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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

Appeal No. E/3256/2005-3260/2005 & 3261/2005 - EX[DB] Date **23/08/2011**

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

To :
M/S DURGA TRADING CO

14,DATIA HOUSE K.COLONY KURSHED
BAG,LUCKNOW U.P.

M/S DURGA TRADING CO Appellant

Vs

C.C. LUCKNOW Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 732-737/ 2011 **EX[DB]** dated 12-8-11 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. LUCKNOW
5TH AND 11TH FLOOR,
KENDRIYA BHAWAN, SECTOR -
H, ALIGANH, LUCKNOW 226024.

2. Adv. / Consult
MR.BIPIN GARG
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 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

Assistant Registrar
(Excise Appeal Branch)

P.T.O.-2,

14. LALCHAND AGGRAWAL
B-1/78, SECTOR-B, ALIGANG, LUCKNOW

15. M/S R.P. PRODUCTSD
68, SHRI RAM ROAD, AMINABAD, LUCKNOW

16. M/S KASHI LAMNATOR (P) LTD.
NEAR SHIA COLLEGE, SITAPUR ROAD, LUCKNOW

17. M/S UDAY TRADERS
67, SRI RAM ROAD, AMINABAD LUCKNOW

18. M/S. BHUPESH BANSAL,
B-1/78, SECTOR-B,
ALIGANJ, LUCKNOW

19. SH. PANKAJ BHATIA, ADV.,
C & B LAW CONSULTANTS,
B-21, JANGPURA EXNTS. N. DELHI-14

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi.

Date of hearing: 12.07.2011
Date of decision: 12.08.2011

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri 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.	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.

Excise Appeal No. 3256 of 2005 with
[Arising out of Order-in-original No. 19/Commissioner/LKO/2005 dated 17.5.2005 passed by the Commissioner of Central Excise, Lucknow].

M/s Durga Trading Company — Appellants

Vs.

CCE, Lucknow — Respondent

AND

Excise Appeal No. 3257 of 2005 with

M/s Uday Traders — Appellant

Vs.

CCE, Lucknow — Respondent

AND

Excise Appeal No. 3258 of 2005

M/s Kashi Laminators Pvt. Limited — Appellant

Vs.

CCE, Lucknow — Respondent

AND

Excise Appeal No. 3259 of 2005

M/s Lal Chand Agarwal — Appellant

Vs.

CCE, Lucknow — Respondent

AND

Excise Appeal No. 3260 of 2005 with

M/s R.P. Products — Appellant

Vs.

CCE, Lucknow — Respondent

AND

Excise Appeal No. 3261 of 2005

Sh. Bhushan Bansal — Appellant

Vs.

CCE, Lucknow — Respondent

Appearance:

Rep. by Sh. Bipin Garg, Amit Awasthi Advocates, Sh. Alim Ali, Auth. Rep., and Sh. Pankaj Bhatia, Advocate for the appellants.

Rep. by Sh. Sunil Kumar, DR for the respondent.

Coram: **Hon'ble Sh. Justice R.M.S. Khandeparkar, President**
Hon'ble Sh. Rakesh Kumar, Member (Technical)

FINAL Oral Order No. 732-737/2011-EX

Per: Shri Justice R.M.S. Khandeparkar:

Heard at length the learned Advocate for the appellants and DR for the respondent. Perused the written submissions.

2. These appeals arise from the common order dated 27.05.2005 passed by the Commissioner, Lucknow. By the impugned order while holding that the appellants are involved in clandestine removal of the goods in the connivance with the dealers and transporters, duty has been confirmed alongwith interest and imposition of penalty.

3. The appellant M/s Durga Trading Company (hereinafter referred to as DTC) is engaged in manufacture of pan masala and gutka under brand name Pukar classifiable under chapter heading 2106.00 and 2404.49 respectively of the first schedule to the Central Excise Tariff Act, 1985. It is a proprietary concern owned by Smt. Asha Chaurasia w/o Sh. Udai Chand Chaurasia. The authorized signatory of M/s DTC is Shri Ashish Srivastava M/s DTC clears its products to various dealers including M/s Udai Traders, M/s R.P. Products, M/s New Sashi Zarda Bhandar.

