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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/1281/2007-1285/2007 – SM[BR] Date 17/08/2010

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

To :
M/S K.P.PAN FLVOURS PVT. LTD.
133/211, TRANSPORT NAGAR, KANPUR.
M/S K.P.PAN FLVOURS PVT. LTD.
[2] SHRI DEEPAK SHARMA 59/103, DANAKHORI TELIANA KANPUR.
[3] M/S VIJAY&COMPANY 13/1, HAATHIPLA, INDORE.
[4] M/S NAVRANG STORES JHAMARKET ALLAHABAD.
[5] M/S VIJAY AGENCY 52/43, NAYAGANJ KANPUR.

Appellant
Vs
C.C.E. KANPUR
Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 885 – 889 / 2010 –SM[BR] dated 12.8.2010 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
   C.C.E. KANPUR
   117/7, SARVODAYA NAGAR, KANPUR 208005.
2. Adv. / Consult
   MR.VERMA KANT & ASSOCIATES
   704,NILGIRI APARTMENT,9,BARAKHAMBA ROAD,N.DELHI
3. S.D.R
4. ~~J.C.D.R.~~
5. Bar association. CESTAT. New Delhi
6. Director Publications. Customs. Excise. I.P. Estate. New Delhi
7. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
10. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
11. Easv Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
12. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Harvana)
13. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block 2, R.K.Puram,New Delhi-110066
Principal Bench, New Delhi.

E/1281-1285/07-SM

(Arising out of Order-in-Appeal No.642-648-CE/APPL/KNP/2006 dt.22.12.2006 passed by the Commissioner(Appeals), Kanpur)

For approval and signature:

Hon'ble Mr. Rakesh Kumar, 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?

2.Whether it would be released under Rule 27 of : the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?

3.Whether their Lordships wish to see the fair copy of the order? :

4.Whether order is to be circulated to the Department Authority? :

1. M/s. K.P.Pan Flavours(P) Ltd.
2. Sh. Deepak Sharma
3. M/s. Vijay & Co.
4. M/s. Navrang Stores
5. M/s. Vijay Agency

Appellant

Vs

CCE, Kanpur

Respondent

Appearance
Shri Krishna Kant, Adv. For Appellant

Shri I.Baig, DR for Respondent

Coram: Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

Date of hearing: 18.3.2010
Date of decision: 12/8/2010
Final Order No. 885-889/2010 SM (BR)

Per Rakesh Kumar:

Appellant No.1 are the manufacturer of Gutka and Pan Masala bearing brand names – "Rajshree", "Rajshree Supreme", "Saffronic", "Madhuban" and "Kamla Pasand". The branded Gutka and Pan Masala is manufactured under a franchisee agreement with M/s. Kamla Kant & Co., a partnership firm of Shri Kamla Kant Chaurasia, Shri Kamal Kishore Chaurasia and Mrs. Sudama Devi, which is the owner of "Rajshree". "Rajshree Supreme", "Saffronic" brands. Appellant No.3,4 & 5 are the dealers buying Gutka and Pan masala from Appellant No.1. Appellant No.2 is the owner of the godown in which, he is alleged to be storing various raw-materials for manufacture of gutka and pan masala pouches on behalf of Appellant No.1.

1.1 On 25.6.04, the Officers of Directorate General of Central Excise Intelligence (DGCEI) conducted simultaneous search of the following premises -

(a) Factory as well as godown premises of Appellant No.1

(b) Residential premises of Sh. Kamal Kishore Chaurasia and Sh. Anand Chaurasia.

(c) Business premises of M/s. Vijay & Co., Indore(Appellant No.3), M/s. Vijay Agency, Kanpur(Appellant No.5) and M/s. Navrang Stores, Allahabad (Appellant No.4).

(d) Business premises of M/s. Vivek Traders, Lucknow; and M/s. K.K.Traders, Kanpur.

