IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. IV

Appeal No. E/55788/2013-EX(SM)

[Arising out of Order-in-Appeal No. 108 to 109/CE/D-II/12 dated 03.12.2012, by the Commissioner (Appeals), Central Excise, New Delhi]

M/s. Tanu Enterprises **....Applicants**

Vs.

C.C.E. Delhi-II **....Respondent**

Appearance:

Shri Kamaljit Singh, Advocate for the Applicants
Shri Dharam Singh, DR for the Respondent

CORAM:
Hon'ble Ms. Archana Wadhwa, Member (Judicial)

Date of Hearing: 07.02.2017
Date of pronouncement: 27.02.2017

FINAL ORDER NO. 51981/2017-EX(SM)

Per Archana Wadhwa:

After hearing both the sides, I find that the appellant is engaged in the manufacture of gutkha and during the relevant period was working under the provisions of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules 2008. In terms of the provisions of the said rule duty liability for a particular month is required to be deposited in advance as per the number of machines installed in the unit. Thereafter, the assessee can seek abatement, subject to the fulfillment of the procedure prescribed there under and the excise duty so deposited for that particular month is required to be refunded to them.

2. The appellant deposited a sum of Rs.1.25 crores in advance towards their duty liability for the month of August 2011 in respect of 10 number of gutkha pouches packing machines. However, on 09.08.2011 they sought sealing of three machines, due to rainy season, Ramzan and less number of orders. Such request was accepted by the Revenue and three machines were sealed w.e.f. 11.08.2011 for a period of 10 days. On de-sealing of the said machines, subsequently, the same were resumed for production in September 2011.

3. In the above scenario there was excess payment of duty of Rs. 25,40,322/- which was paid in advance and was refundable to them. However, in spite of seeking refund of the said abatement of duty the appellant deposited less duty to that extent in the month of September 2011. Revenue initiated proceedings against them on the sole ground that the appellant have on their own adjusted the said abated amount in the subsequent month whereas they should have sought refund of the same and should have deposited full duty for the period September 2011. The said proceedings were taken up by the original adjudicating authority, who observed as under:

> *"I find that the party deposited an amount of Rs.1,25,00,000/- on 04.08.2011 towards duty liability for the month of August 2011 in respect of 10 Gutkha pouch packing machines of MRP Rs.1/- only and as per intimation dated 07.08.2011 given by the party 03 machines were sealed with Central Excise seal by the Range officer on the night of 10th August 2011 w.e.f. 11.08.2011 and these there machines remained sealed throughout the*

month of August 2011. I also find that the duty amounting to Rs.25,40,322/- (calculated for a period from 11.08.2011 to 31.08.2011) on these three machines paid by the party in advance on 04.08.2011 for the month of August 2011 was adjusted / abated by them on their own towards the duty liability of 7 machines for the month of September 2011 without filing proper application with the competent authority. I also find that the intimation given by the party on 08.09.2011 merely mention that the duty of Rs.25,40,322/- paid in advance was refundable to them by way of abatement of duty on 03 machines and due to financial hardship it was not possible for them to deposit the full duty on 07 machines for the month of September 2011 and then file an application for abatement whereas Rule 10 of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules 2008, inter-alia, stipulate that in case a factory did not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period provided the manufacturer of such goods filed an intimation to this effect with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise as the case may be, with a copy to the Central Excise Range at least three working days prior to the commencement of said period with I find to have not been complied with by the party. I find that the party had not filed any proper application with the competent authority regarding abatement of duty of Rs.25,40,322/-. Party is therefore, found to have abated / adjusted the amount of duty of Rs. 25,40,322/- on their own in the month of August 2011 which is in contravention of Rule 10 of the Pan Masala Packing Machines rules 2008, for which I hold them liable for penal action under rule 27 of the Central Excise Rules, 2002. I agree with the party's contention that abatement of duty is admissible to them for closure period as the duty of Rs. 25,40,322/- had already been paid by the party on 04.08.2011 the same is liable to be *abated and appropriated towards duty liability for the month of September 2011 and further as they have on their own availed abatement of the said amount without issue of orders from competent authority in this regard, I hold them liable to pay interest on the said amount at appropriate rate w.e.f. the due date for the month of September 2011 till 26.07.2012.*

In view of the above, I therefore, pass the following order:

i) I allow the abatement of duty of Rs.25,40,322/- with immediate effect i.e. 26.07.2012 for payment of Central Excise duty and appropriate the same towards duty liability for the month of September 2011.

ii) I hereby order recovery of interest on the amount as abated at (i) above, w.e.f. the due date of payment of duty for the month of September 2011 to till date under erstwhile section 11AB of the Central excise Act, 1944.

iii) I hereby impose a penalty of Rs.5000/- on M/s. Tanu Enterprises under Rule 27 of the Central Excise rules 2002."

4. The said order of the original adjudicating authority was challenged by the appellant in respect of confirmation of interest and in respect of imposition of penalty. The same was also challenged by the Revenue before the Commissioner (A). The appellate authority vide his impugned order rejected the assessee's appeal but allowed the appeal filed by the Revenue and held that there is no provision under the Pan Masala Packing Machines to suo motto adjust any duty amount whether abated or otherwise, towards the duty liability for the further months and accordingly confirmed the duty demand of Rs. 25,40,322/- against the assessee

and also imposed penalty of Rs. 2.50 lakhs to them. The said order however arrived before the Tribunal.

5. After having heard both the sides duly represented by Shri Kamaljit Singh, Advocate for the Applicants and Shri Dharam Singh, DR for the Respondent, I find that the short question required to be decided in the present appeal is as to whether on account of failure of the assessee to seek refund of the abatted amount instead of suo motto adjusting the same, would become liable to pay the said adjusted amount or not.

It is not the Revenue's case that such abatement was not available to the assessee. The only objection seems to be that they should not have adjusted the said abatted amount for the subsequent period. The original adjudicating authority has observed that though it is contravention to the rules for which he has imposed penalty of Rs.5000/- on them but has observed that these fact will itself not result in denial of the abatement which is otherwise available to the assessee.

6. Tribunal in the case of ***Rishi Steel & Alloys Pvt. Ltd. Vs. CCE Aurangabad 2005 (186) ELT 287 (Tri-Mumbai)*** has considered the identical situation and observed that the action of the assessee to adjust the abetted amount suo motto may invite some penal action but will not result in confirmation of duty against them. As such I am of the view that the order of the original adjudicating authority lays down the correct legal position wherein

he dropped the demand but since there was contravention of the provisions the penalty was rightly imposed by him along with confirmation of interest. As such, I set aside the impugned order and restore the order of the original adjudicating authority.

7. Appeal is disposed of in the above terms.

[Pronounced in the open Court on 27.02.2017]

(Archana Wadhwa)
Member (Judicial)

Bhanu