4. M/s Udai Traders is a proprietary concern of Sh. Udai Chand Chaurasia and M/s R.P. Products is the proprietary concern of Sh. Raj Kumar Chaurasia. M/s New Sashi Zarda Bhandar is the proprietary firm of Smt. Sashi Rastogi and she is assisted in her business by her husband Sh. H.K. Rastogi and Son Sh. Aniket Rastogi. M/s Rastogi General Store, Allahabad and M/s Chaurasia Traders, Tulsipur are also dealers for the product of M/s DTC.

5. M/s Kashi Laminators Pvt. Limited (hereinafter referred to as KLP) are engaged in manufacture of plastic product classifiable under sub-heading No. 3920.38, 3923.90, 3920.39, 3920.32 and 3915.90 of the first schedule to the Central Excise Tariff Act, 1985 and they supply packing material to M/s DTC. Sh. Bhupesh Bansal is the MD and Sh. Vivek Sinha is authroised signatory of KPL. Sh. Lalchand Agarwal is the father of Sh. Bhupesh Bansal.

6. Pursuant to the intelligence report indicating that M/s DTC was engaged in suppression of the production of their finished goods and they were being cleared without accounting them in their books and without payment of duty, the Officers of the excise department on 18.3.2004 searched the premises of the above referred firms. Pursuant thereto the investigation followed and on conclusion thereof a show cause notice dated 14th/16th September 2004 came to be issued which was contested by the appellants while denying the charge of clandestine removal of the goods. The contention of the appellants, however were rejected by the Commissioner and by the impugned order demand was confirmed.

7. Under the impugned order, M/s DTC is required to pay the duty to the tune of Rs. 5,18,16,960/- for removal of 17992 bags of Pukar gutka without payment of duty, with interest and equal amount of penalty. The duty to the tune of Rs. 1,05,030/- has also been confirmed against M/s DTC in relation to the goods seized at the premises of M/s Udai Traders. A sum of Rs. 60 lakhs already deposited during the investigation are ordered to be appropriated.

8. The Commissioner has also confirmed the duty to the tune of Rs.4,60,800/- on the goods seized in transit namely 110 bags of gutka and 10 bags of gutka seized from the godown and 40 bags of gutka seized from M/s New Mallik Transport and as the said amount has already been deposited, it is ordered to be appropriated. The proceedings regarding the confiscation of the goods seized from the premises of M/s New Sashi Zarda Bhandar are dropped.

9. A sum of Rs. 13,18,000/- seized from the residential premises of the appellants has been ordered to be confiscated alongwith sum of Rs.10,61,000/- seized from the business premises of M/s R.P. Products as also sum of Rs. 2,93,000/- seized from the residence of Sh. Pankaj Chaurasia. Likewise sum of Rs. 10,03,000/- and Rs. 3,70,000/- seized from the residence of Sh. Raj Kumar Chaurasia and Sh. Pushkar Chaurasia are ordered to be confiscated. Penalty of Rs. 1,50,000/- has been imposed against M/s Udai Traders, Rs. 1 lakh against M/s R.P. Product and Rs.9,23,123/- against M/s KPL, penalty of Rs. 10 lakh against Sh. Bhupesh Bansal and penalty of Rs. 1 lakh against Lal Chand Agarwal were also imposed.

