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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.106 of 2008

(Arising out of Order-in-Original No. 32-33/2007 dated 23 November 2007 passed by Commissioner of Central Excise, Shillong.)

M/s. Dharampal Satyapal Limited
(Shed No.6, 7 & 17, Bamunimaidan,
Industrial Estate, Guwahati-781021.)

...Appellant

VERSUS

Commr. Of Central Excise, Shillong

.....Respondent

(Morello Compound, M.G. Road, Shillong, Meghalaya.)

WITH

Excise Appeal No.132 of 2008

(Arising out of Order-in-Original No. 30-31/2007 dated 23 November 2007 passed by Commissioner of Central Excise, Shillong.)

M/s. Dharampal Satyapal Limited
(Shed No.14, Industrial Estate, Arundhuti Nagar,
Agartala, Tripura-799003.)

...Appellant

VERSUS

Commr. Of Central Excise, Shillong

.....Respondent

(Morello Compound, M.G. Road, Shillong, Meghalaya.)

APPEARANCE

Shri T.R. Rustagi, Advocate for the Appellant (s)
Shri R.K.Choudhuri & Shri B.N.Pal, Special Counsels for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI P. VENKATA SUBBA RAO, MEMBER(TECHNICAL)

FINAL ORDER NO. 76577-76578/2019

DATE OF HEARING : 28 June 2019
DATE OF DECISION : 20 November 2019

P.K.CHOUDHARY :

The facts of the case in brief are that the appellant started manufacturing branded chewing tobacco in the brand name of 'Tulsi' prior to 22.08.2001 and started availing the benefit of Notification No.32/99. The Notification No.32/99 was rescinded by new Notification No.8/04-CE dated 21.01.2004. The appellant continued to avail the benefit of exemption from payment of Central Excise Duty. Show Cause Notice dated 06.05.2006 was issued demanding duty in respect of the goods manufactured in shed No.15 and 36D on the ground that the appellants are not entitled for benefit of Notification as production in these Sheds of specified goods commenced only after 28.02.2001. The department is of the view that the appellant after acquiring these two Sheds in December 2003 applied for amendment in the Central Excise registration which was duly allowed and these two Sheds were incorporated in the earlier registration. It is the case of the appellants that Shed No.15 and 36D are part of their factory which commenced production prior to 28.02.2001 and therefore, they are entitled to the benefits of the notification. It is also submitted that relevant details regarding investment in terms of the notification were duly submitted to the Investment Appraisal Committee and no objection was raised by the Committee. Department entertained a view that Shed No.15 and 36D from where the appellants started manufacturing branded chewing tobacco under a different brand name 'Toofani Zarda Silver & Kimam' after 28.02.2001 and as per the provisions of notification, the benefit of notification is not available in respect of the units which had commenced production on or after 28.02.2001. Accordingly, the benefit of notification was denied.

2. The learned Advocate appearing on behalf of the appellants submits that the demand is also barred by limitation as the appellants had applied for amendment to the earlier registration to add shed No.15 and 36D for the manufacture of excisable goods which was duly granted and hence there is no suppression with an intention to evade payment of duty on the part of the appellants. The learned Advocate vehemently argued that the Notification

provides exemption in respect of the units which had commenced commercial production on or after **24.02.1997** but not later than 28.02.2001. It is his submission that there is no dispute that the 02 Sheds viz Shed No.15 and 36D were acquired by the appellants in December, 2003 i.e. after 28.02.2001 but the appellants started manufacturing of a new product in the brand name 'Toofani Zarda Silver and Kimam' which was not manufactured in the earlier existing units regarding which the appellants availed exemption.

3. The learned Advocate submits that the dispute arises from a new Shed No.17 that was acquired by the appellant, by way of expansion of the factory [Shed 6]. The department has treated this Shed as an independent factory, whereas the appellant's contention is that it is part of one and the same factory.

4. The learned Special Counsel Shri R.K.Choudhuri, Advocate along with Shri B.N.Pal, Advocate, appearing on behalf of the respondent, vehemently argued that it has come to its knowledge during investigation that the Appellant filed an IEM (Industrial Entrepreneur Memorandum) in the Ministry of Commerce & Industry for its unit located at Shed 6 & 7 Bamunimaidan Industrial Estate, Bamunimaidan, Guwahati which was duly acknowledged vide Acknowledgement dated 31.08.2000 and that a seprate IEM was field for Shed No.17 which was duly acknowledged vide acknowledgement dated 10.04.2001. Appellant also filed revised IEMs separately in respect of each of two units on the ground of expansion of capacity which were duly acknowledged vide separate Acknowledgements dated 06.12.2001. It is alleged that filing of separate IEM for each unit shows that Appellant was operating two different units.

