IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EAST REGIONAL BENCH : KOLKATA

Appeal No.E/146/2009

Arising out of Order-in-Original No. 110/MP/Denovo/Commr./2008 dated 19.12.2008 passed by the Commissioner of Central Excise, Ranchi.

M/s Dabur India Limited

...APPELLANT(S)

VERSUS

Commissioner of Central Excise, Ranchi

...RESPONDENT (S)

APPEARANCE

Shri Ravi Raghavan, Advocate & Shri H. Shukla, C.A. & Shri Deepro Sen, Advocate for the Appellant (s)
Shri K. Chowdhari, Suptd. (AR) for the Respondent (s)

CORAM:
SHRI P. K. CHOUDHARY, HON'BLE JUDICIAL MEMBER
SHRI C. L. MAHAR, HON'BLE TECHNICAL MEMBER

DATE OF HEARING :-22.06.2018

DATE OF PRONOUNCEMENT : 27.06.2018

ORDER NO.FO/A/76370/2018

Per Shri C. L. Mahar :

This is an appeal filed by the appellant against the order-in-original No. 110/MP/Denovo/Commr./2008 dated 19.12.2008 passed by the Commissioner of Central Excise, Ranchi.

2. Brief facts of the matter are that the appellants are engaged in the manufacture of Ayurvedic Preparation such as, Laltel and Janma Ghunti. The appellants have been classifing the products under Chapter Sub-heading

3003.39 of Central Excise Tariff Act, 1985 which pertains to the Ayurvedic Medicines. It has been the contention of the Department that such preparations are not correctly classifiable under Central Excise Tariff Chapter Sub-heading 3003.39 but under Chapter 33.01 as aqueous distillate of essential oil and accordingly a Show Cause Notice demanding Central Excise duty of Rs.39,92,903/- was issued wherein equal amount of penalty was also proposed to be imposed under Section 11AC of Central Excise Act, 1944 The matter came to be adjudicated earlier vide order-in-original dated 26.03.2001 against which the appellant have come before this Tribunal, and this Tribunal vide its order No. F/A/692/KOL/2002, dated 26.06.2002 in Appeal No. E/386/2001 dated 26.06.2002 has decided the matter and following order was passed. The relevant extracts of the order dated 26.06.2002 are reproduced bellows:-

> "**16.** In respect of Janam Gunti, there is considerable merit in the submission of the appellants that it has been classified under sub-heading 3301 without sufficient materials to support it. Its classification has to be decided after taking into account the various points made by the appellants *inter alia* that it cannot be classified as aqueous distillates and aqueous solutions of the essential oils in view of the process of

manufacture and composition. The appellant's grievance that the classification has been ordered without chemical test or other relevant evidence is also required to be met. Accordingly, we are of the view that the revised of Janam Gunti is required to be re-considered by the Commissioner. For this purpose this issue is remanded to the Commissioner.

17. With regard to the question of limitation, it is observed that the classification of the items had been approved by Central Excise authorities. The entire particulars about the appellants products as to how they were packed, the literature and printed materials, printing on the packages etc. were not suppressed from the Central Excise Authorities. Describing it as "Ayurvedic Medicine" on the packages cannot be considered a misstatement with intent to evade payment of duty. In these circumstances, we agree with the appellants that duty demands raised beyond six months as prescribed in Section 11A would be time barred. The appellant shall be liable to pay differential duty arising within the normal period of six months prior to issue of the show cause notice only.

18. The appellants' submission that the price of the goods should be treated as cum duty while computing short levy is also required to be accepted. This issue is now well settled by the decisions of this Tribunal in the case of *Srichakra Tyres Ltd., & Others* v. *CCE, Madras* - 1999 (108) E.L.T. 361 (T) = 1999 (32) RLT I (CEGAT) and the decision of the Apex Court in the case of *Maruti Udyog Ltd.* - 2002 (141) E.L.T. 3 (S.C.). It is, therefore, ordered that the duty demand shall be re-computed treating the price as cum-duty.