10. Dealing with the case of the appellants, the Commissioner has held that the shortage of excess quantities of supari of about 714 kgs. and katha of about 250 kgs. were crucial for investigation in their attempt to establish the excess unaccounted production and since supari is the most fundamental raw material for manufacture of pan masala and gutka and the availability of the same in unaccounted excess quantity reasonably leads to believe the intention of the appellants to manufacture finished goods out of the same for

eventual unaccounted clearance and evasion of duty. The contention regarding failure of the investigating agency to weigh the supari and katha has been rejected on the ground that the same was not disputed at the time of seizure. The contention of the appellants relating to absence of any excess quantity of tobacco at the time of search has been rejected while holding that though tobacco is crucial and key ingredient in the manufacture of gutka, it could be that the excess quantity thereof could have been hidden by the appellants at the time of seizure. The lamination/ pouch rolls were procured during the period from 01/03 to 11.03.2004 from M/s KL obviously for the purpose of clearing unaccounted finished product. On arithmetical calculations, it has been held that 4,65,05,875 pouches of pan masala gutka were sufficient to contain 5389 bags of pan masala or 4844 bags of gutka. The nine slips which form the basis of the investigation, and procurement of huge quantity of packing material by M/s DTC were considered to be sufficient evidence to support the charge of clandestine removal of final product. As regards 202 slips seized from the residential premises of Shri Lal Chand Agarwal, the same are held to be relating to unaccounted transaction. Non summoning of Shri Sanjay Kumar for cross-examination, though most of his testimony has been relied upon, has been held to be not fatal for the department's case. The recovery of slips is held to be sufficient to prove the possibility of packing finished goods cleared by evasion of duty during the period 3rd March to 11th March 2004. The contention that Shri Lal Chand Agarwal was third party to the proceedings has been rejected. The pen drive seized from the house of Shri Pankaj Chaurasia has been held as disclosing details regarding payment to the labourers, and though the same was recovered from one premises and taken to another premises for extracting its contents through a computer and though the panchas had not accompanied the same, the evidence therefore is held to be reliable and therefore it has been held that the recovery of the pen drive has been established and the contents thereof are also factually correct. It has also been held that the employment of such large number of labourers and paying them in an unaccounted manner brings out the fact that M/s DTC was engaged in clandestine production and clearances. The clearance of 17992 bags of gutka without payment of duty has been held to have been established by the recovery of transporters' documents from five different agencies. The said documents are in the nature of large scroll slips giving summary picture of transport details of finished goods transported on behalf of M/s DTC. It has been held that the transporting agencies had confirmed that the entries in the said scroll pertained to pukar brand product. The contentions of the appellants that apart from appellants many other companies were manufacturing the same product by the same name including a firm in Nepal and that therefore they had even filed FIRs in that regard have been rejected. It has also been observed that though there were several entries in the scrolls not pertaining to pukar brand but they might have been made by the transporters in collusion with M/s DTC to mislead any prospective investigation. It has been further held that the entire evasion was a gross conspiracy involving manufacturer, dealer and the transporter and transport document recovered establish the same. Regarding the liability to pay the duty on 21 bags of gutka and 18 bags of pan masala sales from M/s UT, it has been held that notice for confiscation thereof should have been issued to M/s UT and not to M/s DTC. As regards seizure of 110 bags of pukar brand gutka from the truck, 10 bags seized in the godown of M/s Narayan Transport and Forwarding Agency and 40 bags from the godown of M/s New Mallik Transport it has been held that the goods were found without any duty paying document. Regarding shortage of 124300 pouches of pukar brand gutka and 27000 of pukar brand pan masala, benefit of doubt has been given to the appellants on account of improper and incomplete search. As regards 19 bags of pukar and 21 bags of pukar brand gutka at Shri R. Road Lucknow, 15 bags and 32 packets of pukar brand gutka at M/s New Sashi Zarda Bhandar, Rai Bareilly, 13 bags of pukar gutka at M/s Rastogi General Store and 1.5 bags of pukar brand gutka at M/s Chaurasia Traders, Tulsipur, it has been held that in the absence of notice being served on the owners of those goods, no confiscation could be ordered. As regards the cash seizure at various places, it has been held that the gutka and pan masala industry being cash oriented and huge transaction regularly takes place on cash basis, it was safe to presume that those transactions were out of non duty paid goods and therefore the cash was generated. As regards the cash seizure at the premises of M/s UT and M/s RP, it has been held that though they, being traders and dealers, were entitled to hold cash as per their account, no connection of the said cash with specific clearances on payment of duty has been established. It is further held that it can safely be presumed that the cash was generated from the sale of clandestinely removed goods. As regards allegation against M/s KL arising out of seizure of 202 slips from their premises, it is held that the cash was clearly from the sale proceeds of the clearances of all non duty paid goods by M/s KL and the explanation sought to be given regarding the cash was after thought. As regards penalty under Rule 26 of the Central Excise Rules, 2002 on the appellants Sh. Bhupesh Bansal and Sh. Lal Chand Agarwal, it has been held that both were involved in unaccounted transaction and therefore liable for penalty. The proceedings against M/s New Sashi Zarda Bhandar have been dropped on account of failure to establish the allegation against the same.

