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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

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

EXCISE APPEAL BRANCH

Date **02/08/2011**

Appeal No. E/719 /2010-723 /2010 - EX[DB] WITH
E/S/748-723/2010-EX

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

To :
M/S KURELE PAN PRODUCTS PVT. LTD.
C-87/1, B.S. ROAD, INDUSTRIAL AREA, SITE-I,
GHAZIABAD.

M/S KURELE PAN PRODUCTS PVT. LTD. Appellant

Vs

C.C.E. GHAZIABAD Respondent

STAY ORDER NO. 767-771/2011-EX

I am directed to transmit herewith a certified copy of **Final order** No.680-684/ 2011 EX[DB] dated 29-7-11 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
C.C.E. GHAZIABAD
C.G. O. COMPLEX-II, KAMLA
NEHRU NAGAR, GHAZIABAD
201302

2. Adv. / Consult
MR.RUPESH KUMAR, Adv.,
F-12A,(L.G.F)KAILASH COLONY, N DELHI.110048

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise, I.P. Estate, New Delhi
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 - 110005
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
14. HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

P.T.O.-2,

15. M/S GAHOI CHEMICALS PVT. LTD.
C-152, B.S. ROAD, INDL. AREA, GHAZIABAD.

16. SHRI K.M.SHUKLA, DIRECTOR OF
M/S KURELE PAN PRODUCTS PVT. LTD. C-87/1, B.S. ROAD, INDUSTRIAL AREA, SITE-I, GHAZIABAD.

17. M/S KUMAR ENTERPRISES,
A-68, PARIJAT APARTMENTS, PITAMPURA, DELHI.

18. M/S KUMAR TRADERS,
C-158, B.S. ROAD, INDL. AREA, GHAZIABAD.

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing/decision:11.07 .2011

Stay Application No.748 of 2010 in Central Excise Appeal No.719 of 2010

M/s Kurele Pan Products Pvt. Ltd. .. Appellants

Vs.

C.C.E., Ghaziabad .... Respondent

Stay Application No.749 of 2010 in Central Excise Appeal No.720 of 2010

M/s K.M. Shukla, Director .. Appellants

Vs.

C.C.E., Ghaziabad .... Respondent

Stay Application No.750 of 2010 in Central Excise Appeal No.721 of 2010

M/s Gahoi Chemicals Pvt. Ltd. .. Appellants

Vs.

C.C.E., Ghaziabad .... Respondent

Stay Application No.751 of 2010 in Central Excise Appeal No.722 of 2010

M/s Kumar Enterprises .. Appellants

Vs.

C.C.E., Ghaziabad .... Respondent

Stay Application No.752 of 2010 in Central Excise Appeal No.723 of 2010

M/s Kumar Traders .. Appellants

Vs.

C.C.E., Ghaziabad .... Respondent

Appearance:

Shri S.K. Bagaria, Senior Advocate with Shri Rupesh Kumar, Advocate for the appellants
Shri I. Baig, Authorized Departmental Representative (DR) for the Revenue

Coram: Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Technical Member

STAY Oral Order No. 767-771/2011-EX

Per Shri Justice R.M.S. Khandeparkar:

Since we propose to dispose of the appeals themselves, the applications are allowed without insisting for pre-deposit with direction to the registry to place the appeals for final disposal forthwith. The applications stand disposed of.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Technical Member

scd/

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing:11.07 .2011
Date of pronouncement: 29.7. **2011**

For Approval and Signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Technical Member

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 26 of the CESTAT (Procedure) Rules, 1982?	Yes
2	Whether it should be released under Rule 26 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
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

Central Excise Appeal No.719 of 2010

Arising out of the order in original No.54/Commr/GZB/2009 DATED 24.12.2009 passed by the Commissioner, Customs & Central Excise, Ghaziabad.

M/s Kurele Pan Products Pvt. Ltd. .. Appellants

Vs.

C.C.E., Ghaziabad .... Respondent

Central Excise Appeal No.720 of 2010

Arising out of the order in original No.54/Commr/GZB/2009 DATED 24.12.2009 passed by the Commissioner, Customs & Central Excise, Ghaziabad.

M/s K.M. Shukla, Director .. Appellants

Vs.

