

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

Date of Hearing:28.06.2018

Date of Decision:21.12.2018

**Excise Appeals Nos.51819,51960-51965/17,
50004-50005, 50021/2018**

Case No	Impugned Order Detail's	Date of Impugned Order	Passed By	Appellant	Respondent
E/51819/2017-DB	OIA-JOD-EXCUS-000-COM-0013-17-18	23/08/2017	Commissioner of Central Excise and Service Tax-JODHPUR	SHREERAJ PANMASALA PVT LTD	C.C.-JODHPUR
E/51960/2017-DB	OIO-JOD-EXCUS-000-COM-0013-17-18	23/08/2017	Commissioner of Central Excise-JODHPUR	BABULALBHAWARLA L JAIN	C.C.-JODHPUR
E/51961/2017-DB	OIO-JOD-EXCUS-000-COM-0013-17-18	23/08/2017	Commissioner of Central Excise-JODHPUR	ASHOK KUMAR JAIN	C.C.-JODHPUR
E/51962/2017-DB	OIO-JOD-EXCUS-000-COM-0013-17-18	23/08/2017	Commissioner of Central Excise-JODHPUR	PRAFUL K SHAH	C.C.-JODHPUR
E/51963/2017-DB	OIO-JOD-EXCUS-000-COM-	23/08/2017	Commissioner of Central Excise-JODHPUR	MAHARASHTRA TRADING COMPANY	C.C.-JODHPUR

	0013-17-18				
E/51964/2017-DB	OIO-JOD-EXCUS-000-COM-0013-17-18	23/08/2017	Commissioner of Central Excise-JODHPUR	SURESH B JAJRA	C.C.-JODHPUR
E/51965/2017-DB	OIO-JOD-EXCUS-000-COM-0013-17-18	23/08/2017	Commissioner of Central Excise-JODHPUR	SURESH B JAIN	C.C.-JODHPUR
E/50004/2018-DB	OIO-JOD-EXCUS-000-COM-0013-17-18	23/08/2017	Commissioner of Central Excise and Service Tax-JODHPUR	SACHIN J JOSHI	C.C.-JODHPUR
E/50005/2018-DB	OIO-JOD-EXCUS-000-COM-0013-17-18	23/08/2017	Commissioner of Central Excise and Service Tax-JODHPUR	JAGDISHPRASAD M JOSHI	C.C.-JODHPUR
E/50021/2018-DB	OIO-JOD-EXCUS-000-COM-0013-17-18	23/08/2017	COMMISSIONER OF CGST & CENTRAL EXCISE-JODHPUR	ARUN JOSHI	C.C.-JODHPUR

Appellants:- Rep. by Shri Ajay Singh, Shri S.P. Mathew, Shri Makrand Joshi, and Shri G. Vidhyadhan, Advocates for the appellants.

Respondent:-Rep. by Shri R.K. Mishra, DR for the respondent.

CORAM : HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

PER ANIL CHOUDHARY:

These appeals have been preferred by the appellants against order-in-original dated 23rd August 2017 whereby duty of Rs.6,01,37, 595 have been demanded along with cess, etc. amounting to Rs.8,17,63,074/- from Shri Raj Pan Masala Private Ltd., along with interest and equal amount of penalty, along with order of notional confiscation of goods(not seized) valued at Rs.24,05,50,380/- on the allegation of clandestinely removal from the factory, located at Jodhpur. As the goods are not seized, nor available for confiscation, fine was imposed of Rs.2.5 crores. Further penalty under Rule 26 have been imposed on the other appellants.

2. The brief facts are that the appellant Shree Raj Pan Masala Private Ltd, is engaged in the manufacture of pan masala containing tobacco, that is gutkha, and their factory is at Banar (Jodhpur) in Rajasthan. The appellant manufactures under the brand name "Goa 1000" Gutkha being brand name belonging to another by paying one per cent royalty. There are other manufacturers also who use the said brand name of "Goa 1000" namely M/s. Royal Marwar near Ahmedabad, M/s. Yogesh Associates, Silvassa, and few others in Delhi and other places.