11. The impugned order is sought to be challenged on various grounds. According to learned Advocate appearing for the appellants the impugned order has been passed without factual basis being established to arrive at the findings which have been arrived at by the lower authority. According to him they are based on surmises and without any evidence on record to support the same. Drawing our attention to the transporter's documents in the form of scroll giving summary of various transportation on behalf of various companies, he submitted that the scroll relates to various companies. There was no investigation in that regard. Without any evidence being collected to establish the link between the entries in the scroll relating to the transportation carried out by the transporter with the product allegedly clandestinly manufactured by the appellants, the authority below erred in holding that the scroll itself establishes transportation of clandestinely cleared product by the appellants. In the absence of any evidence regarding actual manufacture of the product on such large scale and establishing the link between the product transported by the transporter with the product alleged to have been manufactured by the appellants, the authority below could not have jumped to the conclusion adverse to the interest of the

appellants. Besides, there is no mention of M/s DTC anywhere in transport documents and some of the transporters had merely stated that they had transported pukar brand product without disclosing the name of the appellants as the manufacture of the product. Undoubtedly, the Commissioner himself has held that similar product with the similar brand name was manufactured in Nepal and available in India, besides that to do away with the meanace of duplicate product, the appellants had filed nine FIRs. In similar circumstances, without considering the effect of production of the same product under the same brand name by others, the authority below could not have saddled the appellants with the duty liability on the accusation of charge of clandestine removal of the goods. He further submitted that the Commissioner erred in traveling beyond the scope of show cause notice while arriving at the finding about conspiracy. He submitted that there was no such charge in the show cause notice. He further submitted that the Commissioner failed to consider the fact that supari and katha were agricultural products and there was no statutory obligation to make entry regarding the said product in any statutory book, besides that the same was clearly recorded in the private records which were refused to be considered by the authority below. He further submitted that the slips which are sought to be recovered, could have no evidentiary value and they have not been established to have any link with the production process in the appellants' factory. The Commissioner according to the learned Advocate for the appellants also erred in taking note of the vital factor regarding absence of excess or shortage of tobacco at the time of search of premises while admitting that tobacco is the most important ingredient in the manufacture of gutka. According to learned Advocate, that itself was sufficient to conclude that there was no clandestine manufacture and removal of the final product. Merely because the appellants had procured poly bags or lamination/ pouches rolls that can not lead to any conclusion of manufacture of such a huge quantity of the final product in a short span of eleven days. He further submitted that the authority below erred in relying upon the contents of the pen drive without any cogent proof in that regard. The authority also erred in ignoring the explanation furnished regarding the use of the labour on the house construction site by the appellants. Admittedly, the pen drive was found in the house of Sh. Pankaj Chaurasia. Undisputedly, there was no shortage of finished goods. There was absolutely no record found pertaining to any clandestine removal of the final product by the appellants. The entire duty has been claimed on the basis of scrolls prepared on the basis of some unsigned private documents allegedly resumed from the transporter's premises. He further submitted that the appellants did not manufacture zarda. The documents based on which the scroll has been prepared and based on which the duty liability sought to be fastened on the appellants mostly relate to transportation of zarda. There is no statement from any of the transporter that the goods transported by them were cleared or loaded by M/s DTC. No purchasers of so-called clandestinely removed product has ever been examined and no evidence from the buyers side of the alleged clandestinely removed product has been ever sought to be collected or placed on record. In fact, no investigation has been carried out with reference to any of the consignees of the product manufactured by the appellants The so-called transporter documents also do not disclose the appellants to be consigner. He further submitted that no cross-examination was permitted even though prayed for and no reason has been disclosed in rejecting such prayer. The penalty has been imposed without disclosing any involvement of the persons in any clandestine removal of the goods or the matters relating thereto.

