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

COURT NO. II

DATE OF HEARING : 28/11/2017.
DATE OF DECISION : 27/02/2018.

Excise Appeal No. 2608 of 2012 (SM)

[Arising out of the Order-in-Appeal No. 37/CE/DLH/2012 dated 04/06/2012 passed by The Commissioner (Appeals), Central Excise, Delhi – I, New Delhi.]

M/s S.A. Freshners Pvt. Ltd. Appellant

Versus

CCE, New Delhi Respondent

Appearance

Shri A.K. Prasad and Ms. Priyanka Goel, Advocates – for the appellant.

Shri V. Sengraj, Authorized Representative (DR) – for the Respondent.

CORAM: **Hon'ble Shri Anil Choudhary, Member (Judicial)**

Final Order No. 50815/2018 Dated : 27/02/2018

Per. Anil Choudhary :-

The issue in this appeal relates to interpretation of Pan Masala Packing Machines [PMPM] (Capacity Determination and Collection of Duty) Rules, 2008.

2. The brief facts of the case are that the appellants are engaged in the manufacture of Gutka (which is nothing but Pan

Masala containing Tobacco). The short levy relates to the period July, 2009. During the relevant period the appellants were subject to compounded levy scheme under Section 3A of the Central Excise Act, 1944, readwith Pan Masala Packing Machines (Capacity Determination & Collection of Duty) Rules, 2008. As per Rule 5 of these Rules, certain quantities of pouches of Gutka were deemed to have been manufactured per packing machine per month, for pouches of different retail prices. Based on this deemed production, the duty was to be calculated as per Rule 7 of the said rules, readwith Notification No. 42/2008-CE dated 01/07/2008.

3. In the beginning of June 2009 the appellants were operating 9 pouch packing machines, out of which 3 were packing Gutka pouches of MRP Rs. 2/- and 6 of MRP Rs. 1.50. On 24/06/2009 the appellants informed the department that they wished to operate only 5 number of machines of MRP Rs. 1.50 during the period 01/07/2009 to 31/07/2009. Accordingly, 3 machines of MRP Rs. 2/- and one machine of MRP Rs. 1.50, were sealed by the Central Excise officers on 30/06/2009. In other words, with effect 01/07/2009 the appellants discontinued production of Gutka pouches of MRP Rs. 2/-.

4. However, realizing that there was still a considerable demand of pouches of MRP Rs. 2/-, the appellants wrote to the department on 05/07/2009 that they wished to start 5 numbers of machines of MRP Rs. 2/- from 10/07/2009 and would be

operating them till 30/07/2009. Accordingly, 5 packing machines (3 already owned by them and 2 brought from outside.) of MRP Rs. 2/- were desealed/operationalised by the Central Excise officers on 10/07/2009. The issue then arose of the duty liable to be paid by the appellants for July, 2009.

5. The department was of the view that the duty for the month of July, 2009 would come to Rs. 1,20,00,000/- (Rs. 24,00,000/- x 5) as per Rule 6 (4) readwith Rule 9 of the said Rules, whereas the appellants were of the view that they were required to pay duty of Rs. 85,16,130/- only, on pro-rata basis for the period 10/07/2009 to 31/07/2009, as per the fourth proviso to Rule 9 of the said Rules.

6. The Adjudicating Authority has held that since the MRP of Rs. 2/-, a new retail sale price, had commenced on **existing machines** (which had been sealed in June 2009), the first proviso to Rule 8 of the said Rule would apply and it would be deemed that the 5 machines producing Rs. 2/- MRP retail pouches, were operating for the whole month. The Adjudicating Authority also held that the fourth proviso to Rule 9 would not be applicable, as contended by the appellants, since it would apply only when a new retail sale price was introduced for the first time ever (since having started working under the compounded levy scheme).

7. The Commissioner (Appeals) has also upheld the order of the Adjudicating Authority on the same grounds and hence the present appeal.

8. The learned Counsel for the appellant submits that as per Rule 6 (4) of the said Rules, even if a packing machine is installed in the middle of a month it will be deemed that the said machine was operating during the whole month.

