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

Excise Appeal No. 75112/2018

(Arising out of Order-in-Appeal No. 47/Pat/C. Ex./Appeal/2017-18 dated-04/10/2017 passed by the Commissioner of Central Excise & Service Tax, Division-I, Patna)

Sri Amit Kumar alias Amit Shukla

Applicant (s)/Appellant (s)

Versus

Commr. of Central Excise- Patna

Respondent (s)

Appearance:

Sri Amit Kumar Awasthi, Advocate for the Applicant (s)

Sri S. Mukhopadhyay, Supdt. (A.R.) for the Respondent (s)

CORAM:

SHRI P.K. CHOUDHARY, HON'BLE JUDICIAL MEMBER

Date of Hearing :- 14.02.2019

Date of Pronouncement :03/06/2019

ORDER NO. FO/75543/2019

PER SHRI P.K. CHOUDHARY

Briefly stated the facts of the case are that the Department, acting upon information received with respect to storage and trade of clandestinely removed Pan Masala, Mouth Freshner and Chewing Tobacco, visited the premises of the Appellant on 20.10.2015. During the course of the search, certain goods viz. Rounak Pan Masala (7,35,000 pcs. Valued at Rs. 29,40,000 – K.G. Pan Products, Gorakhpur), Rounak Tobacco (7,35,000 pcs. Valued at Rs. 7,35,000 - K.G. Pan Products, Gorakhpur) and Paawan Gold Mouth Freshner (50,000 pcs. Valued at Rs. 50,000 – Khemka Herbs and Spices, Kanpur) were recovered. The Appellant failed to produce any documentary evidence with respect to the seized goods. In his statement, the Appellant stated that he had purchased the aforementioned goods from

K.G. Pan Products Pvt. Ltd., Gorakhpur without any document through a broker and the payment was made by him in cash. The Department issued summons to the said broker, who was apparently the sales-in-charge in the said company, however, the said person did not produce himself. On 31.10.2015, the Department received a letter from the Director of the company who denied any sale having been made to the Appellant. In this regard, a report from the Assistant Commissioner (Preventive), Central Excise, Gorakhpur was received by the Department which confirmed that there was no discrepancy in the functioning of the said company. The report also stated that the disputed goods could have been bought from the open market. Further, the Deputy Commissioner (Preventive), Central Excise Hqrs., Kanpur submitted a report to the Department that the manufacturing unit of Paawan Gold Mouth Freshner had been closed 11 months ago and no manufacturing activity was carried out at Khemka Herbs and Spices Pvt. Ltd., Kanpur. Further, samples of the said goods have been declared unfit for human consumption by FSSAI, Kolkata.

2. Accordingly, Show Cause Notice dated 18th April, 2016 was issued to the Appellant proposing recovery of Central Excise duty of Rs. 20,09,489/- along with interest. The Notice also proposed confiscation of the seized goods under Rule 25 of the Central Excise Rules, 2002 and imposition of penalty on the Appellant under Section 11AC of the Act read with Rules 25 and 26 of the Central Excise Rules, 2002.

3. The Adjudicating Authority confirmed the demand proposed in the Show Cause Notice along with interest. The Adjudicating Authority also ordered confiscation of the seized goods and imposed penalty of Rs. 20,09,489/- on the Appellant under Section 11AC of the Act read with Rule 25 of the Rules. Further, penalty under Rule 26 of the Rules was also imposed. The Commissioner (Appeals) upheld the Adjudication order. Hence, the present appeal.

4. The ld. Advocate appearing on behalf of the Appellant submitted that the Show Cause Notice had been issued on the basis of assumptions and surmises. It was submitted that the Appellant was not the manufacturer of the impugned goods but only a peddler who procured the said goods and

sold them in the open market. It was submitted that since the Appellant was merely a peddler, he could not have been aware of the payment of Central Excise duty which was required to be paid by the manufacturer. It was submitted that the Appellant maintained a stock of the said goods. During the relevant period, ban was imposed on the sale of Pan Masala or Chewing Tobacco in the State of Bihar. As a result, the impugned goods remained in the possession of the Appellant. It was submitted that the Appellant could not find any means of disposal of the said goods and therefore, the said goods were just lying at the Appellant's premises.

5. The ld. DR justified the findings of the lower authorities and submitted that the appellant never submitted any document in support of their contention that the goods were purchased from the local market.

6. Heard both sides and perused the appeal records.

7. As per the report submitted by the Assistant Commissioner (Preventive), Gorakhpur, there was no discrepancy found in the functioning of K.G. Pan Products, Gorakhpur and the report stated that the goods could have been procured from the open market since the products of the said company were being traded openly. Therefore, the payment of duty on the said goods cannot be disputed. The goods found in possession of the Appellant were manufactured by the said company and even if the Appellant had obtained the goods from somewhere else and not from the company, the duty on the said goods had been received by the Revenue under the compounded levy scheme. In any case, Central Excise duty is required to be paid by the manufacturer and since the Appellant is not the manufacturer of the said goods, duty cannot be recovered from the Appellant. Further, it has been recorded by the Commissioner (Appeals) that there is no evidence on record to show that the Appellant had manufactured the said goods.

8. However, I find that the case of the Department is that since K.G. Pan Products, Gorakhpur was operating under the Compound Levy Scheme, the Central Excise duty had been paid in advance. Therefore, the question of

payment of duty at the time of clearance does not arise. Further, as per the report of DC (Preventive), Kanpur, Khemka Herbs and Spices Pvt. Ltd., Kanpur had not been carrying out manufacturing activities for the last 11 months. Therefore, the Department is of the view that the Appellant had gotten the impugned goods manufactured from somewhere else and was operating under the guise of being a simple trader. However, since the Department has failed to bring any evidence on record to establish that the Appellant was indeed manufacturing the said goods or getting the same manufactured from some other manufacturing unit, the burden of discharging Central Excise duty cannot be harnessed on the Appellant. I disagree with the findings of the Commissioner (Appeals) that since the Appellant (not being the manufacturer) was unable to submit documentary evidence of purchase of the impugned goods, the onus of proving the duty payment of the said goods shifted onto the Appellant.

9. I find that the investigating authority has neither proven that the goods were being manufactured by the Appellant nor established that the goods could not have been procured from the open market. Since, there is no evidence to the contrary, I accept the contention of the Appellant that the goods had been procured before the ban on sale of Chewing Tobacco and since the Appellant could not trade in the impugned goods pursuant to the ban, the goods were simply lying at the Appellant's premises.

10. In view of the above discussion, the impugned orders cannot be sustained and the same are set aside. The appeal filed by the appellant is allowed with consequential benefits, if any.

(Pronounced in the open Court on 03/06/2019.)

Sd/-

P.K. CHOUDHARY
(JUDICIAL MEMBER)

k.b/-