IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Appeal No. E/436/2008

(Arising out of Order-in-Original No. 15/COMMR/CE/KOL-III/2008-09 dated 20/06/2008, passed by the Commissioner of Central Excise, Kolkata-III.)

M/s. Loknath Prasad Gupta — Appellant (s)
Vs.
C.C.E.- Kol-III — Respondent (s)

Appeal No. E/455/2008

(Arising out of Order-in-Original No. 15/COMMR/CE/KOL-III/2008-09 dated 20/06/2008, passed by the Commissioner of Central Excise, Kolkata-III.)

C.C.E-Kol-III — Appellant (s)
Vs.
M/s. Loknath Prasad Gupta — Respondent (s)

Appearance:
Shri, Ravi Raghavan, Adv. & Miss N. Agarwal, CA for the Appellant (s)
Shri H. S. Abedin A. C. (A. R.) for the Revenue

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing: -26.10.2018
Date of Pronouncement:- 12/11/2018
Order No. FO/76959-76960/2018

PER BENCH

These two appeals are directed against the Order-in-Original No. 15/COMMR/CE/KOL-III/2008-09 dated 20/06/2008. Both the cross appeals are being decided to this common order.

2. The assessee is a manufacturer of Chewing Tobacco popularly known as "Khaini" with their brand name "RAJA KHAINI" falling under Central Excise Tariff Sub Heading 24039910. This product is manufactured from raw tobacco which is the main raw material; but other ingredients are also added such as snuff powder, refined groundnut oil, lime, black peeper, minor quantity of Kewra water and menthol etc. The assessee has one unit at Titagarh, Kolkata (which is

the subject matter of the present dispute) and another unit at Pratapganj, New Delhi for manufacture of similar products. The present dispute is for the period April 2006 to July 2007, during which the Revenue alleged that the assessee did not fully account the goods manufactured in the factory in the statutory records and cleared the unaccounted portion clandestinely without payment of duty. The Show Cause Notice dated 21/02/2008 proposed the demand of Central Excise Duty amounting to Rs.9,07,16,213/- along with interest and penalties.

3. Prior to the present proceedings, the Revenue Authorities, under DGCEI, New Delhi investigated the allegation of clandestine manufacture and clearance of Khaini in respect of the Delhi Unit as well as the Kolkata Unit. This resulted in the Show Cause Notice dated 24/05/2006 being issued covering the period 01/05/2001 to 31/03/2006, commonly in respect of both the units. Upon receipt of the Show Cause Notice, the assessee approached the Hon'ble Settlement Commission, New Delhi. In the matter, the Settlement Commission ordered payment of Central Excise Duty as per a formula worked out by them as 62 kg of tobacco required for 100 Kg of Khaini. This order was accepted and complied with by the assessee.

4. In the present round of litigation, the Show Cause Notice dt. 21/02/2008 was issued citing the investigations undertaken by DGCEI for the earlier period 2001-02 to 2005-06. The order of the Settlement Commission was also cited in the Show Cause Notice. The Revenue Authorities however, recorded a further statement from Shri Subhash Bhunia, Accountant of the Kolkata Unit dated 19/04/2006 in which he

reiterated that the assessee, during the period under present period also used the same process of manufacture and used the same percentage of ingredients as in the earlier period which went before Settlement Commission. Shri Loknath Prasad Gupta, Proprietor in his statement dated 20/05/2006 also confirmed the same. The Show Cause Notice dated 21/02/2008 proceeded on the same lines as the earlier Show Cause Notice dated 24/05/2006 by adopting the same formula for determination of the alleged quantity of clandestine manufacture and clearance of khaini. The ratio of production suppressed to the recorded production was taken to be 50% i.e. the assessee was alleged to be accounting only 50% of the actual production.

5. The adjudication process was completed and the Adjudicating Authority passed the Impugned Order. However, the Adjudicating Authority, while arriving at the demand for Central Excise Duty did not go by the formula adopted in the Show Cause Notice. She adopted the formula as crystallized by the Settlement Commission vide their order dated 29/02/2008. Accordingly, 62 Kg of Tobacco was considered as required for every 100 kg of Khaini, the final product. By adopting this formula, the Adjudicating Authority restricted the demand to Rs.2,84,26,761/- along with interest and penalty of an equal amount.

6. The impugned order has been challenged by both sides. The Revenue's appeal seeks to raise the total demand to that made in the relevant Show Cause Notice. On the other hand, the assessee has challenged the demand confirmed in the impugned order itself.