(e) Premises of transport companies – M/s. Hathras Forwarding Agency, Kanpur and M/s. Vinod Forwarding Agency, Kanpur.

(f) Raw material supplier of the Appellant No.1.

1.2 The above searches resulted in seizure of unaccounted gutka, raw-material packing material and incriminating documents etc. The details of the finished goods, lamination etc. seized, with which we are concerned in these appeals, are as under:

1.2.1 Search at factory premise of the Appellant No.1 revealed shortages in lamination roll, supari and tobacco. Search at godown premises of Appellant No.1 resulted in seizure of some unaccounted finished goods as well as raw-material which were placed under seizure. Search at the business premises of M/s. K.K.Traders resulted in recovery of unaccounted cash of Rs.6,71,150/- and search at the residential premises of Shri K.K.Chaurasia resulted in recovery of case of Rs.3,36,000/- . The cash recovered from M/s. K.K.Traders and from residential premises of Sh. K.K.Chaurasia was placed under seizure. From the premises of M/s. Vijay Agencies and M/s. Vijay & Co., finished goods(Gutka) without any duty paying documents were recovered which were placed under seizure. Similar seizure of unaccounted Gutka bags manufactured by Appellant No.1 were made from M/s. Navrang Stores and M/s. Vivek Traders. From the premises of transporters, bags containing "Rajshree" brand gutka was recovered and since no duty paying documents were produced, the same were placed under seizure. The goods seized from the godown included lamination rolls of the brands being used by Appellant No.1 as well as the lamination rolls of other brands like "Phoolchand" and "Phoolchand Supari" empty gutka tin tobacco etc..

1.3 On completion of investigation, a show cause notice dt.21.4.06 was issued to the Appellant No.1 and other persons demanding duty of Rs.2,20,39,725/- from Appellant No.1, alongwith interest on the duty under Section 11AB and proposing imposition of penalty on them. The show cause notice also proposed appropriation of Rs.75.40 lakhs deposited by Appellant No.1 during the investigation. In addition to this, another show cause notice dt.22/12/04 had been issued to M/s. K.P.Pan Flavours(P) Ltd., Kanpur (Appellant No.1), Sh. Deepak Sharma (Appellant No.2), M/s. Vijay & Co., Indore (Appellant No.3), M/s. Navrang Stores, Allahabad

(Appellant No.4), M/s. Vijay Agency, Kanpur (Appellant No.5), M/s. Vivek Traders, Lucknow, M/s. K.K.Traders, Kanpur, M/s. Kay Pan Products Pvt. Ltd., Lucknow and Sh. Ravi Rastogi for –

(a) demand of duty amounting to Rs.2,77,938/- from Appellant No.1 under proviso to Section 11A(i) of the Central Excise Act,1944 alongwith interest on duty under Section 11AB ibid;

(b) confiscation of Gutka and raw material – tobacco, plastic laminates etc. and cash seized from various premises and

(c) imposition of penalty on the noticees under the provisions of Rule 25(1) of Central Excise Rules,2002 read with Section 11AC of the Central Excise Act and Rule 26 of the Central Excise Rules.

1.4 In respect of show cause notice dt.21.4.06 the Appellant No.1 and Sh. Pradeep Kumar Chaurasia filed an application under Section 32E of the Central Excise Act,1944 before the Settlement Commission admitting duty evasion and admitting duty liability of Rs.47,67,175/- as against duty demand of Rs.2,20,39,725/-. The Settlement Commission, vide order No.F.775/CE/08-SC(PB) dt.28.2.08, settled the duty liability of the Appellant No.1 at Rs.47,67,175/- plus interest at 13% per annum and penalty of Rs.15 lakhs.