3. The officers of the DGCEI on some intelligence that the appellant, Shree Raj and other Group of Companies are involved in clandestine removal of the goods, searched the office premises of Raj Group of Companies located at 101/A, Devi Darshan Complex, Tembhi Naka, Thane West, Maharashtra. Simultaneous search

was also conducted at the factory premises at Jodhpur. Search was also conducted at premises of the transporter at Bhiwandi. The group companies namely Sunrise Food Products Private Limited located at Narela Delhi. Shreeraj Export Private Ltd. , Raj Exports, Raj Marketing, Raj Perfumery & Foods are all registered with the central excise and are companies of Raj group of Companies. All are engaged in the manufacture of Gutkha. In the said search, certain documents were recovered. One Mr Suresh Balkishan Jajra, Director of SJJ Foods Private Ltd, who was present at the office at the time of search, some documents were also recovered from his person. Statement of several persons were recorded in the course of investigation. The godown premises of one M/s.GM Carriers at Bhiwandi (near Mumbai) was also searched on 18 Feb., 2008 for the alleged reason that the goods transported by 'Bombay Andhra Transport Company' having office at Ahmedabad, which transported the goods from Jodhpur to Bhiwandi, where delivered from the go down of GM carriers.

4. Statement of J.G. Shaikh, an Assistant with GM carriers was recorded on 18th Feb., 2008 wherein he stated that 'Goa 1000' Gutkha was transported by 'Gujarat Marathawada Transport Services' (GMTS), which was their Associate company and the entries made by him in notebook pertaining to transportation of 'Goa 1000' Gutkha was from Jodhpur to Bhiwandi via Ahemdabad by GMTS. During the course of investigation one Mr Arun Joshi, Chairman of Raj Group of companies was arrested and was compelled to deposit an amount of Rupees 3 crores towards the duty liability to secure bail. After completion of investigation

show cause notice dated 9th May 2011 was issued demanding duty along with penalty and also penalty was proposed on others mainly on the basis of records seized from the go down premises of GM Carriers transporter at Bhiwandi near Mumbai oral testimony of Mr Javed G. Shaikh, an employee with GM carriers. Statement of several other persons was also referred to and relied upon in the show cause notice. The SCN was adjudicated on contest and the proposed demand confirmed along with penalty of equal amount on Shree Raj Pan Masala and also penalty was imposed on others under Rule 26.

5. Assailing the impugned order, the learned counsel for the appellant states that the appellants requested for cross examination of the witnesses, whose statements had been referred to and relied upon in the SCN. The Adjudicating Authority allowed cross-examination of witnesses wherein the witnesses narrated the circumstances in which the statements were recorded by use of pressure tactics and undue influence by the officers, giving little credence to the validity of statements as evidence. The witnesses namely Mr Abdul Rahman Patniy, Suresh B Jajra, Suresh B. Jain, Ashok Jain, Praful Shah, Nayab R Siidique, and Abdul A Patni deposed before the Adjudicating Authority that the statements recorded earlier were neither true nor correct and were obtained under pressure. Mr AR Patniy of GMTS and Mr. A.A Patniy of GM carriers contradicted the contents in the notebook and the statement of Mr. J.G. Shaikh on the basis of which huge demand of duty was proposed. The cross-examination of main witness Mr. J.G

Shaikh could not be conducted as he was not produced by revenue for cross examination.

6. That the allegation against the appellant Raj Pan Masala was based on the documents resumed from the premises of transporter. Appellant also requested for inspection of those documents and permission to take copies of these documents after inspection. Inspection of the documents was granted by the Adjudicating Authority and the investigating agency was directed to give inspection and to take out copies. In spite of repeated visits and writing several letters by the office of Adjudicating Authority, the documents at Sl.No.3 of the Panchnama dated 01.03.2008 and the copy of CPU/Hard Disk recovered from the transporter's premises, were never provided. The fact that, the investigating agency could not produce some of the original documents for inspection was brought to the notice of the Id. Adjudicating Authority during the hearings held before him. However, the Id. Adjudicating Authority proceeded to pass the impugned order without providing the copies of documents as listed in the list of relied upon documents, to the notice. Copies of the correspondence exchanged between the appellants, Advocate, DGCEI and Id. Commissioner in the context of non-production of original seized documents for inspection by the appellant's advocate are annexed in the appeal paper book.

7. As the key witness Mr. Javed Gamir Shaikh was not produced for cross-examination, appellant also requested for the examination of the officer who recorded the statement (on the day of search) during investigation. Though cross-

examination of the said officer was allowed by the Adjudicating Authority and the witness was examined, the memo of cross-examination was never provided to the Appellant, preventing them from relying on the said evidence of cross-examination. In the correspondence with the Id. Adjudicating Authority, the Appellant's Advocate requested for furnishing a copy of the record of cross-examination of the Investigating Officer, however, the same was not provided to the Appellant, and the request letters are part of the appeal paper book.