C.C.E., Ghaziabad .... Respondent

Central Excise Appeal No.721 of 2010

Arising out of the order in original No.54/Commr/GZB/2009 DATED 24.12.2009 passed by the Commissioner, Customs & Central Excise, Ghaziabad.

M/s Gahoi Chemicals Pvt. Ltd. .. Appellants

Vs.

C.C.E., Ghaziabad .... Respondent

Central Excise Appeal No.722 of 2010

Arising out of the order in original No.54/Commr/GZB/2009 DATED 24.12.2009 passed by the Commissioner, Customs & Central Excise, Ghaziabad.

M/s Kumar Enterprises .. Appellants

Vs.

C.C.E., Ghaziabad .... Respondent

Central Excise Appeal No.723 of 2010

Arising out of the order in original No.54/Commr/GZB/2009 DATED 24.12.2009 passed by the Commissioner, Customs & Central Excise, Ghaziabad.

M/s Kumar Traders .. Appellants

Vs.

C.C.E., Ghaziabad .... Respondent

Appearance:

Shri S.K. Bagaria, Senior Advocate with Shri Rupesh Kumar, Advocate for the appellants
Shri I. Baig, Authorized Departmental Representative (DR) for the Revenue

Coram: Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Technical Member

FINAL Oral Order No. 680-684/2011-EX

Per Shri Justice R.M.S. Khandeparkar:

These appeals were heard pursuant to the order passed in Stay Applications Nos.748 to 752 of 2010 on 11.7.2011.

2. We have heard at length the learned Senior Advocate for the appellants and the DR for the respondent. All these appeals arise

from the order dated 24.12.2009 passed by the Commissioner, Ghaziabad. By the impugned order, the appellants M/s Kurele Pan products Pvt. Ltd. has been ordered to pay the central excise duty to the tune of Rs.1,35,91,459/- along with interest and equal amount of penalty. Besides, penalty of Rs.25 lakhs has been imposed on Shri K.M. Shukla, Director of the said company and penalty of Rs.15 lakh each has been imposed on M/s Gahoi Chemicals Pvt. Ltd., M/s Kumar Enterprises and M/s Kumar Traders.

3. The impugned order is sought to be challenged on the following grounds:-

a) The impugned order has been passed in gross violation of principles of natural justice and therefore, is a nullity.

b) The impugned demand has been raised on assumption that 1000 kgs. of perfume allegedly found short during stocking must have resulted in manufacture of 1,23,000 kgs. of gutkha which must have been cleared clandestinely without payment of duty even though there is no evidence at all either of manufacture or of removal or clearance of any such quantity.

c) The quantity of 15,800 kgs. of gutkha allegedly found in excess was the subject matter of another show cause notice and on the adjudication wherein the contention of the appellants was accepted by the authority, however, this fact has been totally ignored.

d) Neither the contentions sought to be canvassed by the assessee have been appreciated nor even considered in proper perspective.

e) Levy of penalty is totally illegal.

4. The facts on record reveal that the premises of the appellants were searched on 30.5.2006 and consequent to the investigation carried out, a show cause notice dated 28.11.2006 came

to be issued. The same was adjudicated upon under order dated 13.2.2009. This is not the subject matter of the present appeals.

5. A show cause notice dated 31.7.2008 came to be issued demanding duty to the tune of Rs.1,35,91,459/- on the basis that during the search conducted on 30.5.2006, a quantity of 1000 kgs. of perfume was found short and by utilising the same gutkha to the extent of 1,23,000 kgs. was manufactured and clandestinely cleared. The notice was contested by the appellants. Thereafter, the matter was fixed for hearing on 24.8.2009 which was sought to be adjourned as the Advocate for the appellants was indisposed. On 17.9.2009, the appellants wrote to the Department that some of the relied upon statements/documents along with the show cause notice were not provided to the appellants and requested for supply of copies thereof. The personal hearing was thereafter fixed on 24.9.2009. However, the appellants sought adjournment on the ground that the documents were not yet received. Under letter dated 6.10.2009 by the Department, it was informed that all the information regarding RUD had been transferred to the Central Excise Commissionerate, Ghaziabad and the adjudication branch of the said Commissioner be contacted for further action. The next date of personal hearing was fixed on 22.10.2009 which was again adjourned on account of non-supply of the documents. The documents were in fact supplied on 22.10.2009 itself. The appellants filed reply on 17.11.2009. The appellants appeared before the authority and prayed for cross-examination of the various statements sought to be relied upon in the show cause notice. Personal hearing was then fixed on 20.11.2009 and the appellants reiterated the request for cross-examination of the witnesses. The authorities below however disposed of the proceedings vide impugned order dated 24.12.2009.