1.5 The show cause notice dt.22.12.04 was adjudicated by Joint Commissioner vide order-in-original dt.26.6.04 by which –

(a) duty demand of Rs.2,77,938/- was confirmed against Appellant No.1, alongwith interest;

(b) penalty of Rs.2,77,938/- was imposed on Appellant No.1 under Section 11AC;

(c) penalty of Rs.2,77,938/- each was imposed under Rule 25 of Central Excise Rules,2002 on Appellant No.3, 4 & 5;

(d) penalty of Rs.2,77,938/- each was imposed under Rule 26 of Central Excise Rules on Sh. Kamal Kishore Chaurasia, and M/s. Vivek Traders,

(e) penalty of Rs.3,00,000/- was imposed on Appellant No.2 under Rule 26 of the Central Excise Rules; and

(f) the goods including cash seized from various noticees were ordered to be confiscated with option to be redeemed (except in respect of cash) on redemption fine of different amounts.

1.6 On appeal against the Joint Commissioner's order, the CCE(Appeals) passed order-in-appeal dt.22.12.06 by which –

(a) duty demand to the extent of Rs.2,43,288/- was upheld against Appellant No.1 as duty of Rs.34,650/- included in the demand confirmed by the Jt. Commissioner was the duty involved on the goods found in the premises of the Appellant No.1 and accordingly penalty of Rs.2,43,298/- on Appellant No.1 was upheld; and

(b) upheld the confiscation of the goods seized from the noticees but reduced the redemption fine and penalties. The reduced penalty on Appellant No.2,3,4 & 5 was Rs.2,00,000/- , Rs.20,000/-, Rs.10,000/- and Rs.10,000/- respectively.

1.6.1 Against the above order of CCE(Appeals), the present appeals have been filed.

2. Heard both the sides.

2.1 Shri Krishna Kant, Advocate, the learned Counsel for the Appellants made the following submissions:-

(1) The duty demand of Rs.2,43,288/- upheld by CCE(Appeals) is in respect of the goods manufactured by Appellant No.1 from the premises of dealers and freight forwarders. The goods recovered from the freight forwarder's premises were covered by the invoices – invoices issued to Sh. Sudhir Kumar and Sh.

Shailendra Kumar. As regards the goods seized from the premises of dealers, the same had also been cleared on payment of duty. As held by Hon'ble Supreme Court in the case of CCE vs Decent Dyeing Co. reported in 1990(45)ELT.201(SC) and by Hon'ble Delhi High Court in case of Sulekh Ram and Sons vs UOI & Others reported in 1978 ELT(J.525), in respect of the excisable goods seized from the market, the burden to prove that no duty had been paid is on the Department.

(2) Since the goods seized from the premises of dealers (Appellant No.3,4 & 5) and freight forwarders were duty paid, there is no question of confiscation of the same under Rule 25 of the Central Excise Rules and imposition of penalty on the Appellant No.1,3,4 & 5.

(3) The duty demand in show cause notice dt.22/12/04 is included in the duty demand of Rs.2,20,39,725/- raised in the show cause notice dt.21.4.06 which has already been settled for Rs.47,67,175/- by the Settlement Commission vide Settlement Commission's order dt.28.2.08. In view of this, the present duty demand does not survive.

(4) There is no justification for confiscation of raw-material like plastic laminates, metal containers etc.

(5) As regards the penalty on Appellant No.2, there is no justification for the same as –

(a) the lamination seized from the godown was rejected material from M/s. Flex Industries, purchased from M/s. Kalpana Trading Co. and M/s. Montage Enterprises and was meant for manufacture of polyethylene bags, kites etc. not the gutka/pan masala pouches and considering the same as fresh lamination of Appellant No.1 is wrong;

(b) the processed tobacco seized from the godown is inferior quality tobacco purchased by the Appellant No.2 from M/s. Banshidla Shriram vide cash memo No.5301 dt.12.9.03, 5302 dt.12.9.03 and 5245 dt.12.9.03 and the same did not belong to Appellant No.1;

(c) the tin containers bearing "Kamla Pasand" and "saffronic" be seized from the godown were not meant for packing of Gutka of Appellant No.1, as the same was rejects meant for sale to scrap dealers; and

(d) the Appellant No.2 is not involved in any manner in storage of excisable goods which he knew were liable for confiscation.

