CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Date of hearing/decision: 27.02.2017

Excise Appeal No. 1172 of 2012 & 742 of 2011

(Arising out of order-in-original No. COMMISSIONER/RPR/CEX/13/2012 dated 28.02.2012 and order-in-appeal No. 281/RPR-1/2010 dated 21.12.2010 passed by the Commissioner of Central Excise, Raipur).

M/s Kay Pan Sugandh Pvt. Limited Appellant

Vs.

CCE & ST, Raipur Respondent

Appearance:

Sh. K.K. Verma & Sh. Rupesh Kumar, Advocates for the appellant
Sh. H. C. Saini, AR for the Revenue

Coram:

Hon'ble Mr. M. V. Ravindran, Member (Judicial)
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Final Order No. 52058 – 52059/ 2017

Per: **M. V. Ravindran**:

These two appeals are interconnected hence taken up for disposal by this common order. Excise Appeal No.742/2011 is directed against order-in-appeal No. 281/RPR-1/2010 dated 21.12..2010 while Excise Appeal No. 1172/2012 is directed against order-in-original No. COMMISSIONER/RPR/CEX/13/2012 dated 28.02.2012.

2. Heard both sides and perused the records.

3. The relevant facts that arises for consideration, after filtering out unnecessary details are, appellant are engaged in the manufacture of gutka / pan masala; working under the provision of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 (hereinafter referred to as the

Rules). In continuation of the said Rules, appellant deposited an amount of duty of Rs.6.62 crore (approx.) towards the duty liability for the month of October, 2009. Subsequently, due to constraint, appellant filed a letter dated 07.10.2009 requesting the closure of the production activity on account of the Deepawali. The said closure letter was responded to by the office of the Superintendent by visiting the factory premises of the appellant and sealing the entire factory by removing the plugs of all the 53 machines. The said activity of removing of the plug from the pouch packing machine and sealing of the entire factory is done under panchnama dated 11.10.2009. (A letter and panchnama at page 17 and 18 of the appeal memorandum in Appeal No. E/742/2012). Subsequently, on 26.10.2009 appellant requested the authorities to unseal the said machines as they intended to start manufacturing; it was attended to for removing/ breaking the seal of the factory premises which is also recorded by the independent panchas in panchanama dated 29.10.2009. Consequent to such non-production from 11.10.2009 to 28/29.10.2009 appellant sought abatement of the duty paid by them for this period. The Deputy Commissioner of Central Excise, the adjudicating authority allowed the said abatement by passing order-in-original. Aggrieved by order-in-original Revenue filed an appeal before the first appellate authority. The first appellate authority allowed the appeal of the Revenue by setting aside the order-in-original. The said order-in-appeal is contested before us in Appeal No. E/742/2011. Simultaneously, Revenue authorities also issued show cause notice to the appellant for recovery of the abatement sanctioned by the adjudicating authority, by show cause notice dated 21/28.12.2010 which after due process of law was confirmed by the Commissioner, as an adjudicating authority by order-in-original dated 28.02.2012 which is being appealed in Appeal No. E/1172/2012.

4. On consideration of the submissions made by both sides and on perusal of records, we find that the adjudicating authority in Appeal No. E/1172/2012 has confirmed the demand raised on the appellant only on the ground that the Revenue authorities has not sealed each packing machine as stipulated in Rule 10 and Rule 6(5) of the said Rules. We reproduce the said para 4.4.1:

> "4.4.1.*On going through the records such as Respondent's intimation dated 07.10.2009, panchanama dated 11.10.2009, I find that the Respondent had intimated about the closure of their factory for the period from 11.10.2009 to 28.10.2009 to the Assistant Commissioner of Central Excise as well as the Superintendent on 07.10.2009. From the Panchnama dated 11.10.2009 and 29.10.2009, I find that, 53 Nos. of packing machines were un-plugged and kept inside the factory premises and then sealed the lock of the premises. I also find that, the Sealing of each packing Machines as stipulated in Rule 10 and Rule 6 (5) ibid has not been done and instead of that, only the locks of the Room/ Factory were sealed. For claiming abatement of duty, it has to be ensured that, the stipulated conditions of the Rule-10 of the relevant Rules are complied at the time of sealing. But in the instant case no sealing of packing machines was done inspite of a clear mention regarding sealing of eah machines in the said Rule-10. I also find that, the Respondent is well aware about the procedures and provisions of the relevant Rule-10 at the time of filing of intimation regarding closure of production activity. But in the instant case, they did not adhere to the sealing of each packing machines which they are bound by the relevant Rule of law read with Notification No. 30/2008 dated 01.07.2008 as amended. Also I find that, the sealing of the locks of the hall and main gate of the factory where the machines are kept cannot be accepted as sealing of the packing machines as nothing to this effect has been provided in the said Rule-10. Thus in the absence of sealing of each 53 Nos. of packing machines for the impugned period of closure, the stipulations under Rule 10 of the Pan Masala Packing Machines Rules, 2008 have not been followed*."