19. In view of the above findings, the appeal is ordered as under :-

(1) Lal Tail and Janam Gunti are not eligible for classification as medicaments under Chapter 30 of the Central Excise Act.

(2) The classification of Lal Tail under sub-heading 3304 is confirmed.

(3) The issue regarding classification of Janam Gunti is remanded to the original authority for a fresh decision.

(4) Short levy shall be computed treating the price of the goods as cum-duty.

(5) Duty demand shall be restricted to the normal period of six months under Section 11A of the Central Excise Act."

3. Against the above-mentioned order of the Tribunal, the appellants have also approached before the Hon'ble Supreme Court, wherein the Hon'ble Supreme Court in his order in case of the Dabur (India) Ltd. Vs. Commissioner of Central Excise, Jamshedpur reported in 2005 (182) E.L.T. 290 (S.C.) dated 1.04.2005, has upheld the above order of this Tribunal. The Hon'ble Supreme Court in their Order (supra) has held as under:-

" *2.We has heard the parties. In our view, there is no infirmity in the Order of the Tribunal insofar as it remits the matter back to the original authority for a fresh decision on classification of the product 'Janam Ghunti'. Chapter Note 1(c) of Chapter 30 states that Chapter 30 does not apply to aqueous distillates or aqueous solutions of essential oils even though they are suitable for medicinal uses. Further, under Chapter Note 1(d) of Chapter 30 preparations of Chapter 33 would not fall under Chapter 30 even if they have therapeutic or prophylactic properties. The Tribunal has, therefore, correctly held that if 'Janam Ghunti' is an aqueous distillates or aqueous solutions of essential oils it would fall under Chapter 33 even though it may have therapeutic or prophylactic properties. The Appellants have* *claimed that their product 'Janam Ghunti' is neither a distillate nor a solution but is an extraction. However, this is a matter which requires inquiry into. We approve the finding of the Tribunal that this would require looking into the process of manufacture, the composition of the product and that classification of this product cannot be decided upon without chemical test of the product. We, therefore, see no infirmity in the Order of the Tribunal to this extent and the same is upheld."*

4. It can be seen from the above that the Hon'ble Supreme Court has held that whether Janam Ghunti is an aqueous distillate or an extraction, which can only be determined by going into the process of manufacture, the composition of the product and that classification of this product cannot be decided without chemical test of the product.

5. This can also be seen from the above order that the Ld. Commissioner was asked to re-adjudicate the matter after taking into account the relevant factors including composition of Ayurvedic Medicine, namely Janma Ghunti and the composition of the Janam Ghunti needs to have been done only by getting the necessasry Chemical Test done of the sample of the Medicine for deciding the classification of the same, whether it is Ayurvedic Medicine classifiable under Chapter 3003.39, or an Aqueous Distillate of Essential Oil classifiable under

Chapter 33.01. The Ld. Commissioner vide his denevo adjudication order No. 110/MP/Denevo/Commissioner/2008 dated 19.12.2008 has adjudicated the matter and has held that:-

(i) Since the classification of Janma Ghunti can only be decided on the basis on chemicals test or other relevant evidences. However, since the appellant-assessee could not provide the sample of Janma Ghunti saying that the factory in the Daburgram is closed and as the self life of the products being only three years, samples manufacturers in their Daburgram factory could not be provided.

(ii) The Ld. Commissioner has erred in holding a view that this Tribunal in its decision dated 26.06.2002 has already held that the product, namely, Janma Ghunti, is classifiable under Central Excise Tariff Heading 3301 and therefore, he has proceeded to confirm the demand again holding that the Ayurvedic Product, namely, Janma Ghunti, is classifiable under Chapter 3301 as Aqueous Distillate of Essential Oil. We find that this Tribunal in his order has very categorically held as under:

> ***"16.*** *In respect of Janam Gunti, there is considerable merit in the submission of the appellants that it has been classified under sub-heading 3301 without sufficient materials to support it. Its classification has to be decided after taking into account the various points made by the appellants inter alia that it cannot be classified as aqueous distillates and aqueous solutions of the essential oils in view of the process of manufacture and composition. The appellant's grievance that the classification has been ordered without chemical test or other relevant evidence is also required to be met. Accordingly, we are of the view that the revised classification Janam Gunti is required to be re-considered by the Commissioner. For this purpose this issue is remanded to the Commissioner."*

