IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing: 8.1.2018
Date of Pronouncement : 19.1.2018

Appeal No. E/50076-50078/2015-DB

(Arising out of Order-in-Original No. 30-COMMR-CEX-ADJ-SGR-2014 dated 16.9.2014 passed by the Commissioner , Central Excise, Jaipur-II)

Mukesh Katheil Appellant
Anil Nikhra
Arvind Pateria

Vs.

CCE & ST, Bhopal Respondent

Appeal No. E/50183-50185/2015

(Arising out of Order-in-Original No. 29-30-COMMR-CEXZ-ADJ-SGR-2014 dated 16.9.2014 passed by the Commissioner , Central Excise, Jaipur-II)

Ashok Gupta Alias Ashok Gurha Appellant
Purushottam Gupta Alias P.D. Rawat
Dinesh Seth

Vs.

CCE & ST, Bhopal Respondent

Appearance

Shri Prabhat Kumar, Advocate - for the appellant
Shri S.S. Dabas, Advocate
Shri P.C. Kashiv, Advocate

Shri S.K. Bansal, D.R. - for the respondent

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

Final Order No. 50252-50257/2018

Per **V. Padmanabhan:**

The present appeals have been filed against the Order-in-Original No. 29-30/2014 dated 16.9.2014.

2. The brief facts of the case are that the main noticee Shri Mukesh Katheil has made a declaration under Rule 6 of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008, where he has declared one pouch packing machine. He has also intimated that the factory will be closed in the registered premises in the month of July 2008. The factory has restart the work after 27th July, 2008. Shri Mukesh Ketheil, the main noticee is engaged in manufacturing and selling of Paheli Brand gutkha and Paheli brand desi gutkha. The premises of the factory declared by the appellant is exactly opposite to his residence. In the factory premises, it was found that the operation was carried out using electricity drawn directly from the nearby pole illegally and one DG set was also installed. On the basis of intelligence report, it was found that Shri Mukesh Ketheil was also operating from the three other premises which have not declared to the department. Search was conducted at the three undeclared premises and one residence on 23rd July 2008 and 24th July, 2008. A search was also conducted at the original factory premises and adjoining premises on 6.8.2008, from where more than 5007 Kgs. of the raw material was found. The department, after recording the statement and other material has made out the case of the clandestine removal on the main noticee Shri Mukesh Katheil. Penalties were levied on other persons who

were involving in the illegal operation. Being aggrieved, the present appeals have been filed by the appellants.

3. With this background, Dr. Prabhat Kumar, ld. Counsel for the main noticee submits that the impugned order is not sustainable in the eye of law. It is the submission of the ld. Counsel that in the illegal factory premises, there were three persons viz. Pawan Kumar Pathak, Raghvendra Singh and Shri Pholchand Choubey. He submits that no opportunity of cross-examination was provided to the appellant of these persons. On the basis of the statement of these persons, the case has been made out for clandestine removal. He also submits that in the illegal factory there were other brand items Paheli brand gutkha. He accepted that the finished product i.e pouches under the Paheli brand gutkha, the registration number of the appellant was mentioned. It is the submission of the ld. Counsel that the duplicate gutkha was manufactured in the illegal premises and his client has nothing to do with the same. He accepted that in the three premises, there were 12 machines, no raw material was found only finished goods were found. It is the submission of the ld. Counsel that the owner’s statement was not recorded. Transportation aspect was also not examined by the department. He also submits that the cross examination of certain persons were in fact conducted by the authorities below but the same was never brought on record.

4. Ld. Counsel also submits that the FIR was lodged to the police on 21.7.2008, where it is stated that duplicate pouches are prepared illegally somewhere. But fact remains that search was also conducted on 23.7.2008 and FIR was lodged on 21.7.2008. He submits that the impugned order may kindly be set aside. Lastly, he relied on the following decisions:

(i) ***CCE Vs. Vishnu & Co. Pvt. Ltd.*** – 2016 (332) ELT 793 (Del.);

(ii) ***Continental Cement Company Vs. Union of India*** – 2014 (309) ELT 411 (All.).

