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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.75579 of 2014

(Arising out of Order-in-Original No.CCE/BBSR-I/02/2014 dated 29.01.2014 passed by Commissioner of Central Excise, Custom & Service Tax, Bhubaneswar-I.)

Brundaban Sahu
(Proprietor of M/s.Arjun Sahu & Sons,
Kathamentu Square, Haridakhandi Road, Berhampur,
Dist.Ganjam, Odisha.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Bhubaneswar-I
.....Respondent
(C.R. Building, Rajaswa Vihar, Bhubaneswar-751007.)

WITH

(i) Excise Appeal No.75580 of 2014 (Bibhudatta Sahu); (ii) Excise Appeal No.75581 of 2014 (Manoj Kumar Sahu); (iii) Excise Appeal No.75672 of 2014 (Brundaban Sahu); (iv) Excise Appeal No.75673 of 2014 (Bibhudatta Sahu);

(i & ii) (Arising out of Order-in-Original No.CCE/BBSR-I/02/2014 dated 29.01.2014 passed by Commissioner of Central Excise, Custom & Service Tax, Bhubaneswar-I.)

(iii & iv) (Arising out of Order-in-Original No.CCE/BBSR-I/04/2014 dated 17.02.2014 passed by Commissioner of Central Excise, Custom & Service Tax, Bhubaneswar-I.)

APPEARANCE

Dr.Samir Chakraborty, Senior Advocate & Shri Abhijit Biswas, Advocate for the Appellant (s)

Shri T.Mondal, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 75386-75390/2020

DATE OF HEARING : 13 January 2020
DATE OF DECISION : 13 January 2020

P.K.CHOUDHARY :

The two sets of appeals arise out of two show cause notices dated 06.08.2012 and 26.05.2011, both issued by the Commissioner of Central Excise, Customs and Service Tax, Bhubaneswar-I, pursuant to search and seizure operations carried out by the Central Preventive Unit of the Commissionerate on 03.12.2010 in the factory as well as the residential premises of the appellants. The proceedings under the said show cause notices have resulted in two adjudication orders dated January 29, 2014 and February 17, 2014, both passed by the Commissioner, being aggrieved by which the instant appeals have been filed by the appellants before this Tribunal.

2. By the order dated January 29, 2014, being the subject matter of the first set of appeals, E/75579-75581/2014, the Commissioner has confirmed a central excise duty demand of Rs. 17.25 crores and ordered recovery thereof from the sole proprietorship firm, M/s. Arjun Sahu & Sons, Berhampur, Odisha of which Brundaban Sahu, the appellant no. 1, is the sole proprietor, under Section 11A(1) of the Central Excise Act, 1944 along with interest thereon under Section 11AB thereof. The Commissioner has also ordered appropriation of Rs. 62.40 lakhs deposited by the said firm during the course of investigation towards the said duty demand confirmed and has imposed penalty of an equivalent amount of Rs. 17.25 crores under Section 11AC of the Act read with Rule 17 of the Pan Masala Packing Machines (Capacity Determination and Calculation of Duty) Rules, 2008 upon the appellant no. 1, Brundaban Sahu. Penalties of Rs. 20 lakhs each have been also imposed on the appellant nos. 2 and 3, Bibhudatta Sahu and Manoj Kumar Sahu respectively, under Rule 26 of the Central Excise Rules, 2002.

3. By the order dated February 17, 2014 the Commissioner has:

(i) Confiscated the seized 960260 pouches of Haridakhandi Mawa Masala, 1750 pouches of Seetal Delux Mix and 7140 pouches of Swastik Delux Mix valued at Rs. 7,20,195/-, Rs. 1,313/- and Rs. 5,355/- respectively, under Rule 17 of the Pan Masala Rules but, allowed redemption thereof under Section 34 of the Act on payment of a fine of Rs. 6,20,000/-.