12. The Departmental Representative on the other hand submitted that the panchnama drawn clearly disclose seizure of the goods and the currency illegally held. He further submitted that the basis for preparation of scrolls is disclosed from the documents seized. He submitted that all the firms manufacture the product by the brand name pukar. Regarding the shortage as well as excess quantity of supari and katha in the factory, the same was clearly admitted by the appellants in their statements. The very fact that huge quantity of packing material was procured within short span of period, that itself disclose the quantum of production that must have been carried out by the appellants during the relevant period. As regards the refusal to permit the cross-examination, it is sought to be contended that there is no valid reason disclosed for the purpose of cross-examination and as regards Shri Sanjay, it was a fictitious name and, therefore, there was no possibility of tracing any such person. He further submitted that various anomalies had remained unexplained. Inspection of factory premises of M/s DTC had revealed 915.84 kgs. of gutka 48.6 kgs. of pan masala and 1128.92 kgs. of pauch rolls were found short over the corresponding recorded balance whereas 714 kgs. of supari and 250 kgs. of katha were found excess over the corresponding recorded balance. Search of residential premises also resulted in seizure of cash amount which were also not explained. Besides recovery

of some slips disclosed actual production of goods which was not reflected in the accounts. A Tata truck at Faizabad Road containing 110 bags of pukar gutka without proper invoices also remain explained. Various documents seized in the course of investigation revealed sale proceeds of the finished goods as well as raw material which clearly established clandestine removal of goods. In the course of search 24 pauches machines were found in working condition. The entire arrangement of transportation of clandestinely removed goods was made directly or indirectly by M/s DTC. Relationship and nexus between UT and RT is clearly revealed from the fact that both were engaged in almost similar business having their godown at 910 Datia House, Lucknow, besides that the document seized in the course of the investigation establish this nexus. Shri Ashish Srivastava who was the authorized signatory of M/s DTC was reporting to Shri Uday Chaurasia in all the matters relating to M/s DTC. Though, the generator shed for electricity used for production of Pukar, and godown of RP/ UT, but expenses were met by DTC which disclose common interest of all these persons involved in the matter. Non availability of stock clearly shows the magnitude of manipulation in the stock of raw materials based on the calculation of that 24 machines were running at a speed of 120 pouches per minute with average working hours of 8 per day and for 30 working day in a month it was evident that there was enough scope for ample production and atleast to the tune of 35,76,96000 nos. of gutka pauches which must have been clandestinely removed by the appellants.

13. On consideration of rival contentions, and in the facts and circumstances of the case it is seen that undisputedly there had been

manufacture of similar product with the similar brand in Nepal and the said product is available in India and there is a clear finding to that effect by the authority below in the impugned order. Equally the records disclose and the Commissioner has confirmed that the appellants had filed FIRs in respect of manufacture and availability of such products in India. However, unfortunately there was no investigation in that regard nor even in relation to the documents of transportation seized from the transporters and which are simply presumed to be in relation to the goods manufactured by the appellants. Before arriving at the said finding it was necessary for the authority below to ascertain whether the department had investigated on the aspect of possibility of those documents being in relation to such product imported from Nepal. There were FIRs filed by the appellants. The appellants had raised a specific plea that those documents do not relate to the transportation of the product of the appellants. It was merely on assumption that the same might be to relating to the product of the appellants that the authority below has held that the same establishes clandestine clearance of goods by the appellants. Besides as rightly pointed out by the learned Advocate for the appellants, some of the documents relate to the product which is not manufactured by the appellants and yet they were also included in the list of documents relating to the goods alleged to have been clandestinely removed by the appellants. There is no assessment of evidence to ascertain whether the documents seized disclose link with the goods stated have been manufactured and clandestinely cleared by the appellants.

