CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal No. 209 of 2012 with
Excise RoA No. 50136 of 2018

(Arising out of Order-in-Original No. 07/D-I/2011 dated 31.10.2011 passed by the Commissioner of Central Excise, Delhi-I)

DATE OF HEARING : 10.04.2018
DATE OF DECISION : 16.04.2018

M/s Shiv Shakti Agrifoods Pvt. Ltd. …. Appellants
(Rep by Shri Manish Pushkarna, Adv.)

VERSUS

CCE, Delhi-I …. Respondent
(Rep. by Sh. R.K. Mishra, DR)

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

FINAL ORDER NO. 51364/2018

PER JUSTICE (Dr.) SATISH CHANDRA :

After hearing both sides, we recall our earlier Final Order No. 54023/2016 dated 06.10.2016 where the appeal was dismissed for non-prosecution, for the reasons mentioned in the RoA Application. The appeal is restored to its original number.

2. With the consent of both sides, we proceed to decide the appeal on merits.

3. The present appeal is filed by the assessee-Appellants against the Order-in-Original No. 07/D-I/2011 dated 31.10.2011 passed by the Commissioner of Central Excise, Delhi-I. The period in dispute is May to September, 2010.

4. The brief facts of the case are that, during the period under consideration, the assessee-Appellants were engaged in the manufacture of 'Gutka' i.e. Pan Masala containing tobacco which attracts the Central Excise Duty under the Central Excise Tariff Act, 1985. The activity of the assessee-Appellants was subject to Section 3A of the Central Excise Act, 1944 read with Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 [hereinafter referred to as '**Rules**'] w.e.f. 01.07.2008 which were notified under Notification No. 30/2008-CE(NT) dated 01.07.2008.

5. The assessee-Appellants were paying the Central Excise Duty as per Rules on pro-rata basis i.e. only in respect of those machines which were working and only for those number of days for which they were working, but the Department has demanded the duty for the whole month and also imposed penalty. Being aggrieved, the assessee-Appellants have filed the present appeal.

6. With this background, we have heard Shri Manish Pushkarna, learned counsel for the assessee-Appellants and Shri R.K. Mishra, learned DR for the Department.

7. The learned counsel, at the strength of written submissions, mentioned that, during the period under consideration, certain number of machines were installed in their factory, out of which some were 'operational' and some were, admittedly, lying sealed. The assessee-Appellants have calculated the duty on pro-rata basis for the number of machines in 'operation' which on notified goods (Gutka) was manufactured and claimed abatement for the machines which were lying under seal and, admittedly, did not produce the notified goods. The duty was, accordingly, paid on pro-rata basis for the machines in operation. The alleged demand is for such machines which were lying sealed on the ground that duty is leviable on the number of machines 'installed' in the factory even though they did not produce/manufacture excisable notified goods. For this purpose, he has drawn our attention to para 7 of the show cause notice which provides details (in a table) pertaining to the machines sealed and desealed. He read out Rule 8 and 10 of the Rules, which are reproduced below :

> **"Rule 8. Alteration in number of operating packing machines–**
>
> **In case of addition or installation or removal or uninstallation 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:**
>
> ***Provided*** **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 packing machine for the month:**

Provided **further that in case of non-working of any installed packing machine during the month, for any reason whatsoever, the same shall be deemed to be operating packing machine for the month."**

"Rule 10. Abatement in case of non-production of goods.-

In case a factory did not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period provided the manufacturer of such goods files an intimation to this effect with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, with a copy to the Superintendent of Central Excise, at least three working days prior to the commencement of said period, who on receipt of such intimation shall direct for sealing of all the packing machines available in the factory for the said period under the physical supervision of Superintendent of Central Excise, in the manner that these cannot be operated during the said period :

Provided **that during such period, no manufacturing activity, whatsoever, in respect of notified goods shall be undertaken and no removal of notified goods shall be effected by the manufacturer except that notified goods already produced before the commencement of said period may be removed within first two days of the said period:**

Provided **further that when the manufacturer intends to restart his production of notified goods, he shall inform to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, of the date from which he would restart production, whereupon the seal fixed on packing machines would be opened under the physical supervision of Superintendent of Central Excise."**

8. On the other hand, the learned DR justified the impugned order.

9. We have heard both sides at length and gone through the material available on record. During the period under consideration, the assessee-Appellants were required to discharge the duty liability under the Rules, notified under Section 3A of the Central Excise Act, 1944. To this effect, the assessee-Appellants were required to file a declaration in a prescribed form to jurisdictional Assistant/Deputy Commissioner containing the required details – the main information being the number of single track and multiple track packing machines available in the factory, out of available machines, how many are installed and out of installed machines, how many are intended to be operated for production, the name of manufacturer of each machine, its maximum speed, identification number, the retail sale price of the gutka/pan masala pouches to be manufactured etc.