(ii) Absolutely confiscated 12000 packets of Laxmi Nrusingha Ketaki Masala seized from the factory and 1080 Kgs. of loose Khara Masala seized from the residence of the appellant no. 1, valued at Rs. 1,74,000/- and Rs. 1,08,000/- respectively, under Rule 25 of the said Rules.

(iii) Confiscated absolutely cash amounting to Rs.14.47 lakhs seized from the residence of the appellant no. 1 under Section 121 of the Customs Act, 1962 as applicable to the Central Excise Act, on the ground that the same represented the sale proceeds of goods manufactured by forced opening of the 6 packing machines clandestinely and cleared without payment of duty.

(iv) Imposed penalty of Rs. 15 lakhs upon the appellant no. 1, as sole proprietor of the said firm, under Section 11AC of the Act read with Rule 17 of the Pan Masala Rules.

(v) Imposed penalty of Rs. 5.00 lakhs on the appellant no. 2 under Rule 26 of the said Rules.

4. In the instant cases the said firm carried on the business of manufacture and sale of different brands of Pan Masala containing tobacco falling under Chapter Sub-headings 24039990 and 24039920 respectively of the First Schedule to the Central Excise Tariff Act, 1985. The brand of Pan Masala manufactured and sold by the said firm, commonly known as "Mawa Masala", classifiable under CTH 24039990, was notified goods under Section 3A(1) of the Act and was therefore covered under the Pan Masala Rules and excise duty was liable to be paid thereon in the manner provided in the said Pan Masala Rules. The other brand of pan masala, commonly known as

“Khara Masala”, classifiable under CTH 24039920, was however outside the purview of Section 3A(1) of the Act and, consequently, the Pan Masala Rules.

5. On December 3, 2010 the Officers of the Central Preventive Unit of the Bhubaneswar-I Central Excise Commissionerate conducted a search and seizure in the factory and the residential premises of the appellants, during which a large number of documents, along with goods, were seized under Panchnamas. Statements of various persons, including the appellants, were recorded in the course of investigation carried out thereafter, regarding alleged operation of packing machines without permission and manufacture and clearance of the goods manufactured with the said machines without alleged payment of duty by the said firm.

6. During the said search and seizure the Officers of the Central Preventive Unit seized six packing machines along with finished goods and packing materials, which together was valued at Rs. 23,40,143/- from the factory premises of the said firm. They also seized from the residential premises of the appellant no. 1 1080 Kgs. of loose Khara Masala as well as 57 roll bundles of packing materials of brand “Shree Laxmi Nrusingha Ketaki Masala”, of total value of Rs. 5,35,025/-, along with Indian currency of Rs. 14.47 lakhs, under Panchnamas dated February 03, 2010. The six packing machines were, however, provisionally released upon deposit of a sum of Rs. 62.50 lakhs by the said firm.

7. In the show cause notice issued on August 6, 2012 it was alleged that during the period July 2008 to December 2010 the said firm had 5 undeclared packing machines for manufacture and packing of notified goods which were cleared without payment of duty. It was also alleged that on the date of search the Preventive Officers had found that out of the 7 packing machines, known as Form Fill Seal Machines (“FFS Machines”) in running condition, 6 machines were packing a brand of “Mawa Masala” as against the said firm’s declaration filed in terms of Rule 6 of the Pan Masala Rules by its letter dated August 23, 2010 of only one packing machine. Accordingly a

duty demand of Rs. 17.25 crores was made against the said firm, including additional duty of excise, national calamity contingent duty, education cess and secondary & higher education cess, under the Proviso to Section 11A(1) of the Act read with Rule 17 of the Pan Masala Rules, Section 93 of the Finance (No. 2) Act, 2004 and Section 128 of the Finance Act, 2007, along with interest thereon under Section 11AB of the Act, in respect of the alleged 5 undeclared machines. The show cause notice also proposed imposition of penalties upon the appellant no. 1, as sole proprietor of the said firm, under Rule 17 of the Pan Masala Rules and Rule 25 of the said Rules read with Section 11AC of the Act and upon the appellant nos. 2 and 3 under Rule 26 of the Central Excise Rules.