2.2 Sh. I.Baig, the learned DR, defending the impugned order, made the following submission:

(1) There is no doubt that there were larger scale clandestine clearances of gutka by the Appellant No.1 – a fact accepted before the Settlement Commission. Therefore, the veracity of the statement of Sh. Pradeep Chaurasia, that the goods seized from the freight forwarder's premises and dealers' premises were non duty paid, cannot be doubted.

(2) The duty demand against Appellant No.1 in the show cause notice is not covered by the matter settled by the Settlement Commission. In any case, the Appellant should have raised this issue of double demand before the Settlement Commission, which was not done.

(3) In respect of the goods seized from the premises of m/s. Vinod Forwarding Agency, the person who issued the invoice – M/s. Krishna Agencies, Kanpur is fictitious. In case of the goods seized from M/s. Hathras Forwarding Agency, while the invoice produced was issued to Sh. Shailendra Kumar, the corresponding GR showed the consignee as Sh. Sudhir Kumar.

(4) The Appellant No.2 – Sh. Deepak Sharma was storing the unaccounted raw material on behalf of the Appellant No.I and this fact has been admitted by Sh. Chaurasia. None of the laminate seized were waste or reject.

3. I have carefully considered the submissions from both the sides and perused the records.

3.1 Coming first to the duty demand of Rs.2,43,288/- against the Appellant No.1 and penalty of equal amount on them under Section 11AC, I find that this duty demand is in respect of the goods manufactured by the Appellant seized from the premises of two transporters and some dealers.

3.1.1 As regards the goods seized from M/s. Vinod Forwarding Agency, the same was covered by an invoice issued by M/s. Krishna Agencies, Kanpur, which was found to be a non-existent firm. As regard the goods seized from the premises of the other transporter – M/s. Hathras Forwarding Agency, while as per the invoice, the consignee was Sh. Sudhir Kumar, as per the GR, the consignee was Sh. Shailendra Kumar and in respect of this discrepancy, Sh. Pradeep Chaurasia, in his statement dt.14/12/04, inspite of being specifically asked, could not give any explanation. Therefore, in respect of the bags of gutka of the brands manufactured by Appellant No.1 seized from the premises of the transport companies, the duty demand has been rightly upheld.

3.1.2 As regards the "Kamla Pasand", "Rajshree Supreme" and "Saffronic" brand gutka seized from the business premises of Appellant No.5 on 25.6.04, Sh. Rameshwar Gupta, Proprietor of the Appellant firm, other than purchase invoice of Jan.'04 showing purchase of "Rajshree" brand gutka could not give any other evidence. In respect of 6950 pouches of "Rajshree" brand gutka seized on 25.6.04 from the business premises of Appellant No.4, Shri Arun Kumal Agarwal, partner of the Appellant firm, in his statement stated that they used to purchase gutka from Appellant No.1 sometimes under Central Excise invoices and sometimes without any invoices for which payments used to be made in cash and that he is unable to produce any invoice to cover the seized goods. As regards the seizure of 42500 pouches of "Kamla Pasand" brand gutka and 150 tins of "Kamla Pasand" Gutka from the premises of Appellant No.3 on 25.6.04, the Appellant could not produce any duty payment documents and Shri Jai Kumar Satwai, Manager and son of the Proprietor Shri Raj Kumar Satwai stated that they were purchasing "Kamla Pasand" brand gutka from Appellant No.1 without any invoices and the goods were being received under the cover of GRs/bilties in favour of non-existent firms like – M/s. Rajesh & Co., M/s. Jai Pan Corner etc.

3.1.3 Thus the goods seized from the premises of Appellant No.3, 4 & 5 were not covered by any duty paying documents and the statements of the partner/proprietor/manager of these firms indicated that the same had been received from Appellant No.1 without any invoices. The statement of Sh. Jai Kumar Satwani even describes the modus operandi of receiving the Gutka consignments from Appellant No.1 without the cover of invoices.

