In the Customs, Excise & Service Tax Appellate Tribunal
West Block No.2, R.K. Puram, New Delhi-110066

Appeal No.E/51107-51108/2017
(Arising out of Order-in-Original No.81/PR.Commr/CEX/IND/2017 dated 21.03.2017 passed by The Principal Commissioner of Customs, CEST, Indore)

M/s MSS Food Processors …Appellant
Amarchand Upadhaya Vs
CCE Indore …Respondent

Appearance:
Present for the Appellant : S/Sh S.Sunil and Anil Mishra Advocate
Present for the Respondent : Shri H.C. Saini, DR

Coram:
HON'BLE JUSTICE (DR) SATISH CHANDRA, PRESIDENT
HON'BLE MR B.RAVICHANDRAN, MEMBER (TECHNICAL)

Date of hearing: 17.10.2017
Date of decision: 31.10.2017

Final Order No.57483-57484/2017

<u>Per B. Ravichandran,</u>

These two appeals are against order dated 21.03.2017 of Commissioner of Central Excise, Indore. The main appellants are engaged in the manufacture of Pan Masala containing tobacco and chewing tobacco. They were discharging Central Excise duty in terms of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008. The capacity determined for excise duty liability has been fixed by the Jurisdictional Assistant Commissioner for the appellants. The appellants are liable to pay Central Excise duty as per the said determination by 5th of the same month and intimate the Jurisdictional

Supdt. by 10th of the same month. While discharging Central Excise duty, they have calculated their liability on prorata basis excluding the period when the machines were sealed and kept without operation. The Revenue objected to the procedure adopted by the appellants on the ground that the duty as determined by the Jurisdictional Officer has to be paid by the assessee in the beginning of the month (by 5th) and thereafter abatement of duty in terms of Rule 10 has to be claimed. On this ground, proceedings were initiated against the appellants to demand and recover the full duty liability in terms of the capacity determination orders already issued by the Jurisdictional Officer. The appellants contested the demands. The original authority adjudicated the case and held that the appellants are liable to pay Rs.4,18,97,457/- in terms of Rule 9 and Rule 18 of 2008 rules. He imposed a penalty, 50 % of the confirmed duty, on the main appellant and further penalty of Rs.20/- lakhs on the second appellant under Rule 26 of Central Excise Rules, 2002.

2. The ld Counsel contesting the impugning order submitted that there could be no dispute on the legal position regarding availability of abatement calculated on prorata basis when the factory did not produce the notified excisable goods, during any continuous period of 15 days or more. The provisions of Section 3A and Rule 10 uses the terms “shall be abated”. There is no procedure for filing claim for abatement and processing the same as a refund by the excise authorities. He relied on the following decisions to contend that there is no ground for demanding of duty against the appellant when they availed the abatement based on the legal provisions:

(a) CCE v. Thakkar Tobacco Products Pvt Ltd-2016(3) 332 ELT 785(Guj.)
(b) CCE & ST Delhi v. Tanishq Enterprises [Appeal No.E/53205/2015-Ex. Final Order No.51699/2015-EX(SM)].
(c) Som Pan Products Ltd v. CCE Delhi-II [Appeal Nos.55768-55770 of 2014 EX (DB)-Final Order No.52591-52593 dated 11.09.15].
(d) CCE v. Shakti Fragrances Pvt Ltd 2015 (324) ELT 390 (Del.)
(e) Shree Flavours Pvt Ltd-2014 (304) ELT 441
(f) Kay Fragrances Pvt Ltd (Final Order No.50223-50232/2015 dated 21.10.2015).

3. As the ratio followed in these decisions are squarely applicable to the present dispute, the ld Counsel prayed for setting-aside the impugned orders and allowing their appeals.

4. The ld AR reiterated the findings of the lower authority. He also submitted that for certain months, the appellants are not even eligible for abatement as the production was not closed for more than 15 continuous days. He referred to the table annexed at para 5 of the impugned order. It is clear that during September, 2015 in respect of SM Tobacco, the appellants produced notified goods for 18 days. As such, even abatement cannot be claimed in such a situation.