5. The learned Special Counsel submits that in Excise Appeal No.106 of 2008 that Appellant's unit located at the Shed No.17, Bamunimaidan Industrial Estate, Bamunimaidan, Guwahati was an independent unit and not an extension of Appellant's another unit located at Shed No.6 & 7 in the same industrial estate. That the Appellant failed to take separate registration in respect of its unit located at Shed No.17, instead they got this shed endorsed on the registration certificate granted to their unit located at Shed No.6 & 7. As the Shed No.17 was acquired by the Appellant after eligibility cut-off date of

28.02.2001, it has therefore been alleged that tobacco products manufactured and cleared from the unit located at Shed No.17 were not entitled to the benefits under Notification No.69/2003-CE and 8/2004-CE.

According to the department, Shed No.17 is an independent factory which 'started commercial production' after the cut off date 28.02.2001 and had not been availing exemption under 32/99-CE. As such, one of the necessary conditions of Notification No.69/2003-CE dated 25.08.2003 or 8/2004-CE dated 12.01.2004 in respect of products alleged to be 'removed' form Shed No.17 **[Para 60 and P 73-74 of the two SCNs.]** was not satisfied and certain goods alleged to have been removed from this shed were not eligible to exemptions.

6. It is further alleged that prior to 28.02.2001, no industrial unit from Shed No.17 was operating which availed benefits of Notification No.32/1999-CE or 33/1999-CE, as all plant and machinery, except those transferred from Appellant's another unit located at Shed No.6 & 7, were purchased by Appellant during the year 2001.

7. It is also alleged that the flow chart of manufacturing process submitted by the Appellant reveals that two units one located at Shed No.6 & 7 and the other located at Shed No.17 produced different tobacco products. Products namely Tulsi Mix 0, Tulsi Mix 00, Tulsi Mix 00 NES, and My mix were manufactured in the unit located at Shed No.6 & 7, whereas the products namely Toofani Gutkha, Tulsi Royal, Tulsi Royal Gold, Double Maza, Nazakat and Tulsi Mix 1 were manufactured in the unit located at Shed No.17.

8. The Appellant has filed another Appeal being Excise Appeal No.132 of 2008 which is also based on similar facts. Appellant has been operating an industrial unit engaged in production of chewing tobacco products located at Shed No.14 in Arundhoti Nagar Industrial Estate, Agartala. This unit availed the benefits under Notification No.32/1999 dated 08.07.1999 and continued operation despite retrospective withdrawal of exemption. This unit was expanded by acquiring and adding Shed No.15 & 36D to the existing unit after cut-off date of 28.02.2001.

Show cause notices were issued alleging that Appellant's unit located at the Shed No.15 & 36D, Arundhoti Nagar Industrial Estate, Agartala was an independent unit, not an extension of Appellant's another unit located at Shed No.14 in the same industrial estate. That the Appellant failed to take separate registration in respect of its unti located at Shed No.15 & 36D, instead they got these sheds endorsed on the registration certificate granted to their unit located at Shed No.14. As the Shed No.15 & 36D were acquired by Appellant after eligibility cut-off date of 28.02.2001, it has therefore been alleged that tobacco products manufactured and cleared from the unit located at Shed No.15 & 36D were not entitled to the benefits under Notification No.69/2003-CE and 8/2004-CE.

9. Heard both sides and perused the appeal records.

10. There is no dispute that Appellant's unit located at Shed No.6 & 7, Bamunimaidan Industrial Estate, Bamunimaidan, Guwahati is a lawful beneficiary of Notification No.69/2003-CE dated 25.08.2003 and 8/2004-CE dated 21.01.2004, having fulfilled all qualification conditions.

Date of letter issued by AIIDC allotting Shed No.6 & 7 in Bamunimaidan Industrial Estate, Bamunimaidan, Guwahati	23.10.2000
Date of Registration Certificate issued by Central Excise authorities	25.10.2000
Date of filing of ground plan by Appellant to Central Excise authorities	15.11.2000
Date of commencement of commercial production of the unit	17.11.2000
Date of approval of ground plan by Central Excise authorities	20.11.2000

11. The dispute in the instant case is related to the Shed No.17 located in the same Bamunimaidan Industrial Estate and Appellant's claim that this shed is an extension of its existing unit located at Shed No.6 & 7 in the same industrial Estate.