8. During the course of adjudication proceedings Appellants filed interim reply dated 01.06.2015. Further, Appellants also requested to provide inspection /copies of some of the relied upon documents which were never provided to the Appellants. Request for cross –examination of the remaining witnesses including Mr. Javed Gamir Shaikh was neither permitted nor any communication denying the same was given to the Appellant. However, Id. Adjudicating Authority directed the appellants to make final submissions as he was duly bound to adjudicate the case within the time frame granted to him. Thus, Appellants without prejudice to pending request of cross-examination and provision of relied upon documents, made further written submission vide letter dated 10.07.2017.

9. Learned Adjudicating Authority without acceding to the request of cross-examination and providing of relied upon documents and furnishing the memo of cross –examination passed the impugned order-in-original (No.JOD-EXCUS-000-

COM-0013-17-18 dated 23.08.2017 and issued on 25.08.2017) confirming entire central excise duty demand totaling to Rs.8,17,63,074/- along with interest and consequent penalties etc. and confiscating the goods allegedly cleared without payment of duty and imposing redemption fine (A copy of the said order is hereto annexed and marked as Exhibit-A).

10. On going through the impugned order passed by the Id. Commissioner, it was noticed that in para-5.7.8 of the order, 3 letters of the DGCEI dated 31.12.2012, 22.04.2015 & 4.7.2017 have been referred and relied to hold that appellants were given inspection of all the documents relating to the case, and an inference is drawn on the basis of these letters, ignoring the letters and submissions of the appellant and without providing copies of these 3 letters, in gross violation of principles of natural justice.

11. No evidence of clandestine manufacture and or removal of gutkha from the appellant's factory at Jodhpur has been adduced in the notice. Though Appellants factory at Jodhpur was searched on the very first day of the investigations, no evidence of clandestine manufacture and or removal, or any excess shortage of any raw material (except a very negligible variation) or finished goods were noticed. No evidence whatsoever was found, showing unaccounted transportation of goods from the Jodhpur factory of the appellant.

12. In the entire investigation no evidence of clandestine manufacture or removal of Gutkha or unaccounted receipt of any raw material /packing material

in the appellant's factory required for clandestine manufacture & sale of Gutkha could be brought to light except the recovery of certain documents from the office of Raj Group of companies in Thane allegedly showing procurement of raw materials. Even these evidences recovered from one Mr. Suresh B. Jajra, during corss-examination were revealed to be pertaining to M/s. Royal Marwad, Ahmedabad and Meenakshi Foods Pvt. Ltd. other franchisees engaged in the manufacture of Goa 1000 Gutkha.

13. Though the S.C. Notice relies on documents seized from the premises of Raj Group of Companies and also statement of Mr. Suresh Jajra to substantiate the allegation of unaccounted procurement of raw material, however none of these evidences point to any specific instance of unaccounted procurement of raw material for the appellant's factory at Jodhpur. The statement of Mr. Jajra was retracted and the said witness during cross-examination has categorically clarified that the documents listed at Sr.No.1 of Annexure-A are pertaining to the activities of M/s.Royal Marwar Tobacco Products, Gandhinagar, Gujarat, which were purchased by his company, Meenakshi Food Products. Despite the aforesaid clarification in his cross-examination the Id. Commissioner blindly relied o his statement recorded under Section 14 without giving any valid and cogent reasons totally ignoring the record of cross-examination of this witness.

14. The investigations could not reach any customer to whom appellants have sold Gutkha allegedly removed clandestinely without payment of excise duty. Nowhere, any cash transaction could be unearthed establishing clandestine sale of

Gutkha manufactured in the appellant's factory, except for very vague generic statements. The witnesses, Shri Suresh Jain, Shri Ashok Jain & Shri Praful Shah, whose statements were relied in the notice have not stated that the consignments of Gutkha in question in respect of which the demand is raised were received by them, least from the Appellant's factory.

15. The alleged clandestinely removed Gutkha, according to the allegations in the Notice were originally transported by one M/s.KGN Transporter at Jodhpur, who was neither summoned, nor searched nor any statement recorded. No investigation whatsoever was conducted or even attempted with the said transporter at Jodhpur.

16. Accordingly to the allegations, the clandestinely manufactured Gutkha were first transported from Jodhpur to Ahmedabad and then trans-shipped through another truck from Ahmedabad to Bhiwandi, but no investigation whatsoever was conducted with the persons involved in the first leg of the transportation, linking it to Appellants factory at Jodhpur. No investigation with any other manufacturer of 'Goa 1000 Gutkha' at Ahmedabad or nearby was conducted.