5. At the same time, Shri Dabas representing to the other five noticees viz. Shri Ashok Gupta Alias Ashok Gurha, Shri Purushottam Gupta Alias P.D. Rawat, Shri Anil Nihra, Shri Dinesh Sethi and Shri Arvind Pateria submits that in the instant case, penalty was levied on their clients under Rule 26 of the Central Excise Rules, 2002 is illegal. He submits that the order regarding levy of the penalty is non-speaking. He submits that his clients are innocent, penalty is not desirable.

6. On the other hand, Shri S.K. Bansal, ld. D.R. has justified the impugned order. He submits that in RG-1, the appellant has declared only 27 Kg. mixed raw material but there was 5600 Kg. of raw material available in the factory premises and adjacent premises which was taken on rent. He submits that only one machine was

declared to the department. The raw material is a perishable item which cannot be stored for a long period. Thus, it is evident that the raw material was used in the 12 other machines which were not declared to the department. The statement of Shri Pawan Kumar Pathak, Supervisor was recorded. He is the owner of one of the premises. In the statement, it is clearly mentioned by him as well as by other workers that operation was conducted by the main noticee i.e. Mukesh Katheil. He submits that these other illegal factories which were located 4 Km. from his residence were operated by the main noticee without declaring to the department. He submits that the opportunity was given to the appellant for cross-examination by issuing summons to other co-notices to appear before the adjudicating authority but they adopted tactics to delay proceedings. In the statements of the illegal owners of the premises where illegal factory going on, they confirmed that the raw material was received from the premises of the main noticee. Lastly, he submits that in the illegal premises no raw material was found, 12 machines cannot run without the raw material. Labourers were common as per statement made by them.

7. We have heard both sides and perused the record. The facts of the case are that Shri Mukesh Katheil, proprietor of M/s Shree Swaroop Products, Harpalpur, filed a declaration under Rule 6 of the Packing Machine Rules and declared one single track packing

machine. He filed an intimation for closure of his factory in the month of July 2008. But during the course of search operations, carried out by the departmental officers on 23.7.2008, it was found that gutka was being manufactured by using a total of 12 packing machines in three different premises which were not declared to the department. The packing material as well as packed material found during search in these three undeclared premises indicated that the goods were being packed in pouches bearing the brand name of "Paheli" and bearing registration number of Shri Mukesh Katheil. After completion of investigation, show cause notices have been issued and the impugned order has been passed in which Central Excise duty of Rs. 1.5 crores has been demanded from Shri Mukesh Katheil along with interest and penalties of equal amount. The findings in the impugned order have been challenged by the present set of appeals filed by Shri Mukesh Katheil as well as other persons to whom penalties have been imposed.

8. Prior to 1.7.2008, manufacture and clearance of pan masala and gutka were subject to Central Excise duty as per prevailing Central Excise Tariff. However, with effect from 1.7.2008, pan masala and gutka have been brought in the purview of Section 3A of the Act vide Notification No. 29/2008-CE(NT) dated 1.7.2008. The said Notification provides for charge of Excise duty on the basis of production capacity. Further, Pan Masala machines (Capacity

Determination and Collection of Duty) Rules, 2008 was issued vide Notification No. 30/2008-CE(NT) dated 1.7.2008. As per these rules, the factor relevant to the production of goods is the number of packing machines installed in the factory for manufacture of Pan masala/Gutka. The manufacturer had to file declaration with the department in respect of the number of packing machines installed along with various other details on the date prescribed therein.

9. In accordance with the above rules, one machine has been declared by Shri Mukesh Katheil in his registered premises, but the same has been intimated as closed in the month of July, 2008. During the course of search, three undeclared premises have been detected where 12 packing machines were found working and engaged in packing 'Paheli' brand gutka bearing the registration number of Shri Mukesh Katheil. In terms of the Packing Machine Rules, Central Excise duty is liable to be paid on the 12 packing machines. However, the issue for adjudication is whether the duty liability is to be borne by Shri Mukesh Katheil, proprietor of M/s Shree Swaroop Products.

10. The evidences linking the manufacture happening in the three undeclared premises to Shri Mukesh Katheil is discussed below.

