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

Date of hearing: 05.10. 2017
Date of decision: 11.10.2017

Excise Appeal No. 50280 of 2016

(Arising out of order-in-appeal No. JAI-EXCUS-000-COM-34-15-16 dated 20.11.2015 passed by the Commissioner OF Central Excise, Jaipur).

M/s Shree Pouches Appellant

Vs.

CCE, Jaipur Respondent

Appearance:

Sh.Amit Singh, Advocate for the appellant
Sh. S. K. Bansal, A. R. for the respondent

Coram:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Final Order No. 57105/2017

Per: **Justice (Dr.) Satish Chandra**:

The present appeal is filed against the order-in-appeal No. JAI-EXCUS-000-COM-34-15-16 dated 20.11.2015 passed by the Commissioner OF Central Excise, Jaipur.

2. Brief facts of the case are that during the period under consideration (March, 2012, May, 2012 and July 2012), the appellant was engaged in the manufacture of pan masala and gutka which falls under the schedule of the Central Excise Tariff Act, 1985. The appellant was availing the "compound levy scheme", notified vide Notification No 30/2008-CE (NT) dated 1.7.2008 issued under Sub section (2) & (3) of Section 3A of the Act called Pan Masala

Packing Machine (Capacity Determination and Collection of Duty) Rules, 2008 (hereinafter called as Rules). The appellant was having two machines in its factory. One machine was continuously working and duty was paid as per the compound levy scheme. The dispute arose regarding the second machine which was closed from time to time. Regarding the second machine, prior information was given, so, it was sealed for some time in March, 2012, May 2012 and July, 2012 for a few days. The dispute is that department is asking the duty for the full months under the compound levy scheme. The claim of the appellant is that duty is not payable on the second machine for the period when it was sealed by the department till reopened by the department. Being aggrieved, the present appeal is filed by the appellant.

3. With this background, we heard Sh. Amit Singh, ld. Advocate for the appellant who submits that the adjudicating authority has mis-interpreted the work “installed machine” contained in 2nd proviso to Rule 8 of the Rules and has considered sealed machine as installed machine even for the period when it was sealed. He submits that the 2nd proviso to Rule 8 does not deal with the situation where the machine was sealed and uninstalled by following the procedure prescribed under Rule 6(5), 6(6) and 13(1) and 13(2) of the Rules. If the procedure of sealing and unsealing of the machines prescribed under the Rules is complied with, and the machines are added or removed by filling declaration under Rules 6(6), then those sealed machines cannot be considered as installed machines for the period as the machines were sealed.

4. It is the submission of the ld. Counsel that the department has first demanded the duty for the full month under the compound levy scheme and then asked the appellant to file the refund claim for the period when the second

machine was sealed. He submits that this approach of the department is against the law as per the ratio laid down by Hon'ble Gujarat High Court in the case of ***Commissioner*** vs.***Thakkar Tobacco Products P. Ltd. - 2016 (332) ELT 785 (Guj***) where it was observed that-

> "15. *Besides, in the light of the findings recorded by the Tribunal to the effect that it is not disputed that the adjustments made were not more than the amounts of duties mandated to be abated as per Rule 10 of the PMPM Rules, the action of the respondent –assessee in computing the proportionate amount of duty towards the abatement and setting it off against the duty payable in the next month does not adversely affect the revenue in any manner. The abatement, in the opinion of this Court, is no akin to refund and means reduction or diminution of the duty. Therefore, when the duty stands reduced to the extent provided in the rule, there is no liability to pay the same, inasmuch as, to that extent the duty stands abated. Therefore, if the assessee has correctly calculated the proportion of duty and set off the same against the duty payable for the next month, it cannot be said that the said action is contrary to the statutory scheme. When the rules do not provide for the manner in which duty is required to be abated, nor do they provide that abatement shall be by an order of the Commissioner or any authority, but nonetheless provide for abatement of duty and the extent of entitlement to such abatement, no fault can be found in the approach of the assessee in suo motu taking the benefit of such abatement*".

5. He also submits that no duty liability arises when machines are sealed and there is no manufacturing operation as per the ratio laid down in the case of ***Taste Well Product vs. CCE&ST, New Delhi – 2016 (335) ELT 55 (Tri. Del.)***. Lastly, he submits that the impugned order may please be set aside.

6. On the other hand, ld. AR for the department submits that under Rule 9 of the Pan Masala Packing Machine (Capacity Determination and Collection of Duty) Rules, 2008, (the 4th proviso) provides for grant of prorata refund in case manufacturer permanently discontinues manufacturing of goods. So, he submits that as per Rule 10, the appellant is suppose to deposit the entire duty on second machine and then file the refund claim for the period when machine was sealed.

7. We have heard both sides and gone through the material available on record.

8. We find that the view of the department is that machine No. 2 was operating for manufacturing pouch for MRP Rs. 1. Initially, it was operating from 1.7.2012 to 20.12.2012 and remaining period not working (sealed) condition during the period 21.7.12 to 31.7.2012. The assessee deposited the duty amount for the month of July in advance vide e-receipt. As per the composite scheme, for production of pan masala and gutka, duty is payable. When there is no production due to sealing of the machine (as in the instant case), the factory cannot be considered closed completely as one machine was continuously working. So, Rule 10 is not applicable to the present case. The appellant will have to pay the duty on the second machine only for the period when it was working. The appellant is not suppose to pay any duty for the period when machine was sealed. Hence, we direct the adjudicating authority to compute the period when the machine was working and raise the demand of duty and alongwith interest. The charging of the interest is mandatory as per the ratio laid down by the Hon'ble Supreme Court ***- CIT vs. Anjuman - 252 ITR 1 (SC).***

9. In view of above, the impugned order is modified. For the limited purpose, the matter is remanded to the Adjudicating Authority who is directed to compute the period when machine was working (not sealed) and compute the demand alongwith interest but by providing reasonable opportunity of being heard. If the excess duty has already been paid then after deducting the

demand, the refund will be sanctioned as per law but within a period of four months. Fresh evidence, if need be, may be admitted as per law.

10 With the above observation and for limited purpose, the appeal is allowed by way of remand.

(Pronounced on 11.10.2017).

(V. Padmanabhan)
Member (Technical)

(Justice (Dr.) Satish Chandra)
President

Pant