3.1.4 The Appellant have cited the judgments of Hon'ble Delhi High Court in case of Sulekh Ram & Sons vs UOI & Others reported in 1978 ELT.(J 525) and of Hon'ble Supreme Court in case of CCE vs Decent Dyeing Co. reported in 1990(45)ELT.201(SC) wherein it was held that in respect of the excisable goods seized from the market, the burden to prove their non-duty paid nature is on the Department. However, in this case, in view of the admissions of the partner/proprietor of the Appellant firms that they were receiving gutka from Appellant No.1 without any invoice and admission of large scale duty evasion made by Appellant No.1 before the Settlement Commission, the burden of proof shifts to the Appellants which has not been discharged by them by producing cogent evidence in support of duty paid nature of the goods under seizure.

3.1.5 In view of the above discussion, the duty demand on the Appellant No.1 and penalty on them under Section 11AC has been rightly upheld and similarly the confiscation of the goods seized from Appellant No.3,4 & 5 and penalty on them under Rule 26 of Central Excise Rules has also been correctly upheld.

4. As regards the penalty on Appellant No.2 Shri Deepak Sharma and confiscation of the goods whose ownership has been claimed by him, it is seen that there is no dispute that the fact that the godown from which the goods - raw-material and packing material, belonging to Appellant No.1 and raw-material claimed by Appellant No.2 had been seized, was in the name of the Appellant No.2. The Department's allegation is that the Appellant No. 2 was storing the unaccounted raw material belonging to Appellant No.1 in his godown.

4.1 From the godown of Appellant No.2, 4200 kgs. of plastic lamination of "Rajshree" brand gutka, 420 kg. of plastic lamination of "Kamla Pasand" brand gutka, 3120 kgs. of tobacco, 1125 kgs. of polypouches, 4020 pcs. of empty tin containers bearing "Kamla Pasand" brand name, 1536 tin containers of "Saffronic" brand,60 kgs. of musk abrette, 4550 kgs. of plastic lamination of "Phoolchand" brand, 105 kg. plastic lamination of "Phoolchand Super" brand and 7410 kg. plastic lamination of "Talab" brand was recovered, out of which while the lamination of "Phoolchand" "Phoolchand Super" and "Talab" brand was claimed by the Appellant No.2 and the remaining goods were claimed by Appellant No.1.

4.2 Shri Pradeep Chaurasia, while accepting the ownership of 3120 kgs. of tobacco, 4200 kgs. of plastic lamination of "Rajshree" brand gutka, 420 bags of plastic lamination of "Kamla Pasand" brand gutka, 1125 kgs. of polypouches, 4020 pcs. of tin containers "Kamla Pasand", 1536 tin containers of "Saffronic" and 60 kgs. of musk abrette, could not produce any bill or invoice for the same. Similarly Shri Pradeep Sharma has not been able to produce any bill or invoice for 4550 kgs. of plastic lamination of "Phoolchand" brand gutka, 105 kgs. of plastic lamination for "Phoolchand Super" brand gutka and 7410 kgs. of plastic lamination of "Talab" brand gutka and no evidence has been produced by him to show that this plastic lamination meant for packing of various brands of gutka was unusable meant for being sold as plastic waste. The goods seized from the godown of Appellant No.2 were obviously meant for unaccounted product of gutka of various brands and the Appellant No.2 was storing this material in his godown for various manufacturers of gutka including Appellant No.1. In view of this, the confiscation of these goods and penalty on the Appellant No.2 has been rightly upheld. However, looking to the role of Appellant No.2, the penalty on him is reduced to Rs.20,000/-.

5. In view of the above discussions, except for reduction of penalty on Appellant No.2 to Rs.20,000/- , the impugned order is upheld. The appeals stand disposed off as above.

(Order pronounced in the open Court on....12/....8/..2016

(Rakesh Kumar)
Member Technical

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