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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/2035 & 2051/2008 – SM [BR]** Date **02/05/2011**

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

To :
C.C.E. LUCKNOW

7-A, ASHOK MARG, LUCKNOW.

C.C.E. LUCKNOW Appellant

Vs

M/S DURGA TRADING CO. Respondent

I am directed to transmit herewith a certified copy of **Final order No . 225- 226 / 2011-SM[BR]** Dated13.4.2011 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
M/S DURGA TRADING CO.
KHURSHID BAUG.LUCKNOW (UP)

2. Adv. / Consult SHRI BIPIN GARG 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. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi -
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

2. **SHRI UDAI CHAND CHAURASIA, PROPRIETOR,**
M/S UDAI TRADERS,67 SHRI RAM ROAD, LUCKNOW. (U.P.)

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. III

Excise Appeal No. 2035 & 2051 of 2008-SM(BR)

[Arising out of Order-in-Appeal No. 76 & 77-CE/LKO/08 dated 30.5.2008 passed by the Commissioner of Central Excise & Service Tax (Appeals), Lucknow]

For approval and signature:

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

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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

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Commissioner of Central Excise Lucknow — Appellants

Vs.

M/s. Durga Trading Co.
Shri Udai Chand Chaurasia — Respondent

Appearance:
Shri R.K. Gupta, SDR for the Appellants
Shri Bipin Garg, Advocate for the Respondent

Final

Date of Hearing/decision : 13.04.2011

ORAL ORDER NO. 225-226/2011 SM(BR)

Per M. Veeraiyan:

These two appeals by the department are against the order of the Commissioner (Appeals) No. 76 & 77-CE/LKO/08 dated 30.5.2008.

2. Heard both sides extensively.

3. The relevant facts, in brief, are that M/s. Durga Trading Co. is a manufacturer of 'Pukar' brand gutka. The premises of Durga Trading Company and premises of M/s Laxmi Agencies at Mumbai and other connected premises were searched on 28.2.07. Certain consignments of 'Pukar' brand of gutka which were found in the premises of M/s. Laxmi Agencies and some consignments which were found being transported from Railway station were seized. Certain private records including diary which inter alia indicated receipt of gutka and payments in cash and accounts in coded form were also seized. Vehicles used for transporting gutka from Mumbai Railway station, were also seized. Statements were taken from representative of Durga Trading Co., Udai Trading (an intermediaries firmwith Shri Sushant Saha husband of Asha Sushant Saha who is proprietor of Durga Trading Company) and that of Laxmi Agency and transporters were taken. It appears summons were issued to Udai Chand Chaurasia to appear on 9.4,2007, 26.4.2007 and 19.7.07 for tendering evidence but he has not appeared, as mentioned in para 9.1 of the show cause notice. (At this juncture, learned advocate submits that statements of Shri Udai Chand Chaurasia was taken at Lucknow and the same has not been relied upon in the

show cause notice.) On the basis of show cause notices dated 24.8.07 issued to Durga Trading Co. and M/s. Laxmi Agencies and M/s. K.K. S. Enterprises (owner of two vehicles) and Shri Udai Chand Chaurasia, the original authority passed order confiscating the seized goods and vehicles. He allowed goods seized at the Railway station to be redeemed by Durga Trading Co. on payment of fine of Rs.2,60,000/-. He confirmed demand of Rs.5,81,645/- from Durga Trading Company and imposed equal amount as penalty. He also imposed a penalty of Rs.3,00,000/- on Shri Udai Chand Chaurasia, proprietor of M/s. Udai Traders. In addition, he confiscated the vehicles used and allowed the same to be redeemed on payment of redemption fine. He also imposed a penalty of Rs.50,000/- on Shri Sushant Kamlakar Saha, the owner of transport firm. On appeal by the two of the parties namely, M/s. Durga Trading Co. and Udai Chand Chaurasia , the Commissioner (Appeals) partly modified the order of the original authority. He set aside the demand made against M/s. Durga Trading Co. He also set aside the penalties imposed on M/s. Durga Trading Co. and Udai Chand Chaurasia. The department is in appeal against these orders of the Commissioner (Appeals).

4. Learned SDR reiterated the grounds of appeal and the findings and reasoning of the original authority. He particularly drew my attention to the fact that several telephone calls have been made between Durga Tarading Co. Udai Traders and Laxmi Agencies. Shri Udai Chand Chaurasia, as per records did not appear for giving evidence

inspite of being summoned on three occasions. He also submits that Commissioner (Appeals) has not appreciated the evidence relied upon by the original authority. However, he has relied upon the evidences which have neither been relied upon in the show cause notice nor considered in the order of the original authority. He has thus come to a conclusion without granting an opportunity to the respondent.