9. The first proviso to Rule 8 provides that if a manufacturer is producing pouches of MRP, say, of Rs. 1.50 per pouch on 5 machines and in the middle of the month starts production of pouches of new MRP, of say, Rs. 2/- on one of the existing 5 machines, it will be deemed that the manufacturer had been operating 5+1 = 6 machines during the whole month. The expression "existing machine" used in this proviso obviously refers to an existing operational machine and not a non-operational machine which has been sealed by the department on the manufacturer's request.

10. The fourth proviso to Rule 9 of the said Rules refers to a situation where pouches of a 'new retail price' are proposed to be packed on a machine which was not in operation earlier (i.e. other than an existing machine). In the instant case, the 5 pouch packing machines which commenced packing of Rs. 2/- MRP retail pouches with effect from 10/07/2009, were not operating machines on 09/07/2009. Hence, this case would not be covered by proviso 1 to Rule 8 of the said Rules.

11. The expression "new retail sale price during the month" used in fourth proviso to Rule 9 of the said Rules, has also been wrongly interpreted by the Adjudicating Authority and the Commissioner (Appeals). The interpretation that this expression covers cases where a new retail sale price has been introduced for the first time ever, and was never ever used by the manufacturer, since the introduction of the Rules, is totally misplaced. When the department is accepting that the same expression used in the first proviso to Rule 8 refers to a retail sale price which was not in use during the particular month, they cannot adopted a different interpretation of the same expression when it comes to application of the fourth proviso to Rule 9 of the said Rules.

12. A similar matter had come up before this Tribunal in the case of **Trimurti Fragrances Pvt. Ltd. vs. CCE, Delhi – III – 2015 (329) E.L.T. 175 (Trib. – Del.)**, wherein it has been held that when a new RSP is introduced the fourth proviso to Rule 9 of the said rules would apply and that any other interpretation would make the said proviso redundant or otiose, which is not permissible by law.

13. In view of the above the appellants had correctly paid pro-rata duty in respect of machines manufacturing pouches of new MRP Rs. 2/-, for the period 10/07/2009 to 31/07/2009, as per the fourth proviso to Rule 9 of the said Rules.

14. The learned AR for the Revenue Shri V. Sengraj relies on the findings in the impugned order.

15. Having considered rival contentions, I find that under the PMPM Rules, the period of assessment is calendar month. It is evident from Rule 5 which provides for determination of capacity on monthly basis and the duty payable per machine is prescribed for each month. Further in several other rules, the reference to determination of duty, abatement of duty is with respect to month. On a conjoint reading of the rules as a whole particularly Rule 9 proviso 4, Rule 8 first proviso, Rule 6 (4), Rule 7, it is evident that the applicable rule in the facts of the present case is Rule 9 which provides for the monthly duty payable on notified goods shall be paid by the 5th day of the same month and an intimation in Form – II shall be filed with the Jurisdictional Authority by 10th of the same month. Further, 4th proviso to Rule 9 provides that in case a manufacturer <u>commences manufacturing of goods of a new retail sale price during the month</u>, the monthly duty shall be recalculated pro-rata on the basis of total number of days in that month and the number of days remaining in that month counting from the date of such commencement and the duty liability for the month shall not be discharged unless the differential duty is paid by the 5th of the following month and in case the amount of duty so re-calculated is less than the duty for the said month, the balance shall be refunded to the manufacturer by the 20th day of the next month, whereas Rule 8 provides in case of addition or installation or

removal or un-installation of a packing machine in the factory during the month, the number of operating packing machine for the month shall be taken as the maximum number of packing machines installed on any day during the month. Further, the first proviso provides that in case a manufacturer commences manufacturing of goods of a new retail sale price during the month on an existing machine, it shall be deemed to be an addition in the number of operating machines for the month. Thus, the purport of Rule 8 by way of example is that on a particular machine 'a' say a manufacturer is producing notified goods of MRP Rs. 1/- for the first 10 days of the month and on the same machine 'a' he starts manufacturing notified goods of MRP Rs. 2/- for the balance number of days, in that case it will be deemed the manufacturer has been manufacturing notified goods of Rs. 2/- MRP for the whole month and duty shall be payable accordingly. As the period of assessment is month to month and admittedly the appellant have not manufactured notified goods of Rs. 2/- MRP from 1^{st} to 9^{th} July, accordingly, for the month of July 2010 their case is manufacture of Rs. 2/- new MRP notified goods and duty is required to be calculated as provided in Rule 9 (4) proviso of the said rules. I also find that a Division Bench of this Tribunal in **Trimurti Fragrances Pvt. Ltd.** (supra) in the case of claim for abatement for the period of closure of the factory when the appellant paid the proportionate duty for the period factory was in operation and Department contended that appellant should have paid entire duty for the month and only thereafter should have claimed rebate. This Tribunal held as follows :-