10. As per Rule 6(6), the assessee-Appellants can add new packing machines or uninstall one or more installed packing machines or start manufacture of pouches of a new MRP or change any other declared parameters by filing a fresh declaration to Assistant /Deputy Commissioner at least three day in advance. As per Rule 7, the duty payable for a particular month is to be calculated by applying the appropriate rate, as specified in the Notification No. 42/2008-CE dated 01.07.2008 to the number of operating packing machines. Under Rule 8 of PMPM Rules, the number of operating packing machine in a month shall be the maximum number of machines installed on any day during the month and for this purpose, if a manufacturer commences manufacturing the pouches of a new retail sale price during a month on an existing machine, it shall be deemed

to be an addition in the number of operating packing machines for the month. This Rule also provides that in case of non-working of an installed machine during the month for any reason whatsoever, it shall be deemed to be **operating packing machine for the month**.

11. Rule 9 provides that the duty payable for the month shall be paid on or before 5th day of the month and if subsequent to payment of duty, there is increase in the number of operating machines, the differential duty shall be paid by the 5th of the next month.

11. Rule 10 provides for abatement of duty in case the **factory** did not produce the goods for any continuous period of 15 days or more. The abatement is allowed subject to the condition mentioned in this Rule.

12. In the instant case, the assessee-Appellants were manufacturing gutka pouches of Rs. 1/- MRP. At the cost of repetition, it may be mentioned that under Rule 7 the duty payable by a Pan Masala/Gutka manufacturing unit during a month is to be determined by applying appropriate rate of duty under Notification No. 42/2008-CE to the number of operating packing machines. Under rule 8, the number of operating packing machines for a month is the maximum number of machines installed on any particular day during the month. In terms of 2nd proviso to Rule 8, in case of non-working of an installed packing machine during the month for any reason whatsoever, the same shall be deemed to be operating packing machine for the month. In the instant case, it is not

disputed by either side that during each month, during the period of dispute, certain number of machines had been got sealed, as mentioned in para 7 of the show cause notice and these machines had not been operated for the whole month but had been operated only for part of the month. The point of dispute is, as to whether in respect of such machines the duty would be payable only on pro-rata basis for the number of days in the month during which the machine had functioned or would be payable for the whole month without giving abatement for the period for which the machine was sealed.

13. In this connection, the only proviso for abatement is mentioned in Rule 10, but for invoking this rule –

(a) the entire factory must be closed for a continuous period of 15 days or more;

(b) during the period of closure there should not be any manufacturing activity whatsoever and no removal of goods by the manufacturers; and

(c) prior intimation, at least three days prior to closure, must be given to jurisdictional Central Excise Officer who shall seal all the packing machines available in the factory in such a manner that the same cannot be operated during the period of closure.

In the instant case, it is clear that the entire factory was not closed. A few machines were working and production was on. It is not the case of the assessee-Appellants that entire factory was closed for a continuous period of 15 days or more during which there was absolutely no manufacturing activity and no removal of the finished goods. Therefore, abatement under Rule 10 is not available. Hence, we are of the view that abatement under Rule 10 cannot be given in respect of individual machines which may have been sealed for a continuous period of 15 days or more, when during that period, other machines were functioning and factory was in operation.

14. At this stage, it may also be mentioned that other than Rule 10, there is no provision for charging duty on pro-rata basis in respect of machines which, for the reason of being sealed, were operating only during part of the month.

15. In view of the above, we find no reason to interfere with the impugned order and the same is hereby sustained along with the reasons mentioned therein.

16. In the result, the appeal filed by the assessee-Appellants is dismissed. RoA application also stands disposed of accordingly.

(Pronounced in the open court on 16.04.2018)

(V. PADMANABHAN)
MEMBER (TECHNICAL)

(JUSTICE Dr. SATISH CHANDRA)
PRESIDENT

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