14. Apparently the deponents were not subject to cross-examination inspite of specific request by the appellants in that regard. Besides, there has been no consideration by the authority below as to whether the statements established link between the documents and the goods manufactured by the appellants. Apparently, the statements of some of the transporters disclose that they were the transporters of the appellants as well as that the goods transported by them were Pukar brand product. Being so, it was necessary for the authorities below to analyse those statements in detailed after affording the assessee to cross-examine the deponents. No such exercise has been done by the learned Commissioner.

15. The appellants are also justified in contending that the Commissioner erred in traveling beyond the scope of the show cause notice while arriving at the finding of conspiracy. Indeed, there is no charge of conspiracy in the show cause notice. The conclusion in that regard has been arrived at for the first time in the impugned order itself. What is curious to note is that though there is finding of conspiracy in the impugned order, yet we do not find that all the alleged conspirators were made parties to the proceedings. Neither the transporters nor the employees of the appellants who have been stated to have connived with the appellants in clandestine removal of the goods were joined as the parties to the proceedings nor even any show cause notice was issued to them. We have not been pointed out any part of the show cause notice which could disclose allegation of conspiracy. Even the impugned order does not record that being the case of the department. Curiously

enough the case of the department as noted by the Commissioner in the impugned order does not include allegation of conspiracy and yet the Commissioner has arrived at the finding of the conspiracy.

16. As regards the excess quantity of 714 kgs. of supari and availability of 250 kgs. of katha, the specific defence raised by the appellants was that no statutory records required recording of balance of supari and katha. The requirement of such recording was deleted from Form –IV Register at the relevant time. The Commissioner has rejected the contention only on the ground that the same was not raised at the time of raid and was raised for the first time in reply to the show cause notice. The finding is totally absurd. Merely because the assessee did not point out the entire defence at the time of raid that does not debar the assessee from raising all the legally available defences in reply to the show cause notice. In fact, it is the first time that the assessee gets opportunity to putforth his defence once he is issued with the show cause notice. The very purpose of issuance of the show cause notice is to give opportunity to the assessee to show cause against the allegations against the assessee. Being so, merely because a particular defence was not raised at the time of raid that does not debar the assessee from raising legally available defences in reply to the show cause notice and certainly it cannot be said that in the absence of defence being raised at the time of raid, no such defence can be raised in answer to show cause notice and that the same is after thought. Actually an assessee gets first opportunity to raise all the defences in answer to the show cause notice. If there was no legal requirement of maintaining the records about the storage of agricultural products at the relevant time, it is immaterial as to whether

such defence was raised at the time of raid or only in answer to show cause notice. The point of law can be raised at any stage of a proceeding.

17. The Commissioner has held that dispute regarding the weighment cannot be entertained for not having raised such dispute at the time of raid. The objection was raised on the ground that the quantity of supari and katha was not weighed at the time of raid and it was calculated on mere assumption basis. Once the fact that the quantity was not weighed is not in dispute merely because objection in that regard was raised in answer to show cause notice, can not be a ground to reject the same. It is well established practice for raiding party to weigh the quantity of the products and not to ascertain the weight by approximation basis. Rather it is necessary for the adjudicating authority to ascertain from the analysis of all the materials on record whether the same establishes correctness of the weight as disclosed in the panchnama. No such exercise has been done by the adjudicating authority.

18. The Commissioner has further held that the excess or shortage of tobacco/ gutka is to be presumed as the appellants might have hidden the excess tobacco. The finding is apparently totally perverse. One cannot jump to such conclusion without analyzing the evidence in that regard and more particularly in cases where the department has to discharge burden to establish the case of clandestine removal of the goods by the assessee. The evasion of duty cannot be assumed without analyzing materials on record.

