

- Hans Steel Rolling Mill v. Commissioner of C. Ex., Chandigarh, 2011 (265) E.L.T. 321 (S.C.).
- Commissioner of C. Ex. & Customs v. Venus Castings (P) Ltd., 2000 (117) E.L.T. 273 (S.C.).
- Union of India v. Supreme Steels and General Mills, 2001 (133) E.L.T. 513 (S.C.).
- Goyal Tobacco Co. Pvt. Ltd. v. Commissioner of C. Ex. & ST, Jaipur-I, 2017 (348) E.L.T. 720 (Tri. – Del.), as affirmed by the Hon'ble Rajasthan High Court in Commissioner of C.G. & S.T., Jaipur v. Goyal Tobacco Co. Pvt. Ltd., 2018 (360) E.L.T. 477 (Raj.).
- Ram Shyam Prints v. Commissioner of C. Ex., Ahmedabad, 2008 (226) ELT 433 (Tri. – Ahmd.).

16. Further urges in the present case, since the Appellant is engaged in the manufacture of notified goods, viz. chewing tobacco, it is submitted that the duty is payable on such goods only in terms of the provisions of the Chewing Tobacco Rules. For this reason only, Department had determined the Annual Capacity of Production and duty is payable on the basis of number of packing machines operating in the Appellant's unit during the relevant period, under capacity Determination Orders passed in terms of Rule 6(2) of the Chewing Tobacco Rules, and such Determination Orders have attained finality.

17. However, the department while issuing the SCN proposing to recover the excise duty, has failed to disclose any evidence regarding the presumed undeclared machines, allegedly operated by the Appellant. In Paras 42 & 43 of the impugned Order the Ld. Commissioner has categorically recorded the following:

"42. ... However, I find that in this case, during the search by Income Tax authorities, the machines on which chewing tobacco identified as category "Red" were manufactured, have not been found during the investigation also, Shri Prakash Chandra Purohit has also not divulged the source of production of the said clearances of pouches shown in the category "Red". Since, the said clearances mentioned in category "Red" were un-recorded clearances of M/s Miraj Products Pvt. Ltd. only and the number of machines were not declared with its identification & place of manufacture and they have not deposited the duty, therefore, the duty was worked out by taking into consideration the speed and maximum

production of their declared machines as were operational during the period from April 2012 to April 2013."

"43. ... I find that in the instant case the entire issue revolves around the facts that they have clandestinely manufactured the Chewing Tobacco pouches on machines not declared by them. The investigation has revealed that the assessee used undeclared machines for manufacturing the goods and clearing the same without payment of appropriate Excise duty, naturally would not be found installed in the declared premises after two years of detection by the income tax authorities."

[Emphasis supplied]

18. On perusal of the above, it is abundantly clear that no such undeclared machines, on which Appellant has allegedly manufactured the notified goods and cleared the same, was ever found/investigated by the department. Accordingly, the duty demand based on theoretical determination of number of alleged undeclared machines operated by the Appellant for clandestine manufacture of goods, is devoid of logic and not tenable.

19. Further urges the duty on notified goods is determined only on the basis of number of machines operating in the factory in terms of the Chewing Tobacco Rules only. As a corollary, it is submitted that no duty demand can be raised on the basis of presumed undeclared machines, as done by the Department in the present case, which is violative of the Chewing Tobacco Rules.

20. At this juncture, reliance is placed on the decision of Hon'ble Tribunal in the case of **Goyal Tobacco Co. Pvt. Ltd. v. Commissioner of C. Ex. & ST, Jaipur-I, 2017 (348) E.L.T. 720 (Tri. – Del.)**, where duty demand was confirmed against the assessee on the basis of availability of three machines in the rented godown premises. The Hon'ble Tribunal, while setting aside such demand, held that under the compounded levy scheme, duty cannot be levied on

machines which were not functional or installed during the relevant period. The said decision was further affirmed by the Hon'ble Rajasthan High Court in the case of **Commissioner of C.G. & S.T., Jaipur v. Goyal Tobacco Co. Pvt. Ltd., 2018 (360) E.L.T. 477 (Raj.)**.

21. It is further submitted that the Appellant has sufficient positive evidences to establish that it was operating only the number of machines as declared before the CE Department. The same are mentioned below.