11. During the course of investigation, the department has interrogated and recorded the statement of the owners of the three premises, where machines were found working. Shri Pawan Kumar Pathak, Shri Raghvendra Singh and Shri Pholchand Coubey, owners of the three premises in their separate statements before the departmental officers have clearly admitted that their premises have been taken on rent by Shri Mukesh Katheil. They have, further stated that Shri Mukesh Katheil had been carrying out gutka manufacturing activity at the three premises. It is further to be recorded that none of the statements have been retracted at any time from the date of their recording until submission of reply to the show cause notice. Only in such reply, the contents of the statements have been sought to be disowned. This can only be considered as an afterthought. During the course of search, packing material as well as packed pouches were found bearing the brand name of "Paheli" belonging to Shri Mukesh Katheil. This further supports the statements made by three persons above. Further, various workers who were found working in the three undeclared premises, in their independent statements have also confirmed the above fact. They have further stated that the raw material mix which was used for packing gutka using the pouch packing machines were received in the unregistered premises from the registered factory of Shri Mukesh Katheil.

12. During the course of search, it was found that in addition to the registered premises, the adjacent premises were also in possession of Shri Mukesh Katheil. In the adjacent premises, it was found that the preparation of raw material mix was in full swing even when the registered factory had filed an application for closure in the month of July. Further, a huge amount of stock of raw materials to the extent of 5007 Kg. was found in the adjacent premises which would be sufficient for production of as much as 13 months if these were used by the sole machine installed in the registered premises. As per the statements of Shri Ashok Gupta, supervisor, Purrushotam Gupta, Shri Arvind Pateria and Shri Anil Nikhara and others who were employees of Shri Mukesh Katheil, the raw material mix was prepared either in the registered factory or in the adjacent premises and was regularly supplied for use in the packing machines found installed and working in the three unregistered premises. These statements support and corroborate the statements recorded from the owners and workers in the three unregistered premises.

13. The huge stock of raw materials found in the premises adjacent to the registered factory also lends credence to the view that they were meant to be used to prepare the raw material mix for supply to the three unregistered factories. Shri Devendra Parihar, the owner of the adjacent premises has also stated that his premises

was taken on rent to Shri Mukesh Katheil for processing the raw materials and supply of the same to the illegal factories.

14. The clandestine nature of the operations carried out in the three unregistered premises is further evidenced by the fact that the operations were carried out either using the DG set or using electricity drawn illegally from the nearby electric pole. The search in the various premises also resulted in seizure of machines, finished goods, processed raw materials-mix ready for manufacture and packing material for gutka. Such seized goods have been confiscated in the impugned order. We uphold the same.

15. As per the grounds agitated in the present appeal, none of the facts are challenged. The fact of the illegal manufacture happening in the three premises using 12 packing machines have not been challenged at all. A feeble attempt has been made to raise the technical ground that the appellant had asked for cross examination of various persons whose statements have been relied upon in the proceedings. The same has not been denied by the adjudicating authority but in spite of several summons issued to all the witnesses, none of the witnesses turned up before the adjudicating authority at the time of personal hearing.

16. After appreciation of the entire evidences, we are of the view that it stands fairly established that Shri Mukesh Katheil, proprietor of M/s Shree Swaroop Product has taken on rent four premises and making use of raw material prepared in the premises adjacent to the registered factory, sent the raw material-mix to the three unregistered premises. In the three premises, by installing 12 machines illegally, gutka has been packed and sold bearing the brand name Paheli. On the basis of the evidences produced by Revenue, the case is fairly established. It is settled proposition that in quasi judicial proceedings, the level of evidence required to be produced is to be such that the case is established to the extent of preponderance of probability. The standard of proof need not be as required in the case of judicial proceedings. In the facts and circumstances of the case, we hold that Shri Mukesh Katheil has carried out manufacture of gutka using 12 packing machines in illegal factories. Hence, we uphold the demand of Central Excise duty to the extent of Rs.1.5 crores along with interest and equal amount of penalty from Shri Mukesh Katheil, proprietor of M/s Shree Swaroop Products.

17. Penalties have also been imposed amounting to Rs. 10 lakhs each on various persons. We note that all the persons have played an important part in abetting the clandestine manufacture of gutka in the illegal factories. They were all employees of Shri Mukesh Katheil and have worked in various capacities and have facilitated

the huge evasion of Central Excise duty. Consequently, they are liable for penalty under Rule 26 of the Central Excise Rules, 2002 and we uphold the penalties imposed on them in the impugned order.

18. In the light of the above discussions, the impugned order is upheld and all the appeals are dismissed.

(Pronounced in Court on 19.1.2018)

(Justice Dr. Satish Chandra)
President

(V. Padmanabhan)
Member (Technical)

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