5. We have heard both the sides and perused appeal records. The present demand against the appellant is only on the ground that they have not followed the procedure of first paying duty based on the determination by the Jurisdictional Officers and thereafter claiming the abatement in terms of Rule 10. We note similar dispute came before the Hon'ble Gujarat High Court in the case of M/s Thakkar Tobacco (P) Ltd (supra). The Hon'ble High Court observed as below:

“13. As noticed earlier, rule 10 of the PMPM Rules provides for statement of duty calculated on proportionate basis in case where the factory does not produce notified goods during any continuous period of fifteen days or more. However, such statement is subject to the conditions stipulated thereunder as referred to hereinabove. Once such conditions are satisfied, the assessee becomes entitled to abatement of duty to the extent of the days the factory did not produce the notified goods.

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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 the rule 10 of the PMPM Rules, the action of the respondent assesee in computing the proportionate amount of duty towards the abatement and getting 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 not akin to refund and means reduction or diminution of the duty. Thereafter, 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 then rules do not provide for the manner in which duty is required to be abated, nor do they provide that statement 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 statement, no fault can be found in the approach of the assessee in suo motu taking the benefit of such abatement.

16. In the light of the above discussion, it cannot be said that the view adopted by the Tribunal is not a plausible view warranting interference by this court. In the absence of any infirmity in the impugned order passed by the Tribunal, it is not possible to state that the same gives the rise to any question of law, much less, a substantial question of law. The appeals, therefore, fail and are accordingly dismissed.”

6. We also refer to the decisions of the Tribunal cited by the appellants mentioned above. In fact, the decision in Som Pan Parag Products Limited (supra) has also been accepted by the department. In appellants’ own case, for the period from July, 2011 to August , 2015, the Tribunal followed the ratio of Som Pan Parag Products Limited (Final order No.53639-53640/2017 dated 02.06.2017). The Tribunal observed as below:

> "8. Admittedly, the appellants have to discharge duty payable for a particular month, by 5th of the same month. Rule 10 provides for abatement when the unit was not in operation for more than 15 days continuously. It is to be noted that the procedure to be followed for claiming such abatement has not been elaborated in the said rules. The appellants could not pay duty by 5th of the same month as they have closed for operation during the period stipulated for payment of duty. By the end of the month, they were aware of the number of days for which the unit operated and also their exact duty liability on prorata basis. This duty liability was discharged subsequently in the next month. This will necessarily bring the liability for interest, which is admitted by the appellant also. We are not able to accept the view of the Revenue that the appellant have to first pay full duty liability for the all days, as determined by the jurisdictional officers and thereafter, after the end of the month, ascertaining the number of days closed, they should claim the excess paid amount, as abatement from the Department. No such procedure has been laid down in the said rules.
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> 9. As already noted, the very same dispute came up before High Courts/Tribunal on more than one occasion. Reference can be made to **Thakkar Tobacco Products Pvt Ltd-2016 (3) 332 ELT 785 (Gujarat). Tanishq Enterprises – Final Order No.51699/2015-EX(SM), Som Pan Products Ltd – Final Order No.52591-52593 dated 11.09.2015, Shakti Fragrances Pvt Ltd – 2015 (325) ELT 390 (Delhi), Shree Flavours Pvt Ltd 2014 (304) ELT 441 and Jayaswals Neco Ltd – 2006 (195) ELT 142."**

7. The Tribunal also refer to the decision of Hon'be Gujarat High Court in Thakkar Tobacco Products Limited (supra) and to Tribunal decision in Som Pan Parag Products Limited (supra).

8. In view of the above said position of law, we find no merit in the present impugned order. However, it has to be noted that the eligibility of abatement will arise only when the production is closed for a continuous period of 15 days or more. We note from the table annexed in the impugned order, at least in respect of one month (September, 2015), the continuous period of 15 days appears to have been not met. The fact of fulfillment of condition of continuous closer of 15 days or more can be re-verified by the jurisdictional authorities. The

payment of duty liability by the appellant as per such re-verification has to be confirmed. The appeals are allowed by way of remand to the limited extent as above. Verification and quantification, duty payable, may done in line with above observation after giving due opportunity to the appellant.

(Pronounced in Court on 31.10.2017)

(Justice (Dr) Satish Chandra) President	(B. Ravichandran) Member(Technical)

pcs