19. The Commissioner on the basis of arithmetic calculations about of the packing material to ascertain how many pouches it could have manufactured and correspondingly would have stored the pan masala / gutka has arrived at

the conclusion about possibility of use of huge quantity of lamination rolls for the purpose of clandestine removal of the goods. As rightly pointed out by the learned Advocate for the appellants apart from mere arithmetical calculations in that regard, the adjudicating authority has not analysed the evidence on record to find out whether the arithmetical calculation are born out from the materials on record or not.

20. The Commissioner has further held that recovery of nine slips has sufficiently proved possibility of taking finished goods for the purpose of evasion by clearing unaccounted finished goods. Indeed unless credibility of the slips on proper analyzing of materials is established the Commissioner clearly erred in jumping to the conclusion that the recovery of those slips sufficiently proves possibility of packing of finished goods. That apart mere possibility of packing of finished goods and factum of actual packing of finished goods for the purpose of evasion of duty by clearing unaccounted finished goods are totally different facts. Mere possibility of clearance cannot be a substitute for the evidence regarding actual clearance.

21. As regards the details retrieved from pen drive the Commissioner has concluded the same related to the labour employed by the appellants for clandestine manufacture of the product in question. However, Commissioner has nowhere analysed the materials which were retrieved from the pen drive. Besides it was the explanation by Pankaj Chaurasia that the same related to the construction activity of the house. Merely because large amount of money which are shown as spent on labour charges in the material retrieved from the pen drive that itself cannot be a justification to

link the same with the alleged manufacturing activity in the appellants factory in the absence of any analysis of material to establish such link.

22. The allegation of supply of 18602.35 kgs. Of laminated plastic rolls (pouch rolls) for making Pukar brand gutka pouches from M/s Kashi Laminators Pvt. Ltd. (KL) during 1/3/04 to 11/3/04 period is based on some slips recovered from the residential premises of Lal Chand Agarwal, Father of Bhupesh Bansal, Managing Director of M/s KL. These slips are stated to contain datewise details of despatch of pouch rolls to M/s DTC and each of these slips bears the name – "Sanjay Kumar, LKO" Shri Bhupesh Bansal in his statement dated 12/7/04 has clarified that "Sanjay Kumar, LKO" in the code for M/s DTC and all the slips on which the words "Sanjay Kumar, LKO" figure appears to pertain to M/s DTC. Para 4.9 of the show cause notice also, while explaining the contents of these slips, mentions "Sanjay Kumar, LKO" as a code name allotted for the party to whom the lamination is to be sent. Thus "Sanjay Kumar, LKO" does not appear to be a person. Therefore the Commissioner, in para 2 (e) of the impugned order has strangely observed that "Sanjay Kumar, LKO" whose name figures in the slips for M/s DTC is no doubt a crucial witness whose presence would have authenticated the validity of the slips but the investigations inability for trace and record the statement of Shri Sanjay Kumar need not be given importance ..... the importance of Sanjay Kumar, though cannot be denied but need not be stressed to a extent that the evidence of slips be brushed aside". The above observations of Commissioner are indeed meaningless as "Sanjay Kumar, LKO" on the slips is a code name and does not appear to be the name of a person. The Commissioner should have tested the correctness

of the statement of Shri Bhupesh Bansal, M.D. M/s KL by permitting his cross-examination.

