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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

SINGLE MEMBER APPEAL BRANCH

Appeal No. **E/2267/2009 E / CO / 239 / 2009-SM[BR]** Date **28/04/2011**
APPeal NO. **E / 2583 – 2584 /2009 –SM[BR] E / CO/ 241 -242 /2009 –SM[BR]**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E. KANPUR

117/7, SARVODAYA NAGAR, KANPUR 208005.

C.C.E. KANPUR Appellant

Vs

M/S PRABHU LALA RAM RATAN DAS (P) LTD Respondent

I am directed to transmit herewith a certified copy of **Final order No. 219 -221 / 2011 –SM[BR]** dated 15.4.2011 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent

1. **M/S PRABHU LALA RAM RATAN DAS (P) LTD**
2. **SHRI VIJAY KUMAR GUPTA DIRECTOR**
3. **SHRI DEVENDRA KUMAR KUPTA DIRECTOR**

3/4, CHATTA BAZAR, AGRA.

2. Adv. / Consult SHRI BIPIN GARGA ADV.
B-1/1289-A, VASANT KUNJ NEW DELHI

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi -
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file

Assistant Registrar
(SM Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
SINGLE MEMBER BENCH

Excise Appeal No.E/2267/2009 with E/CO/239/09

Excise Appeal No.E/2583-84/2009 with E/CO/241-42/09

(Arising out of Order-in-Appeal No.116-118-CE/APPL/KNP/2009 dt.23.04.2009 passed by the CCE (Appeals), Kanpur)

For approval and signature:

Hon'ble Mr.M.Veeraiyan, Member (Technical)

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether Their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

M/s.Prabhu Lala Ram Ratan Das (P) Ltd. Appellants
Shri Vijay Kumar Gupta, Director
Shri Devendra Kumar Gupta

Vs.

CCE, Kanpur Respondent

Present for the Appellant: Shri S.K.Bhaskar, SDR
Present for the Respondent: Ms.Sukriti Das, Advocate

Coram: Hon'ble Mr.M.Veeraiyan, Member (Technical)

Date of Hearing/decision: 15.04.2011

Final **ORDER NO.** 219-221/2011 SM(BR)

PER: M.VEERAIYAN

The appeal Nos. E/2267/09, E/2583/09 and E/2584/09 are filed by the department against a common Order-in-Appeal No.116-118-CE/APPL/KNP/2009 dt.23.04.2009 passed by the

Commissioner (Appeals), Kanpur. The cross objection Nos.E/CO/239/09, E/CO/241/09 and E/CO/242/09 are connected to these appeals.

2. Heard both sides.

3. The relevant facts of the case, in brief, are that respondents, M/s. Prabhu Lala Ram Ratan Das (P) Ltd. are engaged in the manufacture of branded chewing tobacco and other respondents are directors of the said company. The officers visited factory premises, godown and office of the respondents, on 1.6.2007 and found as per records of the raw material stock was 1,13,177.300 kgs of raw tobacco whereas on physical verification the stock available was 65,815 kgs of raw tobacco and also 37,562 kgs of semi processed chewing tobacco. Thus, there was a shortage of 10,400 kgs of raw tobacco. Shri Vijay Kumar Gupta, Director in his statement on 1.6.2007 stated that the said shortage was due to dryness of raw tobacco and wastage during manufacturing process which were not taken into account. The investigators felt that the shortage of 10,400 kgs should have been utilized for manufacture of 550.2 bags each bag containing 540 pouches (each pouch containing 35 gm per pouch) and accordingly goods valued at Rs.7,42,770/- would have been cleared without payment of duty involved amounting to Rs.5,04,934/-. The respondents company paid duty involved on 21.06.2007. A show cause notice was issued proposing confirmation of demand of duty already paid and proposing imposition of penalty on the company and the directors. In reply to the show cause notice, the respondent company contested the demand on the ground that the shortage of raw

tobacco was due to dryness of raw tobacco and wastage during manufacturing process and the same is less than 3% of the raw tobacco processed. It was also contended that no presumption of unaccounted production of chewing tobacco can be made and duty demanded. The respondents also contested that no penalty was imposable on them. However, the original authority confirmed the demand as proposed in the show cause notice and imposed penalty of Rs.5,04,934/- under section 11AC on the respondent company and penalty of Rs.25,000/- each on the directors of the respondents.