12. It is the Appellant's case that Shed No.17 was in fact acquired for expansion of operations of the unit located at Shed No.6 & 7 as evident from their application to Central excise department for incorporation/endorsement of Shed No.17 in the Registration certificate issued for the unit located at Shed No.6 & 7.

Date of letter issued by AIIDC transferring Shed No.17, Bamunimaidan Industrial Estate, Bamunimaidan, Guwahati to the Appellant	27.04.2001
Date of application to central excise range office seeking incorporation of Shed No.17 in the Registration Certificate issued for Shed No.6 & 7 Bamunimaidan Industrial Estate on the basis of CBEC Letter No.101/2/69-CX.6 dated 12.05.1971 as the Shed	27.04.2001

No.17 is situated across public Road opposite to Shed No.6 & 7 in the same industrial estate	
Date of verification and approval of ground plan showing that Shed No.17 and Shed Nos 6 & 7 are part of same unit covered by single Registration Certificate.	30.04.2001
Date of endorsement of Shed No.17 in the Registration Certificate originally issued for Shed Nos.6 & 7.	30.04.2001

Pursuant to Appellant's application, officers of Central Excise had visited both the premises, verified the ground plan and endorsed the Shed No.17 in addition Shed Nos 6 & 7 already endorsed in the Registration Certificate.

13. Appellant further submits that the department has failed to adduce any evidence to establish that the Appellant was actually operating two independent and self contained units, one located at Shed No.6 & 7 and the other located at Shed No.17 for manufacturing of chewing tobacco products. There is no allegation in show cause notice that Appellant was found operating a chewing tobacco manufacturing unit without obtaining Central Excise license. In fact, out of several serial operations required for manufacturing of different chewing tobacco products, some were carried out in the Shed No.6 & 7 whereas rest of operations were carried out in the Shed No.17. Show Cause Notice issuing authority has ignored to consider vital facts that both the sheds comprised of the same factory licensed under one factory license and different operations in both the sheds were carried out by common employees.

14. In regard to Industrial Entrepreneurs Memorandum (IEM) submitted by Appellant in the Ministry of Commerce & Industry and relied upon in the show cause notice, it is clarified that what was submitted is the Part A of IEM which provides promoter's plan and estimation of investment, employment, consumption of raw material and production etc. Such documents are of no relevance to the present case.

15. In regard to Excise Appeal No.132 of 2008, it has been Appellant's contention that Shed No.14 together with Shed No.15 & 36D have been considered as one unit by different authorities as both premises are covered by common Central Excise Registration, Factory License, CST/VAT registration, Pollution Control Board Registration, Standard of Weight & Measurement registration and registration under Prevention of Food

Adulteration Act, ESI & PF registration etc. The department has failed to adduce any evidence to establish that the Appellant was actually operating two independent and self contained units, one located at Shed No.14 and the other located at Shed No.15 & 36D for manufacturing of chewing tobacco products. There is no allegation in the show cause notice that assessee was found operating a chewing tobacco manufacturing unit without obtaining Central Excise license. In fact, out of several serial operations required for manufacturing of different chewing tobacco products, some were carried out in the Shed No.14 whereas rest of operations were carried out in the Shed No.15 and 36D.

16. Learned Advocate on behalf of the appellants submitted a compilation of case laws.

17. Learned Advocate pointed out that department's case is based on proposition that the original shed and extension (added sheds) are two independent units. Learned Commissioner is conscious of the fact that demand has to follow from revocation of Registration. It is for this reason the first proposal in the show cause notice is to revoke the Registration. However, learned Commissioner has confirmed the demand without revoking or suspending the Registration. Failure to order revocation or suspension of Registration shows that the original Shed together with extension (added sheds) has been considered as one unit.

18. It has been pressed by the learned Advocate that the order-in-original passed by the Commissioner is liable to be set aside as she has confirmed the demand more than the amount of demand raised in the show cause notice. It is submitted that the Commissioner has travelled beyond scope of show cause notice and wrongly confirmed demand of Education Cess which was not raised in the show cause notice.