6. In the above noted background of the facts, the learned Senior Advocate for the appellants has submitted that specific request made by the appellants for cross-examination of the witnesses whose statements had been relied upon was totally neglected and without affording a fair opportunity to the appellants , the matter was disposed of in utter violation of principles of natural justice. According the learned Senior Advocate, the purpose and object for cross-examination was to elicit the truth and also to ascertain whether the statements were voluntarily given and denial of cross-examination has resulted in great prejudice to the appellants. There was no justification for rejection of the request for cross-examination. The appellants also sought to rely upon the following decisions in support of their contentions:-

a) *Arya Abhushan Bhandar vs. Union of India - 2002 (143) ELT 25 (SC)*

b) *Lakshman Exports Limited .vs. C.C.E. - 2002 (143) ELT 21 (SC)*

c) *Swadeshi Polytex Ltd. vs. C.C.E., Meerut – 2000 (122) ELT 641 (SC)*

d) *Kellogg India Pvt. Ltd. vs. Union of India – 2006 (193) ELT 385 (Bom.)*

e) *New Decent Footwear Industries vs. Union of India – 2002 (150) ELT 71 (Del.)*

f) *Sunder Ispat Limited vs. C.C.& C.Ex., Hyderabad – 2002 (141) ELT 24 (A.P.)*

g) *Parmarth Iron Pvt. Ltd. vs. Commissioner of Central Excise I reported in 2010 (255) ELT 496 (All.)*

h) *C.C.Ex., & Customs vs. Rikhab Mehta – 2010 (259) ELT 518 (Guj.)*

i) *Prakash Industries Ltd. vs. C.C.E., Raipur – 2010 (262) ELT 562 (Tri-Del.)*

j) *Bhagirathi Iron & Steel Pvt. Ltd. vs. C.C.E., Meerut – 2010 (261) ELT 654 (Tri-Del.)*

k) *Donear Décor Pvt. Ltd. vs. C.C.E., Rohtak – 2010 (259) ELT 473 (Tri-Del.)*

l) *Galaxy Indo Fab. Ltd. vs. C.C.E., Lucknow – 2010 (258) ELT 254 (Tri.-Del.)*

m) *Amkap Marketing Pvt. Ltd. vs. C.C.E., Lucknow – 2010 (256) ELT 260 (Tri.-Del.)*

7. Learned Senior Advocate has further submitted that refusal of the cross-examination results in violation of the principles of natural justice and any order passed in violation of principles of natural justice is to be held as nullity and in that regard, placed reliance in the following decisions: -

(a) ***State of Orissa vs. Bipani Dei – (1967) 2 SCR 625***

(b) ***Sriram Durga Prasad vs. Settlement Commissioner- (1989) 179 ITR 169.***

8. Drawing our attention to para 4 of the impugned order and in particular para 4.3, the learned Senior Advocate submitted that the ground given by the Commissioner for rejecting the request for cross-examination is totally misconceived. The hearings fixed on 24.8.2009, 24.9.2009 and 22.10.2009 were adjourned on account of non-supply of the relied upon documents. After supply of those documents, the first hearing took place on 20.11.2009 and the appellants had asked for cross-examination. In other words, cross-examination was applied for at the earliest available opportunity and therefore, there was no justification to deny the same. Attention was drawn in this regard to the decision in the matter **Emkay Investment vs. C.C.E., Calcutta I** reported in 2009 (151) ELT 361 (Tri-Cal.).