5. Learned advocate for the respondents strongly supported the order of the Commissioner (Appeals). He submits that the 'Pukar' brand of Durga Trading Co., is a popular brand. It is possible that somebody else has manufactured using the said brand name. Infact they have initiated legal proceedings against the errant firm and this fact has been appreciated by the Commissioner (Appeals). Learned advocate fairly submits that nobody appeared for personal hearing before original authority on behalf of Udai Chand Chaurasia. He fairly concedes that there is no specific averment in his reply regarding the calls made from phones of Udai Chand Chaurasia to Mumabi parties. Learned advocate also at this juncture submits that original authority has not given effective opportunity to cross examine Shri Yadav of Laxmi Agencies.

6.1 I have carefully considered the submissions from both sides and perused the records. The show cause notice alleges that Shri Udai Chand Chaurasia did not appear for summons for three days. This allegation in the show cause notice is being rebutted by the learned advocate on behalf of the respondents. A perusal of reply by Udai Chand Chaurasia does not indicate any submission on the allegation that calls were made from and received on land phones and calls were also made from his cell numbers to a person from whose custody Pukar brand gutka was seized. I also find from records that no one appeared on behalf of Udai Chand Chaurasia before original authority. I also find that the original authority though granted opportunity of cross examination of Shri Rajendra Daji Jadhav he did not turn up on the date for personal hearing and request for cross examination on a subsequent date was denied to them.

6.2 Further, I find that the Commissioner (Appeals) has relied upon certain evidence which have not been cited in the show cause notice and which were not before the original authority. In this regard, his observations are reproduced below:-

> "(c) I further observe that the plethora of evidences collected and relied upon by the department cast a doubt on the conduct of the appellants, but I find from the documents available on record that there are certain other evidences which have neither been relied upon in the show cause notice, nor have been addressed to in the impugned order. These evidences also need to be examined in juxtaposition to the evidence relied upon by the department. I find that on the day searches were conducted in Mumbai, simultaneous searches were also conducted at the appellants premises at Lucknow and statements were recorded."

7. The provisions relating to the production of additional evidence before Commissioner (Appeals) as per Rule 5 of Central Excise (Appeals) Rules, 2001 reads as under:

"RULE 5. Production of additional evidence before Commissioner (Appeals). — (1) The appellant shall not be entitled to produce before the Commissioner (Appeals) any evidence, whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the adjudicating authority except in the following circumstances, namely :-

(a) where the adjudicating authority has refused to admit evidence which ought to have been admitted; or

(b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by adjudicating authority; or

(c) where the appellant was prevented by sufficient cause from producing, before the adjudicating authority any evidence which is relevant to any ground of appeal; or

(d)where the adjudicating authority has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

(2)No evidence shall be admitted under sub-rule (1) unless the Commissioner (Appeals) records in writing the reasons for its admission.

(3)The Commissioner (Appeals) shall not take any evidence produced under sub-rule (1) unless the adjudicating authority or an officer authorised in this behalf by the said authority has been allowed a reasonable opportunity, -

(a) to examine the evidence or document or to cross-examine any witness produced by the appellant; or

(b) to produce any evidence or any witness in rebuttal of the evidence produced by the appellant under sub-rule (1).

(4)Nothing contained in this rule shall affect the power of the Commissioner (Appeals) to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal."

8. The Commissioner (Appeals) has thus relied upon certain evidence which were not relied upon in the show cause notice and which were not before original authority and the same have been relied upon in a manner which is not in consonance with the provisions of Rule 5 of the Central Excise (Appeals) Rules 2001.

9. As already mentioned, the order of the original authority also suffers from the violation of principles of natural justice inasmuch as the request for cross examination of Shri Rajendra Daji Jadhav on a subsequent day was denied.

10. In view of the above, I deem it appropriate that the matter should be decided afresh by the original authority. To enable the same, without expressing any opinion on the merits of the case, I set aside the order of the Commissioner (Appeals) and order of the original authority in so far as the same relates to these two respondents and remand the order to the original authority. The respondents are permitted to file detailed written submissions including evidence they have relied upon before the Commissioner (Appeals) within 45 days from the date of receipt of this order. Thereafter, the original authority shall decide the matter expeditiously preferably within three months after the expiry of the time limit prescribed for filing written submissions. He shall also offer cross examination of Shri Rajendra Daji Jadhav .

11. Appeals are disposed off as above.

(M. Veeraiyan)
Member(Technical)

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