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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/2563/2011-EX[DB]

Dated: **28/06/2012**

Assistant Registrar
C.E.S.T.A.T. New Delhi
To,
RAJAT INDUSTRIES PVT. LTD.
E-655-656, DSIDC INDUSTRIAL
AREA, NARELA, DELHI.

RAJAT INDUSTRIES PVT. LTD. (Appellant)

VS

C.C.E. DELHI I (Respondent)

I am directed to transmit herewith a certified copy of Final Order No. **A/738/2012-EX[DB]** dated **26/06/2012** passed by the Tribunal under section

Assistant Registrar
EXCISE Appeal Branch

Copy To,
1. Respondent
C.C.E. DELHI I
C.R. BUILDING, I.P. ESTATE, NEW
DELHI 110002

2. Advocate(s) / Consultant(s):
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Nagar,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 Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp. ICICI Bank of Defence Colony, New Delhi-3

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

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Assistant Registrar
EXCISE Appeal Branch

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

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

COURT-I

Date of hearing/decision: 26.6.2012

Central Excise Appeal No.2563 of 2011

Arising out of the order in appeal No.66/CE/DLH/2011 dated 17.8.2011 passed by the Commissioner, Central Excise (Appeals), Delhi I.

Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Mr. 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?	
2	Whether it should be released under Rule 26 of 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 Departmental authorities?	

Rajat Industries Pvt. Ltd. ... Appellant

Vs.

C.C.E.., Delhi I .. Respondent

Present for the appellant : Shri J.P. Kaushik, Advocate
Present for the respondent : Shri N. Pathak, A.R.

FINAL Order No. A/738/2012 – Ex BR

Per Mr. Justice Ajit Bharihoke(Oral):

This appeal is directed against the order in appeal No. 66/CE/DLH/2011 dated 17.8.2011 whereby the Commissioner (Appeals) , Delhi- I dismissed the appeal filed by the appellant against the order in original whereby the duty demand of

Rs.5,46,774/- was confirmed against the appellant along with interest.

2. M/s Rajat Industries Pvt. Ltd. , the appellant herein applied for central excise registration and they were issued a Central Excise Registration No.AAECR 0171 QXM001 on 11.12.2008 for manufacture of Gutkha falling under chapter 2403 of the 1st Schedule to the Central Excise Tariff Act, 1985.The appellant company vide its letter 27.4.2009 for the first time filed declaration as required under Pan Masala Packing Machines (Capacity Determination & Collection of Duty) Rules, 2008 [PMPM Rules] and requested the Department to make four machines installed in the factory operational with effect from 4.5.2009 were de-sealed by the Department and the production commenced on 4.5.2009. The appellant being a new unit under reasonable belief paid excise duty as per compounded levy scheme of PMPM Rules, 2008 on pro rata basis for the period 4.5.09 to 31.5.09.

3. The Department was of the view that as per Rule 9 of PMPM Rules, 2008, the appellant was required to pay excise duty on compounded levy scheme for the entire month of May and no abatement of duty for the first three days was admissible to the appellant. Accordingly, show cause notice raising demand of Rs.5,46,774/- with interest was issued. The Department also proposed to impose penalty on the appellant.

4. The appellant contested the show cause notice. The jurisdictional Assistant Commissioner after hearing the parties vide order in original dated 23.8.2010 confirmed the duty demand of Rs.5,46,774/- against the appellant under Section 11A (1) of the Central Excise Act 1944 read with Rule 9 and 18 of PMPM Rules, 2008 and ordered recovery with interest. He however refrained from imposing penalty upon the appellant.

5. The appellant preferred an appeal against the order in original. His appeal was however dismissed by the Commissioner(Appeals), Central Excise, Delhi – I vide the impugned order.

6. Feeling aggrieved by the impugned order passed by the Commissioner (Appeals), the appellant has preferred this appeal.

7. Shri J.P. Kaushik, Advocate, the learned Counsel for the appellant has pleaded that impugned order is not sustainable as it is based upon incorrect reading of PMPM Rules, 2008. Learned Counsel submitted that Commissioner (Appeals) has failed to appreciate that the appellant was a new unit and it commenced production only with effect from 4.5.2009. As such, there was no occasion for charging him for the excise duty for the period when the appellant had not been even commenced production. Appellant in support of his contention has relied upon the judgment of Punjab & Haryana High Court in the matter of Godwin Steels (P) Ltd. vs. C.C.E., Chandigarh – 2010 (254) ELT 202 (P & H) wherein while considering the scope of production capacity based on compounded levy scheme having provision similar to PMPM Rules, 2008 took the view that when the factory of the petitioner was not in the production, he was not liable to pay duty during the period of non-production.

8. Shri N. Pathak, learned A.R. for the Department on the contrary has argued in support of the impugned order and submitted that the duty demand has been rightly confirmed in view of Rule 9 of PMPM Rules, 2008. Learned A.R. further submitted that the judgment relied upon by the appellant is not applicable to the facts of this case as it is based upon the compounded levy scheme relating to the steel manufacturing unit.

9. The issue involved in this appeal is whether the revenue with the aid of Rule 9 of PMPM Rules, 2008 framed under Section 3A of the

Central Excise Act, 1944 can levy and charge excise duty from the assessee for the period before the commencement of production in the unit?

10. In order to find answer to this question it would be useful to have a look on the relevant provisions of the Central Excise Act, relating to levy and collection of excise duty. Section 3 of the Excise Act is the main charging section which provides that there shall be levied and collected excise duty on excisable goods which are produced or manufactured in India. From this, it is evident that excise duty is an incidence of tax on production or manufactured of the goods. That being the case, it is difficult to sustain the plea that the appellant assessee can be charged excise duty for the period during which his unit had not even commenced the production. The department is seeking to justify the impugned order under Rule 9 of PMPM Rules of 2008 framed under Section 3A of the Central Excise Act. Section 3A confers power on the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. The basic object of conferring such power on the Central Government is to prevent evasion of excise duty in respect of certain excisable goods with a view to safeguard the interest of revenue. This does not mean that Section 3A confer power on the Government to frame the rules to charge excise duty for the period prior to the commencement of production. Therefore, in our view the impugned order confirming demand for first three days of May 2009 when the production had not even commenced cannot be sustained. In our aforesaid view, we find strength from the judgement of Punjab & Haryana High Court in the matter of Godwin Steels (P) Ltd. wherein while dealing with the similar issue of compounded levy scheme in relation to steel manufacturing unit it was held thus:-

"3. After hearing the learned counsel for the parties, we are of the considered opinion that as the petitioner's factory started production with effect from 17.11.1997, therefore, it was wholly unjust for the department to recover the duty for the whole month of November, during which, its factory had not commenced production. When the factory of the petitioner was not in production, then obvious, it is not liable to pay the duty during the period of non-production".

11. In view of the above discussion, we find it difficult to sustain the impugned order. Accordingly, the appeal is accepted and the impugned order confirming the demand is set aside.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Technical Member

scd/