> "9. Thus, point of dispute is as to whether the Fourth Proviso to Rule 9 would be applicable to Rule 7 read with Rule 8. As discussed above, it is Rule 7 which prescribes the formula for calculation of duty by applying the appropriate rate of duty as specified in the Notification No. 42/2008-C.E. to the number of operating packing machines in the factory during the month, and Rule 8 specifies as to how number of operating packing machines is to be determined, and according to this Rule, the number of operating packing machine in a factory for a particular month shall be the maximum number of operating packing machine installed on any day during the month. The Fourth Proviso to Rule 9 is about recalculation of duty in the circumstances when during a month the manufacturer either permanently discontinues the manufacture of the goods of an existing RSP or commences the manufacture of goods of a new RSP. Thus the Fourth Proviso to Rule 9 is in respect of calculation of duty payable for a month and has to be treated as qualifying the provisions of Rule 7 read with Rule 8. Hon'ble Bombay High Court in the case of *Shree Satpuda Tapi Parisar Sahkari Sakhar Karkhana Ltd.* v. *Union of India* reported in 2014 (307) E.L.T. 699 (Bom.) in para 13 of its judgment regarding the construction of the proviso has held as under :-
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> > "the general rule in construing a provision containing a proviso is to construe them together without making either of them redundant or *otiose*. Even if enacting part is clear, effort is to be made to give some meaning to the proviso and to justify its necessity. It is also settled preposition of law that the enacting part should be generally given such a

> construction which would make the exceptions carved out by the proviso necessary and the construction which would make construction unnecessary and redundant should be avoided."

9.1 If the Department's contention is accepted, it would make the Fourth Proviso to Rule 9 redundant, which in view of the above mentioned judgment of Hon'ble Bombay High Court is not permissible. The Fourth Proviso to Rule 9 clearly states that in case a manufacturer permanently discontinues the manufacture of goods of existing RSP, his monthly duty liability shall be re-calculated on *pro rata* basis of the total number of days in that month and the number of days remaining in that month counting from the date of discontinuation and in case the amount of duty is so recalculated is less than the duty paid for the month the balance shall be refunded to him by 20th of the following month. This proviso also states that in case a manufacturer in a particular month commences manufacturing of the goods of a new RSP, his monthly duty liability shall be recalculated *pro rata* on the basis of total number of days in that month and the number of days remaining in that month counting from the date of commencement and duty liability for the month shall be discharged unless the differential duty is paid by him by next 5th of the following month. The appellant in this case had used the four new machines installed w.e.f. 24-7-2013 for manufacture of the pouches of the new RSP - Rs. 4 per pouch, which was not being earlier manufactured by them and, therefore, the provisions of this Proviso would be squarely applicable. Therefore, in respect of these four machines, the duty at the rate applicable for the MRP of Rs. 4 would be chargeable only for 8 days from 24th July to 31st July and not for the entire month. The appellant have discharged duty liability on this basis only. Therefore, we hold that the duty demand of Rs. 1,51,35,483/- confirmed against the appellant on the basis that in respect of these 4 machines, the duty would be chargeable for the whole month, is not sustainable and has to be set aside".

16. Accordingly, I hold that the view taken by Revenue is against the provisions of the PMPM Rules, 2008 readwith Section 3A of the Act. Accordingly, the impugned order is set aside and the appeal is allowed. The appellant shall be entitled with consequential relief in accordance with law.

(Order pronounced in the open court on 27/02/2018.)

(Anil Choudhary)
Member (Judicial)

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