21.1 The Determination Orders passed by the jurisdictional Central Excise authorities of the Appellant under Rule 6(2) of the Chewing Tobacco Rules, on the basis of declarations filed by the Appellant under Rule 6(1), determining annual capacity of production of the Appellant, and duty was paid in advance during the FY 2012-13, and no undeclared machines were found. The said orders are also found to be correctly reflecting the declared machines, in the SCN and the impugned order;

21.2 The jurisdictional Central Excise authorities of the Appellant invariably visited the Appellant's manufacturing unit, for uninstalling/ de-sealing or installing/ sealing the machines, as the case may be in terms of Rule 6(5), and no undeclared machines were ever found;

21.3 The jurisdictional Central Excise authorities of the Appellant visited the Appellant's manufacturing unit and conducted physical verification of the machines installed and operating, for verifying the maximum speed of machines in operation as declared by the Appellant

in the declarations filed in terms of Rule 6(2), and no undeclared machines were found;

21.4 The officers of the then Directorate General of Central Excise Intelligence (now, Directorate General of GST Intelligence) carried out surprise search at the Appellant's unit on 24.05.2013, which is prior to the search carried by the IT Department in the present case, and no undeclared machines were found.

25. The Ld. Commissioner in Para 43 of the impugned order, has brushed aside the aforesaid documentary evidences by simply holding that Appellant would not operate the undeclared machines from its declared premises. However, it is submitted that even the department has utterly failed to provide a single piece of evidence to corroborate existence of undeclared machines being operated by the Appellant during the relevant period. Thus, such findings are not sustainable. Hence, in the absence of undeclared machines, duty demand cannot be confirmed against the Appellant.

26. Without prejudice to above, assuming without admitting that even if there was extra production of goods during the relevant period, duty demand is not sustainable since duty is levied on the basis of number of machines operating, and not based on the actual production of goods.

27. Amount of Rs. 92,12,154/- pertained to outstanding dues of Uma Polymers which remained unpaid due to defective packing material supplied. No adverse inference can be drawn. In any case, there is no evidence to support the allegation that such packing material was used in clandestine manufacture of goods.

27.1. As mentioned above, packing material weighing 29,144.06 kg purchased from Uma Polymers was found to be defective by Appellant on inspection, and accordingly, the latter did not make the payment of Rs. 92,12,154/-. Uma Polymers also did not replace the material. It is submitted that the Appellant did not return the material because it contained the Appellant's brand name 'Miraj', thus, the same was prone to misuse of brand name. The material was made of multi-layered film containing plastic and metal foil, which cannot be re-melted and re-used. Accordingly, Appellant put to use part quantity in the production of such material and destroyed the remaining quantity with permission.

27.2. It is further submitted that the Appellant has duly recorded the details of the aforesaid purchase as well as the fact of destruction of part quantity, in its books of account, which further shows *bona fide* on the Appellant's part. Had the Appellant intended to use the material in clandestine manufacture of goods, it would not have accounted for the same. Thus, it cannot be said that Appellant used such packing material in clandestine manufacture of goods. In fact, such a small quantity of packing material cannot be used to manufacture huge quantity of pouches as alleged, by the Department in the present case.

28. Further, it is submitted that the aforesaid amount of Rs. 92,12,154/- was voluntarily offered by Appellant to IT Department for taxation for the assessment year 2013-14. The IT Department vide Assessment Order dated 12.3.2015, taxed the said income as undisclosed income in the hands of Appellant. However, on appeal

against said order, the Ld. Commissioner of Income Tax (Appeals), vide Order dated 5.10.2016, has set aside such finding thereby accepting the Appellant's contentions made in this regard. And this Order has attained finality in absence of any appeal by department before the higher forum. Thus, it proves beyond any doubt that the Appellant did not have any *mala fide* intention as regards the purchase of packing material (found defective) and no adverse inference can be drawn.

29. Without prejudice to above, it is submitted that disclosure of income, if any, before the IT Department cannot be treated as sale proceeds of clandestine manufacture activity on the part of Appellant, in the absence of corroborative evidences to the contrary. Reliance in this regard is placed on the following decisions:

- Trikoot Iron and Steel Casting Ltd. v. Commissioner of C. Ex., Meerut, 2015 (315) E.L.T. 65 (Tri. - Del.).
- Ravi Foods Pvt. Ltd. v. Commissioner of C. Ex., Hyderabad, 2011 (266) E.L.T. 399 (Tri. - Bang.).
- Commissioner of Central Excise, Ludhiana v. Zoloto Industries, 2013 (294) E.L.T. 455 (Tri. - Del.)

30. **THE SURVEY REPORT WAS PREPARED VIDE TELEPHONIC SURVEYS OF DEALERS, AND THE APPELLANT'S EXPLANATION THEREOF CANNOT BE DISREGARDED ON THE BASIS OF REPORTS/ LETTERS. IN ANY CASE, NO RELIANCE CAN BE PLACED ON SUCH REPORTS/ LETTERS.**

30.1. In the present case, Department has discarded the Appellant's explanation regarding the contents of Survey sheet by holding that such sheet is a private document(s) containing the clandestine clearances of Appellant, and chose to rely on the reports/ letters relating to the competitors, to raise duty demand against the

Appellant. Such allegations have been confirmed in the impugned order.