8. In the show cause notice dated May 26, 2011 it was alleged that the appellant had operated the said six packing machines illegally and thereby appeared to have manufactured different brands of Pan Masala containing tobacco by using the said packing machines unauthorisedly, in contravention of the provisions of the Pan Masala Rules, rendering all the goods seized liable for confiscation under Rule 17 of the Pan Masala Rules read with Rule 25 of the said Rules. It was further alleged that the unaccounted packing materials seized in both the factory and residential premises of the appellant no. 1, along with the said 6 packing machines were used unauthorisedly for packing of pan masala containing tobacco in violation of Rule 6 of the Pan Masala Rules and therefore was liable to confiscation under Rule 25 of the said Rules read with Rule 17 of the Pan Masala Rules. It was further alleged that the cash amount of Rs. 14.47 lakhs seized from the residence of the appellant no. 1 was liable to be confiscation under Section 121 of the Customs Act, 1962, as made applicable to, inter alia, the Act and the said Rules since the said amount represented the sale proceeds of pan masala containing tobacco manufactured by using the said 6 packing machines unauthorisedly and removed without payment of duty in violation of the Pan Masala Rules and the said Rules. The show cause notice proposed confiscation of the said 6 packing machines and the finished goods along with packing materials seized under Rule 17 of the Pan Masala Rules read with Rule 25 of the said Rules as well as confiscation of the sum of Rs. 14.47 lakhs under Section 121 of the Customs Act. The show cause notice further

proposed imposition of penalties upon the said firm and the appellant no. 1 under Section 11AC of the Act read with Rule 25 of the said Rules and Rule 17 of the Pan Masala Rules and under Rule 26 of the said Rules read with Rule 18 of the Pan Masala Rules respectively and also upon the appellant no. 2 under Rule 26 of the said Rules.

9. The appellants having filed their respective replies to the two show cause notices personal hearings were held by the Commissioner, after which the impugned orders have been passed.

10. One of the main contentions of the appellants in both the appeals is that inspite of specific requests of theirs in the replies to the show cause notices, as well as reiterating the same at the time of personal hearings, that the 19 persons whose statements had been relied upon in the show cause notices should be allowed to be cross examined by them. The Commissioner did not allow such cross examination although the said statements were relied upon in passing the impugned orders, which have rendered the impugned orders violative of the principles of natural justice and, hence, unsustainable.

10.1 It is also the contention of the appellants that the appellants came to know the decision of the Commissioner not to allow the said firm to cross examine the said 19 persons only from the impugned orders and at no point prior thereto. The appellant relied upon the judgement of the Hon’ble Gujarat High Court in Mahek Glazes Pvt. Ltd. Vs. Union of India, 2014 (300) ELT 25 (Guj), to support this contention.

10.2 The appellants have also challenged the validity and legality of the impugned orders on merits on various grounds. They have also challenged the imposition of the penalties upon all the respective appellants by the impugned orders.

11. Mr. T. Mondal, A.R., appearing on behalf of the respondent reiterates the findings of the Commissioner in the impugned orders.

12. Heard both sides and perused the appeal records.

13. From the show cause notices we find that the case against the said firm of alleged clandestine operation of the sealed packing machines for manufacture of the subject goods during the entirety of the periods involved are primarily based on statements recorded under Section 14 of the Act by 14 workers of the said firm and the contractor who engaged them and 5 other persons. We also find that specific request, with reasons in support, was made by the said firm for cross examining the said workers and other persons. It is also seen from the impugned order that though the Commissioner relied upon the statements of the said 19 persons in the findings arrived at by him in the impugned order, he rejected the said request for cross examination by the said firm.

