CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal No. 55957 of 2013

(Arising out of order-in-original No. 111/COMMR/CEX/IND/2012 dated 31.10.2012 passed by the Commissioner of Central Excise, Indore)

DATE OF HEARING : 02.02.2017
DATE OF DECISION : 09.02.2017

CCE, Indore …. **Appellant**
(Rep by Sh. Yogesh Agarwal, DR)

VERSUS

M/s Shiv Udhyog …. **Respondents**
(Rep. by Sh. C. Harishankar, Sr. Adv
& Sh. S. Sunil, Adv.)

CORAM : HON'BLE MR. JUSTICE (DR.) SATISH CHANDRA, PRESIDENT
HON'BLE MR. ASHOK K. ARYA, MEMBER (TECHNICAL)

FINAL ORDER NO. 50720/2017

PER JUSTICE (Dr) SATISH CHANDRA:

The present appeal is filed by the Department against the order-in-original no. 111/Commr/CEX/IND/2012 dated 31.10.2012 passed by the Commissioner of Central Excise, Indore.

2. The brief facts of the case are that, the assessee-Respondent is a proprietary concern of Shri Jai Kumar Lohani. It is alleged that the assessee-Respondent, during the period under consideration, was engaged in the manufacture of branded

manufactured tobacco falling under Chapter Heading 24039990 and Roasted Cut Supari falling under Chapter Heading 21069030 of the First Schedule to the Central Excise Tariff Act, 1985.

The Officers of the Department had visited the factory of the assessee-Respondent on 23.02.2011 for search of the factory premises. At the time of search, no other person was found except Shri Rajendra Singh Rajput, Accountant, in the factory. It was noticed that the factory was not in operation and there was no production activity. No electric supply in the factory was also found. Physical verification of the finished and un-finished goods was carried out. It was found that Roasted Supari is sold in the packing of 60 Kgs., whereas manufactured Tobacco is sold in the packing of 30 Kgs. The statement of Shri Jai Kumar Lohani was recorded by the Department, who stated that he had taken the factory on rent from Shri Om Parkash Wadhwani since 01.04.2007. The factory was sealed. On 02.05.2011, the factory was de-sealed in the presence of Shri Suresh Katiyar, the Supervisor of the factory, and his statement was also recorded. In his statement, Shri Suresh Katiyar has deposed that :

"(i) The different marks written on the bags of manufactured tobacco in coded form have the following meaning:-

(a) KR – This mix has been prepared for Kargil brand.
(b) SM – This mix has been prepared for Shimla Gutkha (mini).
(c) CMR – This mix has been prepared for Shimla Mini Gutkha.

(d) 2M – This mix has been prepared for Malikchand Gutkha.
(e) 6M – This mix has been prepared for Shimla 6000.
(f) LT – This mix has been prepared for Shimla LT.

(ii) The bags of red coloured roasted supari on which LT has been written, are used for LT Shimla brand.

(iii) The bags of white coloured supari on which KR has been written are used in all brands of Shimla group except LT brands.

(iv) He was not aware as to for which place, industry or factory the mix prepared in M/s Shiv Udhyog, was cleared.

(v) The tobacco mix and the roasted supari prepared in M/s Shiv Udhyog are cleared through the Vehicle No. MP09 1422, MP09 1421 and MP09 1240 but he did not remember the series of the vehicles."

The show cause notice was issued on 19.08.2011 proposing confiscation of the seized goods and demanded duty being the branded items. The Commissioner vide the impugned order has set aside the proposed demand. Being aggrieved, the Department has filed the present appeal.

3. With this background, we have heard Shri Yogesh Agarwal, learned DR for the Department and Shri C. Harishankar along with Shri S. Sunil, learned Counsels for the assessee-Respondent.

4. After hearing both sides and on perusal of record, it appears that from "betel nut" to "suprai", there must be some preparation in which betel nuts are contained and that such preparation does not contain lime, kattha (catechu) and tobacco. Thus, the cut roasted supari is correctly and legally classifiable under Tariff Item 0802 90 12 of the CETA as betel nuts – split, attracting NIL tariff rate of duty. It may be mentioned that the process of roasting and cutting of supari undertaken by them does not amount to manufacture since such process has not been defined as amounting to manufacture in the said Chapter Note 6 of Chapter 21 of the CETA. In this view of the matter, it is evident that after cutting and roasting, betel nut remains a betel nut and no change occurs in the end product. Therefore, their cut roasted supari is correctly classifiable under Tariff Item No. 0802 90 12 of the CETA which attracts the NIL tariff rate of duty.

5. It may be mentioned that the brand names, which were decoded by the Department, like Vansh, Malikchand, Shimla, Kargil and Mama Gutkha etc. belong to M/s M.S.S. Food Processors, Indore. They are not manufacturing Pan Masala and Gutkha bearing brand names KR, SMR, 6M, LT, 2M and SM. In fact, these were the only marks or symbols which cannot be treated as 'brand name' in terms of Chapter Note 2 to Chapter 24 to CETA which are used in the course of trade. In fact, these are the marks for mixing the ratio. In the impugned order, the Commissioner has already observed that confiscation of nut and roasted supari is not sustainable in law for the reason that it is correctly classified under Tariff Item No. 08029012 of the CETA

attracting NIL rate of duty. Further, the confiscation of the unbranded chewing tobacco is not sustainable in law for the reason that the tobacco under seizure is not branded, especially when the assessee-Respondent is entitled for SSI exemption upto Rs. 1.5 crore under Notification No. 08/2003-CE dated 01.03.2003. Therefore, neither the goods under seizure can be confiscated nor any penalty can be imposed under Rule 25 of the Central Excise Rules.

6. From the record, it appears that the marks found on the bags of the seized manufactured tobacco are actually indicating the mix of tobacco meant for use by the manufacturer for a specific brand. They show that tobacco has been mixed in accordance with brand specific formula. Thus, it appears that the marks found written on seized goods at the assessee-Respondent's factory premises do not indicate any connection between manufactured tobacco and cut roasted supari with branded products of M/s M.M.S. Food Processors, Indore, in the course of trade of these products. So, in the impugned order the Commissioner has rightly treated the seized tobacco and cut supari as un-branded items in nature.

7. Further, tobacco product can be classified under Chapter heading 24039990 only when it contains betel nut and tobacco and any one or more of lime and kattha (catechu) whether or not contained any other ingredients. In the instant case, seized manufactured tobacco contains neither lime nor kattha, therefore, it cannot be classified under Chapter heading

24039990. At the maximum, it can be classified under the Chapter heading no. 24039910 as 'Chewing Tobacco' which attracts NIL duty. From the record, it also appears that as per the balance sheet for the financial years 2007-08 to 2010-11 the turn over did not exceed Rs. 50 lacs in any of these financial years. The Notification No. 8/2003-CE dated 01.03.2003 provides exemption to the chewing tobacco, chewing tobacco preparations and tobacco extract and essences falling under Heading 2403, other than those bearing a brand name.

8. In view of the above, we are of the view that the seized manufactured tobacco is unbranded goods and, therefore, entitled for the SSI exemption, in view of the turn over mentioned above. When it is so, then we find no reason to interfere with the impugned order. Hence, the order passed by the Commissioner is hereby sustained along with the reasons mentioned therein.

9. In the result, the appeal filed by the Department is dismissed.

(Pronounced in the open court on 09.02.2017)

(ASHOK K. ARYA)
MEMBER (TECHNICAL)

(JUSTICE Dr. SATISH CHANDRA)
PRESIDENT

Golay