5. The adjudicating authority in this appeal has totally misdirected his findings inasmuch as the panchnama dated 11.10.2009 which was signed by the independent panchas, specifically stated that plugs of 53 pouch packing machines was removed and the entire factory was sealed in their presence. The said sealing of the entire factory is also confirmed by the panchnama dated 29.10.2009 wherein it is recorded that seals of factory were opened before the independent panchas which would mean that there was no production activity. In light of these facts the provisions need to be considered.

6. We find that the provision of the said rules reads as under:

> "6(5) *The machines which the manufacturer does not intend to operate shall be uninstalled and sealed by the Superintendent of Central Excise and removed from the factory premises under his physical supervision:*
>
> *Provided that in case it is not feasible to remove such packing machine out of the factory premises, it shall be uninstalled and sealed by the Superintendent of Central Excise in such a manner that it canoe be operated*".

7. It can be seen from the above reproduced rule that the entire emphasis of the provisions of said Rules is that if the machines are made inoperative, no production activity taken place and the machines could not be operated. In the case in hand, by reading both the panchnamas together, undisputedly the entire factory of the appellant was closed, sealed and same was unsealed in the presence of the panchas, which would mean that none of the machines could be operated. We also find that the provisions of Rule 10 of the said Rule as under:

> "Rule 10. ***Abatement in case of non-production of goods*.-** *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 files 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 Superintendent of Central Excise, [at least three working days] prior to the commencement of said period, who on receipt of such intimation shall direct for sealing of all the packing machines available in the factory for the said period under the physical supervision of Superintendent of Central Excise, in the manner that these cannot be operated during the said period:*
>
> *[**Provided** that during such period, no manufacturing activity, whatsoever, in respect of notified goods shall be undertaken and no removal of notified goods shall be effected by the manufacturer except that notified goods already produced before the commencement of said period may be removed within first two days of the said period]*
>
> ***Provided** further that when the manufacturer intends to restart his produced of notified goods, he shall inform to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, of the date from which he would restart production, whereupon the seal fixed on packing machines would be opened under the physical supervision of Superintendent of Central Excise*".

Holistic reading of both the rules i.e. 6(5) & 10 of the Rules does not indicate that each and every machine has to be sealed by the authorities. The total mandate of the said rules is that abatement from the payment of duty should be granted to an assessee, only if there is non-production of gutka/ pan masala in the factory for a specified period. In view of the factual finding as recorded above, we find that the impugned order are unsustainable and liable to set-aside.

8. We also find that this Tribunal in the case of ***CCE, Bhopal vs. Kalpan Pan Masala Pvt. Ltd. in Excise Appeal No.2023 of 2012 vide final order No. A/959/2012-EX (BR)*** while explaining the provision of rule as recorded the abatement held as under:

> "7. *We do not find merit in the above submission. The plea taken by learned DR is mis-conceived and is based on incorrect reading of Rule 10 quoted above. Bare reading of the above quoted Rule would show that as per the Rule, an assessee is entitled to abatement provided thee has been no production in the factory for a continuous period of 15 days. The rule nowhere provides that continuous non-production of excisable goods should be during a given calendar month. Admittedly in this case, there was no production in the factory of the assessee for a continuous period of 36 days and all forty Gutka sealing machines were sealed, therefore, we are of the view that the claim of the respondent for abatement is fully justified under Rule 10 of Pan Masala Packing Machines (Capacity Determination and Collection of Duty), Rules, 2008 and the order of the Commissioner (Appeals) allowing the abatement cannot be faulted. In view of the discussion above, we do not find any merit in this appeal. The stay application and appeal is, therefore, dismissed in-limine*."

9. In view of the foregoing, we find that the impugned orders are not sustainable and liable to be set-aside. We do so. The impugned orders are set-aside and appeals are allowed.

(Dictated and pronounced in the open Court).

(V. Padmanabhan) Member (Technical)	(M. V. Ravindran) Member (Judicial)

Pant