Thus, it can be found that this Tribunal has not finalized the classification of product, Janam Ghunti under Central Excise Tariff Heading 33.01 as wrongly mentioned by the adjudicating authority and therefore, he has erred in holding Janam Ghunti classifiable under Central Excise Tariff Heading 3301 by making this Tribunal's Order as basis.

6. The Ld. Advocate appearing for the appellant has argued that the Commissioner has not considered the order of Hon'ble Tribunal in its entirety, as the samples of Janma Ghunti manufactured in Daburgram factory, were

not available since the factory has been closed for many years, however, the same product with the similar composition is manufactured by them in their other factory and they have offered vide their latter dated 27/11/2008 that the samples of the same product manufactured by Rudrapur factory are available and the same can also be considered for deciding the classification of the product, namely, Janma Ghunti.

7. The Ld. Advocate has also mentioned that the Janma Ghunti which is also being manufactured by the appellant in their Himachal Pradesh factory is being classified under chapter 3003.39 by the Department and not under Chapter Sub-heading 33.01. The ld. Advocate has also vehemently argued that the ld. Commissioner has not followed the instructions given by this Tribunal in their order dated 26.06.2002. Therefore, the order-in-original is without application of mind and without appreciation of facts which were present before the adjudicating authority.

8. We have also heard the Ld. D.R., for the Revenue, who has only reiterated the findings of the adjudicating authority.

9. We heard both the sides and perused the record of the appeal. It is a matter of fact that this Tribunal has given detailed instruction vide its previous order No. FO/A/692/KOL/2002, dated 26.06.2002 in appeal No. E/386/2001 wherein the Commissioner was asked to decide the issue in the following points:-

> "**19.**In view of the above findings, the appeal is ordered as under :-
>
> (1) Lal Tail and Janam Gunti are not eligible for classification as medicaments under Chapter 30 of the Central Excise Act.
>
> (2) The classification of Lal Tail under sub-heading 3304 is confirmed.
>
> (3) The issue regarding classification of Janam Gunti is remanded to the original authority for a fresh decision.
>
> (4) Short levy shall be computed treating the price of the goods as cum-duty.
>
> (5) Duty demand shall be restricted to the normal period of six months under Section 11A of the Central Excise Act."

10. We also find that the Ld. Commissioner in hurry to adjudicate the order has not followed the instructions of this Tribunal in its letter and spirit. We also find that the adjudicating authority has grossly erred in holding that this Tribunal in its order dated 26.06.2002 had held that the Janam Ghunti is classifiable under Chapter Sub-heading 3301 as detailed in preceding Paras 5 & 6. The ld. Commissioner has also not considered the submissions made by appellant during the course of hearing wherein

the appellant had offered samples of the same products manufactured by their other factory which is still manufacturing the same product with same composition for undertaking necessary chemical test for deciding the composition of the products. It is also seen that the Ld. Commissioner has also failed to verify the practice of classification of the same products followed in the other Commissionerate.

11. In view of above, we find that the impugned order-in-original dated 19.12.2008 is bad in law and merit to be set aside. We are, therefore, of the view that as a consequence of above discussion, we set aside the impugned order and remand back the matter to the original adjudicating authority for denovo adjudication with the directions that the instructions given by this Tribunal vide its order dated 26.06.2002 should be followed in its letter and spirit. Secondly the submissions made by the appellant with regard to availability of the samples and the practice of the classification of the same product in other commissionrate also need to be considered at the time of adjudication. In view of the above, appeal is allowed by way of remand.

(Pronounced in the court on 27.06.2018)

Sd/	Sd/
(P. K. CHOUDHARY)	**(C.L. MAHAR)**
MEMBER (JUDICIAL)	**MEMBER (TECHNICAL)**

T.K.