23. Though in support of allegation of duty evasion by M/s DTC of Rs. 5,18,16,960/- on 17992 bags of Pukar brand gutkha booked through some transport companies to outstation customers, there is oral evidence in form of –

(a) statement dated 19/5/04 of Ashish Srivastava, Authorized Signatory of M/s DTC ;

(b) statements dated 12/8/04, of Proprietor of M/s Narain Transport & Forwarding Agency, Lucknow, statement dated 29/3/04 of Shri Radhey Shyam of M/s NTFC, statements dated 2/4/04 and 12/8/04 of Shri Dharmender Pratap, Proprietor – M/s Narain Transport, Gorakhpur, statement dated 17/5/04 of Shri Babu Singh of M/s Lucknow Tulsipur Forwarding Agency, statement dated 27/5/04 of Shri Vivek Gupta, Proprietor of M/s Lucknow Allahabad Forwarding Agency and statement dated 31/5/04 of Bareilly Badaun Transport, wherein it has been stated that the word "Zarda gutkha" in GRs/challans stands for Pukar gutkha manufactured by M/s DTC and consignment of Pukar gutka of M/s DTC were being sent to transport companies on the slips of M/s UT for delivery of the same to the ordered destination; and

(c) statement dated 20/4/04 of Shri Om Prakash Chaurasia, Proprietor of M/s Chaurasia Traders, Tulsipur, where it has been stated that it is M/s Udai Traders who were despatching the Pukar brand gutkha to them ; none of this evidence has been considered by the Commissioner in the impugned order and he has upheld the duty demand just by making a general observations regarding grand conspiracy between the manufacturer – M/s DTC, the transporters and the dealers.

24. The correct course for the Commissioner would be to test the correctness of the statements of transporters and dealers stating that it is M/s DTC / M/s UT who were arranging the transport, to ascertain whether the words "zarda gutkha in GRs/challans means Pukar brand gutkha of M/s DTC and whether the goods were being booked for transport on slips of M/s UT, and for that purpose to permit cross-examination of deponents and thereafter to decide the matter. No such exercise having been done and the entire adjudication exercise has been done in a perfunctionery manner, the order deserves to be set aside for remand of the matter for consideration afresh.

25. On the finding by the Commissioner is that there was no excess quantity of tobacco found in the appellants premises nor the shortage thereof. It is undisputed fact that tobacco is a crucial and key ingredient in the manufacture of gutka and there is a clear finding in the impugned order itself. Strangely the Commissioner has discarded the contention in that regard on an assumption that it might be that the appellants might have hidden the excess quantity of tobacco. Simultaneously, there is also finding that the entire premises of the appellants factory was inspected. In such circumstances, it was highly improper for the Commissioner to assume that there was excess quantity of tobacco and /or that it might have been hidden by the appellants.

26. The Commissioner has arrived at a finding that "having gone through the relevant documents, statements and cross-examination, I am inclined to agree with the view of the Consultant that the premises of M/s DTC was not searched completely, there is a possibility that the goods found short were

actually present in the third floor as submitted by their defence. I am compelled to extend this benefit of doubt to the assessee as panchnama and the cross-examination leaves me without any doubt regarding improper and incomplete search of the premises of M/s DTC". This finding is contrary to the other findings and certainly warrants further analysis of the materials in accordance with the provisions of law.

27. As regards the cash recovered from the premises there is also no attempt on the part of the adjudicating authority to ascertain its link with the proceeds of the goods alleged to have been clandestinely removed. The link can not be established on mere assumption. There must be some material on record which is to be ascertained by analyzing the same.

28. Similar is the case in relation to the finding against M/s Kashi Laminators Pvt. Limited.

29. For the reasons stated above, therefore, the findings which are arrived at by the Commissioner are merely based on assumption without proper analysis of the materials on record. Hence, the same are not sustainable.

30. The need for cross-examination of the witnesses which is asked for by the appellants could not also be ignored.

31. For the reasons stated above, therefore, we are constrained to set aside the impugned order and remand the matter for consideration afresh in accordance with provisions of law and bearing in mind the observations made herein above.

32. Appeals therefore succeed in the above terms.

33. For the reasons stated above, the question of confirmation of demand and /or imposition of penalty cannot arise.

34. Accordingly, the appeals succeed and same are allowed. The impugned order is quashed and set aside and the matter is remanded for consideration thereof afresh.

(Pronounced in open Court on 12.08.2011)

[Justice R.M.S. Khandeparkar]
President

[Rakesh Kumar]
Member [Technical]

/Pant/