7. Heard Shri Ravi Raghavan, Ld. Advocate and Shri H. S. Abedin, Ld. DR.

8. The main grounds of the assessee are summarized below as argued by Ld. Advocate:

(I) The entire demand is based on earlier investigation pursuant to the search of 31/05/2005 without any further investigation for the period in dispute. During the period of the present dispute the appellant was registered with the Department and the entire production and clearance were regularly recorded in the statutory records.

(II) The Department has not brought on record any evidences of extra or additional or unaccounted receipt of raw materials. Likewise no evidence at all of any additional or unaccounted production of khaini or clearance thereof has been brought on record.

(III) Even though the details of the various buyers of Khaini from the assessee was available to the department, no evidence has been gathered by way of investigation at the buyer's end.

(IV) There is no basis for adopting the formula as outlined either in the Show Cause Notice or as adopted by Adjudicating Authority. No formula has been fixed either by CBEC or any other authority. The Department has not carried out any other verification of the actual ingredients used per batch in the appellant's factory. Not even a test check has been carried out.

(V) It has been urged that the reports of Shriram Institute for Industrial Research, which was relied upon in the proceedings before the Settlement Commission, is un-reliable and incorrect.

(vi) Clandestine clearances are required to be supported by tangible evidences and the revenue has failed to bring such evidence. In this connection, they relied on the following case laws:-

i) *Mittal Pigment Pvt. Ltd. vs. Jaipur-2016-TIOL-2759-CESTAT-DEL*

ii) *Continental Cement Company vs. UoI-2014 (309) ELT 411 (All.)*

iii) *CCE, Mumbai vs. Air Carrying Corp (I) (Pvt. Ltd.-2009 (248) ELT 175 (Bom)*

iv) *Balaji Structural India Ltd. vs. CCE, Raipur (F. Order No. 57776-57777/2017 dt. 10.11.2017)*

v) *Sunrise Food Product vs. CCE, Delhi-2017 (1) TMI-84-CESTAT-DELHI.*

9. The Ld. Counsel for the assesse further submitted that subsequent to the proceedings before the Settlement Commission, the Jurisdictional Authorities at Delhi had also made a similar demand against the Delhi Unit on the lines of SCN which got decided. In the appeal against the decision of the Adjudicating Authority in the Delhi case, Delhi Bench of the Tribunal remanded the case to the Adjudicating Authority to re-determine the demand on the basis of the formula prescribed by the Settlement Commission vide the order reported as Loknath Prasad Gupta vs CCE Delhi 2017 (12) TMI 217-CESTAT, New Delhi. The decision of the Tribunal was further challenged by the assessee before the Hon'ble Delhi High Court

wherein, the Hon'ble Court, vide their Order reported as 2018 (9) TMI 1433-Delhi, has observed that the Tribunal while remanding the matter did not address itself to the issue that the product involved in the subsequent period was different, viz. "Premium Khaini". Consequently Hon'ble HC held that the Settlement Commission's formula cannot be applied to the subsequent period and directed the Adjudicating Authority to determine the appropriate ratio for deciding the increased weight in respect of the new product.

10. The ld. Counsel submitted that in the initial proceedings which culminated in the order of the Settlement Commission, three evidences were available on record.

(I) The record of additional raw materials procured by the assessee.

(II) Overall evidence in the form of statements of various transporters confirming the transportation of clandestinely cleared goods.

(III) Unaccounted quantity of Khaini by not taking into account the increase in weight on account of addition of water.

11. In the present case, he highlighted that absolutely no evidence in the form of raw material procurement or transportation of goods have been gathered by the Department. Finally, he submitted that the confirmation of demand, not supported by evidences may be set aside. He also added that substantially part of the demand will be hit by time-bar in as much as an earlier investigation has been carried out by the Department into the same allegations and SCN already issued invoking the extended period under Section 11A.

12. The Ld. DR while arguing the grounds of appeal submitted that the demand may be confirmed as per Show Cause Notice. He specifically, submitted that the assessee's manufacturing process has remained the same during the current period of demand, as it was during the earlier investigation period. This aspect has been confirmed by Shri Subash Bhunia in his statement dated 20/05/2006. In the present case, there was no need to procure documentary evidence regarding purchase of additional raw materials since the alleged unaccounted quantity of Khaini has resulted, not on account of use of any additional raw materials, but on account of the fact that the quantum has increased by addition of water and the same has not been recorded.