17. The concerned persons responsible for dispatch of Gutkha from the Appellant's factory at Jodhpur were never questioned in the entire investigation nor even confronted with the entries in the note book (recovered from G.M. Carrier) based on which the entire demand was raised and confirmed.

18. The entire evidence in support of the demand in question is the scribbling found in a note book and other documents viz. invoices/LR/Truck Report, recovered from the godown premises of a third party (M/s.G.M. Carriers at Bhiwandi) in Maharashtra and the statement of the person who purportedly maintained the said note book deposing that the said note book also contained details of Gutkha clandestinely cleared from the Appellant's factory at Jodhpur. The said witness had no connection with the transportation from Jodhpur/Ahmedabad to Bhiwandi and not at all concerned with the Appellant's factory at Jodhpur. The said witness had no connection with the transportation from Jodhpur/Ahmedabad to Bhiwandi and not at all concerned with the Appellant's factory at Jodhpur. Cross examination of this witness to elicit as to how he derived the inference of clandestine dispatch of Gutkha from Appellant factory did not materialize as the department did not produce this witness. During cross-examination, employer of this witness and the transporter who transported the goods disowned the said note book and entries made therein.

19. The documents viz. invoices/LR/Truck Report, recovered from the godown premises revealed that in case of Gutkha cleared by the appellant, the LR was prepared by M/s.KGN Transport at Jodhpur and whereas in case of other goods, which are alleged to be Gutkha cleared from the Appellant factory, without invoices, the LR's were prepared at Ahmedabad and the handwriting of the person preparing the truck report at Piplej (Ahmedabad) is same as those appearing on the impugned LR's prepared at Ahmedabad and therefore the allegation that these

goods had any relationship with the Appellant's factory cannot be upheld. In the worst, the LR's/truck reports show the transportation of some goods from Ahmedabad to Jodhpur and nothing else. Investigations in the case would not unearth any LR's prepared at Jodhpur for the offending goods and thus in other words there is no evidence whatsoever in the case to show that the offending goods were transported from Jodhpur to Ahmedabad/Bhiwandi.

20. The unreliability of the deposition of this witness (J.G. Shaikh) is evident from his deposition to the effect that GMTS is their associated transport company (of GM Carriers)and that booking of all these consignments at Jodhpur were done M/s.GMTS, whereas the partner of M/s.GMTS has stated that they did not have any office in Jodhpur and that the booking at Jodhpur was done by M/s.KGN Transport.

21. Many of the statements of witnesses, which were relied on in the show cause notice were either retracted on the ground that these were obtained forcefully by physical abuse or were disowned as involuntary during cross-examination of these witnesses.

22. Accordingly, the ld. Counsel prays for allowing the appeal and setting aside the impugned order.

23. The counsel appearing for the other appellants have adopted the arguments of Shri S.P. Mathew appearing for Shree Raj Pan Masala and they further submitted that they have not played any role in aiding or abetting in the

removal of any goods clandestinely nor have they handled any excisable goods nor done anything to be of clandestine in nature. Further, there have been no confiscation of any goods and penalty under Rule 26 is not exigible.

24. In reply, the Id. AR for Revenue states that in the statements recorded at the time of search of Shri Arun N. Joshi, Chairman of Raj Group of Companies, he stated was handling the matters of the Raj Group of Industries and Companies. Further, Shri Suresh B. Jajra, Director of JMJ Group of Companies after seeing the documents in file at Sl.No.16 from the office of the Raj Marketing at Thane has explained that the documents at page 1 to 39 pertain to accounts of raw materials purchased by him and in some pages, the amount received by him from the customers of 'Goa 1000' Gutkha was also written. He further stated that this amount was later on given to raw material suppliers and these transactions were in cash. He further divulged that account of raw materials purchased was maintained by adding decimal point and confessed that the total amount shown at the bottom of the page should be read without decimal point. He further referred to the statement of Shri B. S. Purohit, Manager (Accounts) of Raj Group of Companies, who stated that M/s. Arun N. Joshi Consutany was a Consultancy firm and gave advice in respect of blending of perfumes and essential oils.