4. On appeal by the parties, the Commissioner (Appeals) has set aside the order of the original authority with following findings:

"In such a scenarios, when appellants have categorically explained the reasons of shortage of raw tobacco, and have denied the departmental allegations of unaccounted manufacturing and clandestine clearance of the finished goods; and no discrepancy was noticed in the stock of finished goods found available in the unit; in absence of any thorough investigation and positive evidences, the benefit of doubt goes to the appellants, and the demand cannot be sustained on the ground of presumption. The whole case of the department is based on presumption, which cannot take the place of proof which is a well settled legal position.

After viewing the circumstances of the case in totality, I am of the opinion that on the basis of shortage in the stock of principal raw material, this long drawn conclusion will be highly presumptive that the entire shortage was actually consumed in the unaccounted manufacture of finished goods and which were subsequently removed clandestinely by the appellants. Such presumption is without any corroborative evidences, which are crucial to support the department allegations. On the contrary, the appellants have categorically denied the charges and have logically explained their *case, without admittal of the departmental view point at any stage of the proceedings.*

In view of the above, I do not find any justification to sustain the demand raised in this case. Regarding the imposition of penalties, I observe that since there is no case of evasion against appellant No.1, as such, there is no justification to impose the penalties upon any of the appellants. I, therefore, set aside the impugned order and allow the appeals filed by the appellants without consequential relief."

5. Learned SDR reiterates the grounds of appeal. He submits that the shortage stands admitted by the director. The respondent company deposited the entire duty involved on 21.6.2007. Therefore, the order of the original authority is legal and proper. He seeks for setting aside the order of the Commissioner (Appeals) and restoration of the order of the original authority.

6. Learned Advocate for the respondents reiterates the grounds in the cross objections. It was a case of shortage of raw tobacco only. The shortage is less than 3% considering that about 4 lakhs kgs of production was recorded during the year 2007-08. No shortage of other raw materials has been found. Serious allegation of suppression of production and clandestine removal has been made on the basis of presumption and assumption. Mere payment of duty at the instance of department cannot bar them for seeking remedy before the adjudicating authority and appellate authority. She relies on the decision of the Hon'ble High Court of Punjab and Haryana High Court in the case of CCE, Chandigarh vs. Nachiketa Paper Ltd. reported in 2008 (225) ELT 194 (P & H) in support of her contention that the demand of duty on presumption and

assumption that the raw material found short must have been used in the manufacture of final products which would have been cleared without payment of duty was not justified.

7. I have carefully considered the submissions made from both sides and perused the records. At the time of visit of the officers, the stock of raw tobacco was found partly as raw tobacco and partly as semi processed tobacco. It is not disputed that there was shortage of 10,400/- kgs of raw tobacco when compared to the stock available as per records. The explanation given by the directors of the respondent-company was that the same was attributable to dryness of raw tobacco and wastage and manufacturing loss over a period of time. Before the original authority, it was claimed that the loss was less than 3%. There was no admission of suppression of production or production of goods without bringing them into account and clandestine removal of the same. There is also no evidence in the form of private records indicating unaccounted production and clandestine removal of the goods. Mere payment of duty involved, (which according to the advocate was under compulsion and according to the learned DR was voluntary without protest) cannot be the basis for coming to the conclusion of suppression of production and clandestine removal. In the absence of any evidence indicating suppression of production and clandestine removal of the same, merely based on shortage of raw materials, no duty on assumed excess production of final products can be made. The facts in the case CCE, Chandigarh vs. Nachiketa Paper Ltd. of Hon'ble High Court of Punjab & Haryana are akin to the facts of the present case. In

view of the above, conclusion reached by the Commissioner (Appeals) that the demand was made on the basis of presumption and no efforts have been made to verify the facts to substantiate allegation against the party cannot be held unreasonable. Further no evidence of corroborative nature such as shortage of other raw materials or documents indicating excess production or clearance has been relied. In view of the above, there is no justification for interference with the order of the Commissioner (Appeals).

8. The appeals filed by the department are rejected. The cross objections are merely in support of the order of the Commissioner (Appeals) and they are also disposed of.

Pronounced in the open court)

(M.VEERAIYAN)
MEMEBR (TECHNICAL)

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