30.2. In this regard, it is submitted that the Tobacco Market Survey Report was an informal telephonic survey from dealers, and was prepared by the Appellant capturing the details of sales (and not clearances) of Appellant's competitors as informed by the dealers. Naturally, the survey report had only captured sales data of the Appellant's competitors as informed by the dealers located across the country and not clearance data of such competitors. Whereas, the reports/ letters were in respect of the other manufacturers showing only the clearances from their respective units. It is due to this difference in Department's verification process, it has been stated by some of the competitors that their clearance of tobacco products during the relevant period was Nil.

31. In the reports/ letters relating to the competitors, namely, Malpani Group and SMC Products, it is mentioned that they are not the manufacturers of tobacco products. In this regard, it is submitted that tobacco under the brand name 'Gai Chhap' and 'Patta Chhap' as mentioned in the Appellant's survey report, are available in the market. Sample copies of such tobacco pouches, together with pouches of all the brands mentioned in the survey report, collected from the market has been annexed in the Appeal paper book.

32. The Ld. Commissioner has not recorded any findings on the aforesaid submissions made by the Appellant in reply to SCN, and simply confirmed the allegations made in the SCN. Therefore, reliance

placed on the reports/ letters to discredit the survey report of the Appellant, is devoid of any merit and not sustainable.

33. Sh. B. L. Narasimhan, Id. Counsel for the appellant inter alia further urges -

Without prejudice, no reliance can be placed on the letters/ reports in the absence of cross examination of author thereof. The impugned order has been passed in violation of the principle of natural justice and in non-compliance of Section 9D of the Central Excise Act.

33.1 The Impugned Order has relied upon various reports/letters to counter the clarification given by the Appellant for the Survey sheet. In this regard, it is submitted that despite making an express request by the Appellant to grant cross-examination of the officers/manufacturers whose reports/letters are relied upon in the show cause notice, the Ld. Adjudicating Authority has passed the impugned order, denying such request.

33.2 It is submitted that reports/letters in the present case, are in the nature of statements tendered during the course of an inquiry or proceeding under the Excise Act. Accordingly, Section 9D of Excise Act requires that the truthfulness of such factual statements made, is required to be accepted only after the same has been complied with the requirement of cross-examination. In the absence of such cross-examination, the reports/letters cannot be made the basis for discrediting the explanation provided by the Appellant. Such reports / letters are required to be discarded.

33.3 It is further submitted that not providing the opportunity of cross examination in the present case, is also violation of the principle of Natural justice. Reliance in this regard is placed on the following decisions, where cross-examination of Chemical Examiner was allowed by this Tribunal to ascertain the veracity of the test reports relied upon by department against the assessee. Therefore, the ratio of such decisions equally applies to the present case, and categorically rebuts the finding recorded by Ld. Commissioner in Para 20 of the impugned order, for denial of such request:

- Youngman Indus. Ltd., v. Commissioner of Customs, Amritsar, 2004 (175) E.L.T. 663 (Tri. - Del.)
- Ultra Fine Fillers (P) Ltd. v. Commissioner of Central Excise, Jaipur-II, 2004 (167) E.L.T. 331 (Tri. - Del.).

34. **EXTENDED PERIOD OF LIMITATION IS NOT INVOKABLE AND DEMAND IS ENTIRELY TIME-BARRED.**

34.1. The demand proposed in the SCN issued on 03.05.2017 for the period April 2012 to April 2013, was raised by invoking the extended period of limitation. It is submitted that the extended period of limitation is not invocable in the present case, because the Appellant did not suppress any facts, thus there is no intention to evade the payment of Central Excise duty. Further, except a bald allegation, neither the SCN nor the impugned order demonstrates as to how Appellant has suppressed the facts. For this reason, extended period of limitation is not invocable and the entire demand is time-barred.

35. It is further submitted that once it is evident that the Appellant was regularly filing its returns and that the records of the Appellant were also routinely audited, there is no basis to allege that

there was any suppression by the Appellant. In fact, the aforementioned documentary evidences in the form of Determination Orders, regular visits by the officers, etc., show that all the material facts were in the knowledge of the Department. Thus extended period of limitation is not invokable. Moreover, it is submitted that despite receiving the relevant information and documents from the IT Department vide letter dated 14.09.2015, CE Department took more than one and a half years to issue the SCN. Thus, extended period of limitation cannot be invoked. In support of above submissions, reliance is placed on the following decisions:

- Pushpam Pharmaceuticals Company v. Commissioner of Central Excise, Bombay 1995 (78) ELT 401 (SC)
- Anand Nishikawa Co. Ltd. v. Commissioner of Central Excise, 2005 (188) ELT 149 (SC)
- Uniworth Textiles Ltd. v. Commissioner of Central Excise, Raipur, 2013 (288) ELT 161 (SC).