14. It is settled law that if the Revenue seeks to rely on statements of witnesses recorded, it has to make the concerned persons available for cross examination, if requested for. The Revenue ought to have granted an opportunity of cross-examination to the Appellants. Not affording such an opportunity amounts to violation of the principles of natural justice. The power conferred upon the adjudicating authority to deny such an opportunity of cross examination is an exception which has to be based on cogent and relevant grounds. We find that the reasons contained in the impugned orders do not satisfy the said requirement.

14.1 In the case of Andaman Timber Industries Vs. CCE, 2015 (324) ELT 641 (SC), dealing with this issue, the Hon'ble Supreme Court observed and held as follows:

> "*6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee*

was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them."

14.2 Following the above decision of the Apex Court, the jurisdictional Hon'ble High Court of Orissa, in the case of Kay Pan Sugandh Pvt. Ltd. Vs. Commr. of C.Ex., Cus. & S.T., Rourkela, 2017 (7) GSTL 276 (Ori) has held as under, while quashing the adjudication order of the Commissioner impugned therein and remanding the matter for de novo adjudication:

"*11. In the present case, it appears that the main edifice of the case of the department rests on the statements of Mr. Tapan Chandra Dey and Soumendra Kumar Sahoo, who state that they got the "Safal" brand "Gutkha" of MRP Rs.5/- from the petitioner. Since the petitioner has taken a stand that during course of investigation neither any pouch of MRP Rs.5/- of "Safal" brand "Gutkha" was seized nor any machinery with capacity to manufacture of "Safal" brand "Gutkha" pouch of MRP Rs.5/- was seized and that there was no seizure of any document/diary/note book/computer printout showing manufacture and clearance of "Safal" brand "Gutkha" of MRP of Rs.5/- from the* *petitioner Unit, in the fitness of things the authorities should have allowed cross-examination of the above two persons to test the veracity of their statements. By not doing so, in our considered view there has been violation of principles of natural justice. The facts in Kanungo and Co. (supra) show that there the petitioner was given enough opportunity including personal hearing. Moreover, as rightly contended by Mr. A. Hidayatullah, learned Senior Counsel in that case there is nothing to show that the petitioner therein had demanded to cross-examine the persons, who have made statement against it at the very initial stage like the present case. Therefore, it appears that in the facts and circumstances of the case, there the Supreme Court rejected the plea of the petitioner praying for cross-examination. But here as would appear while filing the interim show cause under Annexure-25, the petitioner has wanted to cross-examine Mr. Tapan Chandra Dey and Soumendra Kumar Sahoo before filing their final reply. Since the same was not acceded to, in our considered view, the entire decision making process has been vitiated. This is because in case during cross-examination the petitioner is able to demolish the statements of Mr. Tapan Chandra Dey and Soumendra Kumar Sahoo then the entire foundation of the case of the department would collapse. In such background, the opposite party ought to have permitted cross-examination of the above noted two witnesses. In this context, we are satisfied that the decision cited by Mr. A. Hidayatullah, learned Senior Counsel in Andaman Timber Industries (supra) applies in all fours to the present case. There also the statement of the witnesses, whom Andaman Timber Industries (supra) wanted to cross-examine, formed the basis of impugned show cause.*"

14.3 In the instant case also we find that the very foundation of the case against the appellants is the statements of 19 persons whose cross-examination the appellant had sought for. Therefore, cross-examination of the witnesses is vital for proper appreciation of the issues involved.

15. In that view of the matter, following the principle laid down by the aforesaid decisions of the Hon'ble Supreme Court and the Hon'ble Orissa High Court, we set aside the impugned order of the Commissioner and

remand the matter back to the adjudicating authority for de novo adjudication, upon affording the appellants to cross-examine the 19 persons and thereafter affording the appellants a personal hearing in the matter and an opportunity to make further submissions, if any. Since the matters are being remanded due to want of due process of law on the part of the Adjudicating Authority, we refrain from making any observation in respect of the merits of the case.

16. All the appeals are thus allowed by way of remand.

(Operative part of the order was pronounced in the open court.)

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

SD/
(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

sm