25. Ld. AR further stated that in search at factory on 18.02.2008 at Jodhpur, stock verification in respect of items like perfumery compound, kimam and methol was conducted and it was found that 21.895 kg. of perfumes and 10.36 kgs. of glycerine were in excess whereas there was shortage of menthol of 38.087

kgs. and kimam of 34.045 kgs. One Mr. Manoj Kumar Sen, Share Holder of Raj Pan Masala disposed that raw materials purchase was looked after by Shri Dinesh Sen and Shri Kailash Joshi and that the raw materials, which were received, were not always accompanied by the bills and was only accompanied by chits, which were destroyed after receipt of the raw materials. Sometimes, perfumery compound was also received from Sachin Perfumery Works, Silwasa, with bill or without bill, both.

26. Ld. AR further points out that in the search at the premises of transporters, viz. Bombay Andhra Transport Company at Bhiwandi, resulted in seizure of documents relating to Goa Brand Gutkha by way of mis-declaration of description and quantity on the consignment notes, without invoices accompanying the goods. It was observed that duty paying documents were issued only for part of the consignments and some part of the consignment was without duty paying documents, which was mis-declared as supari or mawa etc. However, the said transporter had maintained a separate note book in a consolidated manner, which contained the details of transportation of goods with or without bills. Reliance was placed on the statement of Shri J.G. Shaikh, employee of M/s.G.M. Carriers. The said G.M. Carriers and GMTS both are transport companies, operating from the same premises at Bhiwandi. Further, there is no violation of principles of natural justice. The demand of duty has been confirmed on the basis of cogent evidence. As such, the appeals are fit to be dismissed.

27. Having considered the rival contentions and perusal of records, we record our findings on the evidences of the revenue relied upon as follows:-

27.1 Notebook resumed from premises of G.M. Carriers (GMC). The entries in the notebook were made by J.G.Shaikh, an employee of G.M. Carriers, as claimed by him. He had deposed that these contain the details of goods received from Shree Raj Pan Masala, Jodhpur, both accounted and unaccounted. The said note book was denied to have been maintained by G.M. Carriers by Mr. A.A. Patni of GMC, who also contradicted the statement of J.G. Shaikh, their employee. The said J.G. Shaikh was not produced and examined in the adjudication proceedings. Thus, his evidence being hit by Section 9 D of the Act, becomes unreliable. Thus, the contents of the note book are also rendered unreliable. Mr. Javed G. Shaikh had no idea as to which transporter transported or removed the goods from the factory of appellant.

27.2 Further, Mr. J.G. Shaikh had stated that the goods are transported from Jodhpur to Bhiwandi by GMTS (Transporter). However in the statement of Mr. A.R. Patni of GMTS, he has denied having transported goods of appellant –Shreeraj Pan Masala. Rather have categorically stated that, GMTS does not have any booking office at Jodhpur.

27.3 That although cross examination of the officer-who recorded the statement of J.G. Shaikh was allowed, but copy of the cross-examination recorded by the Adjudicating Authority was not given to the appellant, in spite of specific written requests. This led to prejudice.

27.4 Examination of the original RUD's was never provided, prejudicing the opportunity to defend.

27.5 No evidence of clandestine manufacture and removal of gutkha (finished product) is available, nor found. The transporter of the appellant M/s. KGN Transport was not investigated. Variation in the recorded stock as compared to the raw materials in physical verification is negligible. No evidence of unaccounted removal of finished goods was found.

27.6 Documents of raw materials acquisition recovered from Suresh B. Jajra were related to or pertaining to M/s. Royal Marwad, Ahmedabad, Meenakshi Foods(P) Ltd. & Ors., nowhere related to the appellant. The initial statement of Suresh B. Jajra, specifying the name of appellant company was retracted during cross-examination, and also within few days of recording.

27.7 That the investigation could not trace any buyer of alleged clandestinely removed goods, nor the flow of money. No unaccounted cash was found.

27.8 In spite of other manufacturers at Ahmedabad of Gutkha under the same brand name 'Goa 1000' no investigation was made at their end.

27.9 Almost all the witnesses have denied or disputed their earlier deposition, at the time of investigation, as not free and given under duress and undue influence.

28. In view of our aforementioned findings, we conclude that Revenue have not corroborated its allegations with sufficient reliable evidence. Thus, we hold that the allegations in the show cause notice are based more on assumptions and presumptions, having no legs to stand.

29. So far the other appellants are concerned, we hold that penalty under Rule 26 is not maintainable more so, in absence of conditions precedent for imposition of penalty.

30. Accordingly, we set aside the impugned order and allow all the appeals. The appellants are entitled to consequential benefit.

[Order pronounced on 21.12.2018]

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(BIJAY KUMAR)
MEMBER (TECHNICAL)

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