CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal Nos. 1062-1064 of 2011

(Arising out of Order-in-Original No. 31-32/D-1/2010 dated 12.01.2011 passed by the Commissioner of Central Excise, Delhi-I)

DATE OF HEARING : 05.10.2017
DATE OF DECISION : 25.10.2017

CCE, Delhi …. **Appellant**
(Rep by R.K. Mishra, DR)

VERSUS

M/s Montage Enterprises Pvt. Ltd. …. **Respondents**
M/s M.R. Tobacco Pvt. Ltd. (Rep. by Ms. Surabhi Sinha &
Sh. Chander Kumar Gupta Ms. Mehak Gupta, Adv.)

CORAM : **HON'BLE MR. JUSTICE (DR.) SATISH CHANDRA, PRESIDENT**
HON'BLE MR. V. PADMANABHAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 57361-57363/2017

PER JUSTICE (DR.) SATISH CHANDRA :

All the present appeals are filed by the Department against the Order-in-Original No. 31-32/D-1/2010 dated 12.01.2011 passed by the Commissioner of Central Excise, Delhi-I.

2. In the instant case, the main noticee (party) is M/s M.R. Tobacco Pvt. Ltd. [Respondent in Appeal No. E/1063/2011],

who never responded to the notices sent by the Registry. Attempt was made to serve the notice through Departmental channel on three occasions. A letter dated 16.08.2017 sent by the Department has been delivered to the assessee-Respondent as per the website report of the India Post. On another occasion, the notice has returned with the postal remarks 'left'. On the last occasion, the Panchnama was executed. Thus, it is evident that on M/s M.R. Tobacco Pvt. Ltd. notice of service deemed has been complete.

3. On behalf of assessee-Respondent, Shri Chander Kumar Gupta [A.No. E/1064/2011], Ms. Mehak Gupta, learned counsel, appeared and submits that Shri Chander Kumar Gupta was the Director, who later resigned from the Company. She also submits that a penalty of Rs. 50,000/- was imposed on him which was duly paid. She further submits that in another case, a penalty of Rs. 50,00,000/- was imposed on the assessee-Respondent, but it was reduced by the Hon'ble High Court to Rs. 5,00,000/- on health ground and that was also paid. She submits that since the assessee-Respondent has paid the penalty amount, the Department has unnecessarily filed the present appeal against him.

4. Ms. Surabhi Sinha, learned counsel for the assessee-Respondents, M/s Montage Enterprises Pvt. Ltd. [A.No. E/1062/2011], submits that though in the show cause notice

penalty was proposed, but by the impugned order no penalty was imposed. She also submits that as per the ratio laid down by the Hon'ble Supreme Court in the case of **CCE, Patna vs Woodmen Industries,** 2004 (170) ELT A-307 (SC), no penalty can be imposed on the corporate entity. Penalty can be imposed on individual under Rule 26 of the Central Excise Rules, 2002. Finally, she submits that the Departmental appeal may be dismissed.

5. On the other hand, Shri R.K. Mishra, learned DR for the Revenue, submits that, assessee-Respondents, M/s M.R. Tobacco Pvt. Ltd., at the relevant time, were engaged in the manufacture of Pan Masala and Gutkha falling under Chapter Heading 2404 of the Central Excise Tariff Act, 1985 under the brand name of 'Marshal', 'Pan King' etc. On 26.10.2007, a search was conducted at the factory premises of the assessee-Respondents from where shortage/excess of the raw-material was found. As per the details given in the show cause notice, 84 bags of 'Marshal' brand Gutkha, 2160 kgs. of Supari (cut & uncut) and 7253 kgs of Lamination found excess and 630 kgs of tobacco, 25 kgs of perfume and 10 kgs of Katha were found short. Two machines were round the clock producing Pan Masala and Gutkha, but the assessee-Respondents have declared 12 hours' operation of the machines in one shift only. The declaration regarding speed of the machines was also wrong. In the books of account proper entries of the raw-material was also not made. Lastly, he relied

upon the reasons given in the show cause notice and made a request for setting aside of the impugned order.

6. We have heard both sides at length and gone through the material available on record. From the record, it appears that M/s M.R. Tobacco Pvt. Ltd. has declared the speed of the machines as 60-70 pouches per machine per minute in compliance with the Board's Circular. The allegation of the Department is that the speed of the machines was too high perhaps in the range of 110 pouches per minute per machine, but the fact remains that the speed was never measured by an expert. This was merely a guess work. No expert opinion was sought with regard to the speed of machines. So, in the absence of any technical expert's opinion, this allegation was dismissed in the impugned order. Regarding shortage of raw-material, the entire case of clandestine removal was based on the statement of two employees, Shri Dharmendra Tiwari, Supervisor and Shri Pravesh Gupta, Accountant, who were working in the company for 3-4 months only. They were not cross-examined. The investigating Officer admitted that he did not measure the speed of pouch packing machines nor did he examine the statutory records nor conducted any enquiry in respect of suppliers of raw-material or any buyer of the finished goods. The Department failed to point out any basis that the electricity consumed in the factory was not in consonance with the production. There were five machines in the factory, but the raw-material was calculated on the basis of only two machines. As

mentioned in para 7.7 of the impugned order, the Department has not verified, in the course of investigation, the production capacity of the Company. The Department could not find any irregularity in the electricity consumption nor evidence was collected with regard to the alleged clandestine clearance of the finished goods for the period prior to the investigation and after search of the Company upto 30.06.2008. No enquiry was made with any of the raw-material supplier except Noticee No. 3 or with the purchasers of the finished goods or with the transporters with regard to transportation of inputs from suppliers and transportation of the finished goods to various purchasers.

7. In view of this, we find no infirmity in the impugned order and the same is hereby upheld.

8. From the record, it appears that Shri Chander Kumar Gupta (assessee-Appellant) ceased to be a Director w.e.f. 15.07.2009 and has nothing to do with the Company. The reason for his resignation from the Company was his illness. The Hon'ble High Court has also reduced the penalty on the ground of his illness. His financial condition due to ailment and treatment has become precarious, as mentioned by the Hon'ble High Court in its order dated 18.05.2015 in the matter of Sh. Chander K. Gupta vs Commissioner of Central Excise, CEAC 32/2014. The penalty has already been paid as per the direction of the Hon'ble High Court. When it is so, then we find no reason to interfere with the

impugned order whereby the penalty imposed has already been paid. Thus, the Departmental appeal in this regard has no merit.

9. Regarding Montage Enterprises Pvt. Ltd. (assessee-Respondent), it appears that as per the ratio laid down by the Hon'ble Supreme Court in the case of **CCE, Patna vs Woodmen Industries** (supra), no penalty can be imposed on corporate entity under Rule 26 of the Central Excise Rules, 2002. Hence, we find no reason to interfere with the impugned order and the same is hereby sustained along with the reasons mentioned therein.

10. In the result, all the appeals filed by the Department are dismissed.

(Pronounced in the open court on 25.10.2017)

(V. PADMANABHAN)
MEMBER (TECHNICAL)

(JUSTICE Dr. SATISH CHANDRA)
PRESIDENT

Golay