13. Heard both sides at length and perused the record.

14. The present proceedings have covered the demand for duty raised vide SCN dt. 21/02/2008, for the period April 2006 to July 2007. For the earlier period-01/05/2001 to 31/03/2006, investigations had been conducted by DGCEI resulting in the issue of Show Cause Notice for Delhi as well as Kolkata units. The allegation against the assessee in the present proceedings (as well as in the earlier proceeding) was that they were not accounting the full quantity of Khaini manufactured by them and the unaccounted quantity was cleared without Payment of Duty. To estimate the quantum of Khaini not accounted, Revenue has attempted to work out a formula relating the weight of Tobacco (Raw Material) with that of the manufactured of final product viz. 'Khaini'. The present Show Cause Notice adopted the very same formula which was worked out and cited in the Show Cause Notice in the earlier

proceedings. The assessee approached the Settlement Commission to settle the matter for the earlier period. The Settlement Commission, vide order dated 29/02/2008, after considering all the materials on record followed a formula that 62 kilograms of Tobacco is required for the manufacture of 100 Kilograms of Khaini. This formula was accepted by the assessee before the Settlement Commission and the consequent duty was paid and the issue settled.

15. During the present proceeding, the Show Cause Notice adopted the formula in line with the earlier Show Cause Notice. But the Adjudicating Authority restricted the demand confirmed to that arising on the basis of the formula worked out by the Settlement Commission.

16. During the course of present proceedings, Revenue has recorded the statement of Subash Bhunia, Accountant of the assesee on 19/04/2006 in which he has confirmed that the process of manufacture and the percentage of ingredients used during the present period of demand has remained the same as for the earlier period which got settled before the Settlement Commission. This aspect has also been admitted and confirmed by Shri Loknath Prasad Gupta, Proprietor, in his statement, dated 20/05/2006. Both the above persons have further confirmed that the assessee continued to adopt the same practice as in the earlier period of not accounting the additional quantity of Khaini arising as a result of water added during the process of manufacture.

17. The assessee in their appeal have vehemently argued that the Revenue has gathered no additional evidence for the present period other than adopting the formula arrived by the Settlement Commission. In particular, they have pointed out that corroborating

evidence available in the earlier case in the form of procurement of raw materials as well as the oral evidence of the transporters is absent in the present period. Finally they have submitted that in any case, a part of the demand will be hit by time-bar in view of the fact that Revenue has already investigated the same allegations for the earlier period and issued SCN invoking the extended period of limitation. They have cited the decision of the Hon'ble Supreme Court in the case of Nizam Sugar Factory Vs. Collector of CE-AP 2008 (9) STR 314 (SC).

18. As discussed above, the assessee has admitted that they have continued to follow the same process of manufacture; and the percentage of ingredients during the current period of dispute, as in the earlier period which was already investigated and settled. The proprietor in his statement dt. 20/05/2006 has also admitted to the fact of non accountal of the additional quantity of khaini as result of addition of water.

19. The Adjudicating Authority in the impugned order has proceeded to quantify the demand on the basis of formula crystallized by the Settlement Commission which also stands accepted by the assessee. Since process and ingredients remained the same and the formula stands accepted by the assessee, we are of the view that extrapolation of the same formula for arriving at the demand for the subsequent period is fully justified. However, we are of the view that since this formula was very much within the knowledge of the Department, they should have restricted the demand for duty within the normal period of limitation. The Hon'ble Supreme Court has held in the case of Nizam Sugar Factory (Supra), that the extended period of limitation under

Section 11A will not be available to Revenue to raise demand a second time on the same set of allegations. Consequently, we conclude that the demand duty is to be restricted to the normal time limit.

20. In the appeal filed by the Revenue, they have prayed that demand, as raised in the SCN may be upheld. We find no justification for such a view. The SCN has been issue by adopting the same formula which was adopted in the earlier SCN. But this formula has been discarded by the Settlement Commission and the assessee has accepted the formula as formulated by the Settlement Commission. Since the Adjudicating Authority has restricted the demand as per the Settlement Commission formula, we find no justification for the stand raised by Revenue. Consequently, the appeal filed by the Revenue is rejected.

19. In the light of the above discussion, we pass the following Order:-

(i) Appeal filed by Revenue is rejected.

(ii) Appeal filed by the assessee is partly allowed.

(iii) The demand and the consequent penalty to be restricted to that falling within the normal time limit. Adjudicating Authority is directed to re-quantify the demand and penalty.

(Order Pronounced on……………………….)

Sd/-
(V. PADMANABHAN)
MEMBER (TECHNICAL)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

Pooja