9. Learned Senior Advocate further submitted that the entire duty is merely on assumption that since 1000 kgs. of perfume was found short, there must have been clandestine manufacture of gutkha. In fact, the shortage of 1000 kgs. of perfume was fully explained by the appellants in their reply to the effect that the same was used in making 15,800 kgs. of gutkha which was admittedly found at the factory in semi-finished condition as it was yet to be packed in pouches. Even otherwise assuming that there was shortage of 1000 kgs. of perfume, such shortage can never result in the manufacture of 1,23,000 kgs. of gutkha. For the purpose of manufacture of gutkha

of such vast quantity, according to the learned Senior Advocate, various raw materials like supari 1,00,000 kgs., kattha 6000 kgs., tobacco 8,000 kgs., lime 3000 kgs., menthol 2000 kgs., oil 2000 kgs. and laung and elaychi 1000 kgs. would have been required. It was further contended that the Department did not bother to collect any evidence about the manufacture of alleged extra quantity, its transportation, its sale or disposal, about receipt of price for the same, identity of the buyer for such quantity and no records of any nature were seized to establish manufacture of such huge quantity of gutkha. The entire case has been based on mere assumption. No investigation has been carried out either from the buyers or from any other person nor any regarding the returns from disposal of such huge quantity of gutkha. No documentary evidence was ever being collected in support of such allegation. Reliance is placed in the decision in the matter of **Bhagirathi Iron & Steel P. Ltd. vs. C.C.E.** reported in 2010 (261) ELT 654, in support of the contention on behalf of the appellants. He has also submitted that there is total absence of evidence regarding any raw material or any other corroborative material to establish the charge of clandestine clearance. Reliance is placed in that regard in the matter of **Har Singar Gutkha Pvt. Ltd. vs. C.C.E.** reported in 2005 (186) ELT 369, **C.C.E. vs. G.M. Products Ltd.** reported in 2007 (207) ELT 723 and **Sanket Food Products Pvt. Ltd. vs. C.C.E.** reported in 2005 (188) ELT 107. Attention was also drawn to the fact that as regards the excess quantity of 15,800 kgs. of gutkha, already there had been adjudication resulting in acceptance of the contention of the appellants, however, this fact was totally ignored by the adjudicating authority.

10. The DR on the hand submitted that evidence placed on record clearly justifies the impugned order and does not warrant any interference. Cross-examination is not a matter of right and therefore,

merely because the cross-examination was rejected, that cannot be a ground for interference in the impugned order. He further submitted that the demand is based on the cogent material placed on record and therefore, the findings which have been arrived at are on the basis of proper assessment of the evidence on record. According to the DR, therefore, there is no case for interference in the impugned order. Reliance is placed in the decision in the matter of **Patel Products vs. C.C.E., Lucknow** reported in 2003 (151) ELT 650.

11. Though the impugned order is sought to be challenged on various grounds, the undisputed fact is that at the time the Department issued a show cause notice dated 31.7.2008, some of the relevant documents relied upon by the Department were not made available to the appellants. Copies thereof were furnished on 22.10.2009, this fact has not been disputed by the respondent. Being so, the learned Senior Advocate for the appellants is justified in contending that the demand for cross-examination of witnesses made by them on 20.11.2009 was on the very first occasion which was available to the appellants to make such demand for cross-examination of the witnesses. Once it is not in dispute that the case against the appellants is essentially based on the various facts disclosed from the statements recorded by the Department and the appellants had asked for cross-examination thereof it can hardly be stated that denial of cross-examination would not result in any prejudice to the appellants. The statement of facts disclosed in those statements being relevant for the decision in the matter, the appellants having requested for cross-examination of those witnesses it was but natural that the authority ought to have allowed the appellants to cross-examine those witnesses. Unless the testimony was subjected to test of cross-examination, the authorities were not entitled to rely upon those statements as gospel truth more

particularly because the appellants had specifically asked for cross-examination of those witnesses. Once it is apparent that the authorities had proceeded to decide the matter while denying this basic principles of natural justice to the appellants, the impugned order cannot be sustained and is liable to be set aside and the matter remanded for de novo consideration.

12. In the facts and circumstances of the case, therefore, without going into the merits of the case merely on the ground of denial of principles of natural justice to the appellants, the impugned order is hereby set aside and quashed and the authorities below are directed to give a fair opportunity to the appellants to cross-examine the witnesses and after rehearing the matter, should proceed to decide the same in accordance with the provisions of law.

(Pronounced in open Court on 29. 7- 2011)

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Technical Member

scd/