He referred to North East Industrial Policy, 1997 (NEIP, 1997) issued by DIPP, Ministry of Industry, Govt. of India under OM No.EA/1/2/96-IPO dated 24.12.1997, providing fiscal incentives to new industrial units as also to existing units which have undertaken substantial expansion. He stated that as per Circular No.740/56/2003-CX.3 dated 29.08.2003 issued from F.No.356/29/2003-TRU it has been clarified by CBEC, Ministry of Finance, Govt. of India that benefits of Notification No.69/2003-CE dated 25.08.2003 will apply to those units who had set up their plants in pursuance to NEIP, 1997 and continued their operations despite retrospective withdrawal of Central Excise exemption under Notification No.32/1999-CE dated 08.07.1999 on tobacco products. Conjoint reading of provisions of NEIP, 1997 and above Circular would make it clear that Central Excise exemption under Notification No.69/2003-CE as also under Notification No.8/2004-CE is applicable to new chewing tobacco units as also to those units undertaking substantial expansion.

19. Learned Advocate on behalf of the Appellant also submitted that exemption is subject to conditions i.e. duty foregone is required to be deposited in Escrow Bank Account subject to satisfaction of the Commissioner that all conditions are satisfied. This includes eligibility condition also. The appellant from time to time submitted quarterly escrow returns as well as monthly returns and the department has accepted the entire amount including the amount representing duty forgone on goods cleared from alleged ineligible unit as deposited by Appellant in Escrow Bank Account and allowed withdrawal for investment. Department never objected when duty payable for chewing tobacco variants packed in the premises of Shed No.17 Bamunimaidan Industrial Estate was wrongly deposited in Escrow Bank Account and the jurisdictional Commissioner having control over such Escrow Bank Account had not forfeited amount of duty so payable from such Escrow Bank Account. It is thus trite that when the facts were well within the knowledge of department, the extended period cannot be pressed into service.

20. We observe that it is not in dispute that common registration was granted by Assistant Commissioner. This decision of Assistant Commissioner is being questioned on the basis that the registration was not granted by the Commissioner. Ratio of Tribunal judgement in Balkrishna Industries Ltd. – 2015 (324) ELT 705 (T-Kol) applies, wherein the Tribunal has observed that if DC was not competent to decide, he could have put up the file to the Commissioner.

21. We find that the Tribunal in Escorts judgement – 2011 (273) ELT 415 (T) answers the law point whether benefit of exemption can be disallowed for the past when the department had registered the premises as one factory and later on department feels that they are in fact two or three factories. In this case there were three factories having common Central Excise registration. Tribunal held that unless the registration is reviewed, benefit of exemption cannot be denied. Tribunal also held that registration cannot be reviewed retrospectively.

22. In Grasim Industries Ltd. – 2013 (295) ELT 620 (Tri.-Del) it has been held that if under other statutes a premise is treated as one factory, then it cannot be held as two factories under Excise Act, particularly when license has also been granted by AC. In this case the Tribunal noted that "during the period of dispute they had already been issued a common registration, they have to be treated as a composite unit."

23. Learned Advocate on behalf of the appellant also submitted that demand raised under Section 11A is not sustainable in view of the judgement of Gauhati High Court in the case of CCE, Shillong v. Jellapore Tea Estate reported in 2011 (268) ELT 14 (Gau.), wherein it was held that when the duty is demanded on account of non-fulfillment of eligibility condition. This judgment arose from the decision of the Tribunal in Jellapore Tea Estate v. CCE, Shillong – 2004 (174) ELT 121 (Tri.-Kol.).

24. We find that the CBEC vide Circular No.960/03/2012-CX-3 dated 17.02.2012 has clarified that new plot if added should not affect the benefit. Further vide Circular No.939/29/2010-CX dated 22.12.2010 clarified that addition of new brands would also not mean denying the benefit. Even, if the Circular is modified subsequently against the interest of the assessee, the modification applies only prospectively; Suchitra Components – 2007 (208) ELT 321 (SC).

25. It is our considered view that the proceedings are not maintainable as per Section 72(6) of the Finance Act, 2011. Moreover, since IAC has examined and re-done the whole exercise again as mandated by Section 72 of the Finance Act, 2011 and did not raise any objection on eligibility, the eligibility questioned in SCN had become redundant.

26. In view of the observations made in the foregoing paragraphs, the impugned orders cannot be sustained and the same are liable to be set aside. The appeals filed by the appellants are allowed with consequential relief, if any.

(Order pronounced in the open Court on 20 November 2019.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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