36. It is further urged that even if for argument sake the allegation of Revenue is accepted, still under the scheme of compounded levy under Section 3A of the Act read with notification, no demand can be raised on the basis of presumed undeclared packing machine(s). Demand can only be raised under the compounded levy scheme read with notification, if the Revenue finds any undeclared machine installed in the declared premises or undeclared premises. Admittedly, in the facts of the present case, no such undeclared machine have been found either in the declared premises or anywhere else.

37. It is further urged that Revenue has totally misconceived itself by giving a total goby to the compounded levy scheme which

provides for manner of determination & collection of duty based on the capacity of production and have rather adopted an imaginary method of assessment of duty, which is not permissible under the Act or Rules thereunder.

38. In view of above submissions, it is urged that the extended period of limitation is not invokable. Further submits that no penalty is imposable on the Appellant Co. as well as on Sh. Purohit. It is further submitted that when demand itself is not sustainable, penalty is not imposable, and interest is also not recoverable.

39. In light of the above submissions, the Appellant prays that the impugned order passed by the Ld. Commissioner is liable to be set aside and the present appeals filed by the Appellant Co. and Sh. Purohit are fit to be allowed in full, with consequential relief.

40. Learned Special Counsel Sh. S. K. Mathur appearing for the Revenue urges that the goods manufactured by the appellant are prone of evasion of Central Excise duty. Accordingly, he urges that the duty has been rightly demanded in the impugned order, which is based on assumption and presumption, on the basis of the survey report (private documents) recovered at the time of search from the residence of Sh. Purohit. Although Sh. Purohit has explained the said sheet as survey report, but it is actually data of clandestine manufacture and clearance by the appellant. He also relies on the Appraisal report written by the Deputy Commissioner of Income Tax, Udaipur to the Joint Commissioner (AE), Udaipur which gives the details of data and cash found and seized at different premises,

including residence of the Director. Learned Counsel also stresses that Rs. 4 crore undisclosed income was declared by Sh. Madan Lal Paliwal to cover up their various transactions out of undisclosed income. Accordingly, he supports the impugned order and the demand of duty with penalty.

41. Having considered the rival contentions, we find that Section 3A of the Act read with the Chewing Tobacco Rules is a complete code in itself. It provides for the detailed procedure for determination of duty on the basis of capacity of production. Further, the said Rules also provides for detailed procedure for determination of duty payable and also provides for penalty in case of violation or mis-declaration by the assessee. It also provides that if any undeclared packing machines are found by the Department, the manner of determination of duty on such machines and the penalty imposable.

42. Admittedly, in the facts of the present case, Revenue have not found any undeclared machine(s) in manufacturing premises/factory. Further, no such undeclared machine(s) was found at any undisclosed premises. We further find that duty has been demanded on the basis of assumptions and presumption, which is not permissible under the scheme of compounded levy on the product manufactured by the appellant. We further find that appellant have regularly filed declarations for capacity determination under Rule 6(1) of the Chewing Tobacco Rules, and the said declarations were adjudicated upon and duty payable determined (assessment order) by the Adjudicating Authority. Such adjudication orders have attained finality, as these

have not been appealed against by the Department. We further find that duty is payable under the Compounded Levy Scheme on the 'Capacity of Production' based on the notified factor of production, is not relatable to actual production and clearance of the goods. An assessee may manufacture more or less than the determined capacity, and the same is not relevant. Further, we find that once an assessee is assessed to compounded levy scheme, there is no scope for assessment of duty under Section 3, on the basis of actual production. We also find that the factory of the appellant was regularly visited from time to time by the Officers of the Department and they have never found any undeclared packing machine being operated by the appellant.

42.1 We further hold that in the facts and circumstances (Compounded Levy Scheme), undisclosed income declared before the Income Tax Department has no bearing on the duty payable under Central Excise Act. Further, it is undisputed that the amount of Rs.92,14,154/-, which was voluntarily offered to Income Tax and was confirmed in the Assessment order as undisclosed income, on appeal by the appellant, the Id. Commissioner of Income Tax (Appeals) vide Appellate Order dated 05.10.2016 have set aside the said amount. Thus, the Income Tax Department have not drawn any adverse conclusion with regard to the receipt of defective packing material from M/s Uma Polymers, which is one of the basis for drawing adverse assumption and presumption against the appellant. We further find that the appellant has given a cogent explanation with regard to the

sheet/ survey report found from the premises of Sh. Purohit, which have been arbitrarily rejected by the Adjudicating Authority.

42.2 We also find that invocation of extended period of limitation is bad and not available to Revenue, as no case of ` suppression or contumacious conduct is made out.

42.3 In view of our findings and observations, we allow these appeals and set aside the impugned order. Thus, both the appeals are allowed with consequential benefits to the appellants. Early hearing application is also disposed of.

(Pronounced on 02.09.2022).

(Anil Choudhary)
Member (Judicial)

(P. V. Subba Rao)
Member (Technical)

Pant