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

REGIONAL BENCH – COURT NO. 1

Excise Appeal No. 70876 of 2013

(Arising out of Order-in-Original No. CCE/BBSR-I/11/2013 dated 27.03.2013 passed by the Commissioner, Central Excise, Customs and Central Excise, Bhubaneswar-I Commissionerate, C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007)

M/s. Sai Industries **: Appellant**
At: Rupra Road, P.O./P.S.: Narla,
District: Kalahandi – 766 101 (Odisha)

VERSUS

Commissioner, Central Excise, Customs and Service Tax **: Respondent**
Bhubaneswar-I Commissionerate,
C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007 (Odisha)

APPEARANCE:

Shri N.K. Chowdhury, Advocate for the Appellant

Shri P.K. Ghosh, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 75560 / 2024

DATE OF HEARING: 27.02.2024

DATE OF DECISION: 21.03.2024

Order : [Per Shri K. Anpazhakan]

The present appeal has been filed by the Appellant, M/s. Sai Industries, Rupra Road, Kalahandi, Odisha against the impugned Order-in-Original No. CCE/BBSR-I/11/2013 dated 27.03.2013 passed by the Commissioner, Central Excise, Customs and Central Excise, Bhubaneswar-I Commissionerate, wherein the Ld. Commissioner has confirmed the demand of central excise duty along with interest and penalty.

2. The facts of the case are that M/s. Sai Industries, Rupra Road, Kalahandi, Odisha are engaged in the manufacture of Chewing Tobacco with the aid of Form, Fill and Seal (FFS) machines. On 24.01.2012, the officers of the Directorate General of Central Excise Intelligence (DGCEI) visited and searched the office premises of the appellant-company and the residential premises of Shri Sadhu Ram Agarwal, Partner of the appellant-company. During the course of search and joint verification, they visited an unregistered premises which is adjacent to the registered factory premises of the appellant, wherein they found one packing machine of 'INDOPACK SYSTEM" make and 27 rolls of plastic pouches printed with 'Maruti Special Khaini' in Hindi and 'Maruti Subasit Kada Khaini' in Oriya. Shri Sadhu Ram Agarwal, Partner, available with the officers at the time of joint verification informed that they have not registered the 'INDOPACK SYSTEM' make packing machine found in the unregistered premises with the Central Excise Department under the Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 (hereinafter referred to as 'CTPM Rules 2010'). As per Rule 6 of the CTPM Rules, 2010, the appellant was required to declare the number of packing machines and pay central excise duty as prescribed under Notification. As the appellant has not declared the one FFS packing machine available in the unregistered premises, a Show Cause Notice dated 11.07.2012 was issued to the appellant demanding Service Tax of Rs.3,24,90,000/- along with interest and penalty. The Notice was adjudicated vide impugned Order-in-Original No. CCE/BBSR-I/11/2013 dated 27.03.2013

wherein the demands raised in the Show Cause Notice along with interest and equal amount of duty as penalty under Section 11AC of the Central Excise Act, 1944 have been confirmed. A Penalty of Rs.5,00,000/- was also imposed on Shri Sadhu Ram Agarwal, Partner of the appellant-company, under Rule 26 of the Central Excise Rules, 2002. It is informed that Shri Sadhu Ram Agarwal, Partner has expired and accordingly, the appeal relating to the penalty imposed on Shri Sadhu Ram Agarwal has already been abated. The present appeal only deals with the confirmed demand of Central Excise duty along with interest and penalty on the appellant-company.

3. The appellant submits that they had one FFS/packing machine of "INDOPACK SYSTEM" make which has been used to manufacture *'Maruti Chhap Special Khaini'* With M.R.P. at the rate of Rs.2.00/- per pouch and the same has been declared to the Central Excise department under Rule 6 of the CTPM Rules, 2010. The one FFS packing machine found in the adjacent room was incomplete and cannot be used for making pouches and hence it was not declared. Further, Shri Sadhu Ram Agarwal, Partner of the appellant-company, in his statement dated 24.01.2012 categorically stated that the machine which was lying idle in the unregistered premises is not capable of production of Chewing Tobacco, as it was not fitted with it's main parts like 'Disc' and 'Suit'. Accordingly, he contended that the machine was incomplete and could not be used for the packing of Chewing Tobacco. He had further submitted that the machine had been used for packing tea powder till 2009 and subsequently, as

they have stopped packing tea, the machine was kept in the unregistered premises. Regarding the packing materials and 27 rolls of polythene film found in the room, he stated that they were pertaining to other FFS packing machine which was in use in the registered premises. Regarding the electricity connection used for running the FFS machine, he stated that there was no power connection to the FFS packing machine available in the unregistered premises; the DG set was also not connected to this FFS packing machine. Accordingly, he submitted that there was no truth in the allegation of the Department that the machine kept in the unregistered premises has been used for packing 'Maruti Special Khaini' by the appellant.

3.1 Regarding the demand of central excise duty by invoking the provisions of Rule 18(2) of the CTPM Rules, 2010, the Appellant submits that the provisions of the said Rules are not applicable in this case as they have established that the one FFS packing machine available in the unregistered premises was not capable of being used in the manufacture of Chewing Tobacco. Rule 18(2) cannot be made applicable when there is enough evidence available on record to establish that the machine was not in use. Accordingly, they contended that the packing machine which is not in working condition need not be declared to the Department as per the CTPM Rules. In the present case, they have established that the packing machine did not have the vital parts and hence the machine was not capable of packing Chewing Tobacco. Therefore, they contended that the demand of central excise duty cannot be raised as per the deemed manufacture provision available under Rule 18(2) of the CTPM Rules 2010.

3.2 The Appellant cited the decision of *Goyal Tobacco Co. Pvt Ltd. v. Commissioner of Central Excise and Service Tax, Jaipur-I [2017 (348) E.L.T. 720 (Tri.-Del)]* and contended that in the said case, on similar facts and circumstances, the Tribunal, Delhi has held that the provisions of CTPM Rules, 2010 are not applicable and duty cannot be demanded on deemed basis as provided in Rule 18(2) of the said Rules. Accordingly, they prayed for setting aside the demands confirmed in the impugned order and allowing their appeal.

4. The Ld. Authorized Representative appearing on behalf of the Revenue submitted that the investigation has established that the FFS packing machine was installed in the unregistered premises owned by the Appellant. As per Rule 18(2) of the CTPM Rules, there is no need to establish any actual manufacture of goods; mere installation of the machinery is sufficient to demand duty on deemed basis. Since the investigation has established the installation of the FFS packing machine in the unregistered premises, he contended that central excise duty has been rightly demanded as per Rule 18(2) of the CTPM Rules, 2010. Hence, he prayed for dismissing the appeal.

5. Heard both sides and perused the appeal records.

6. We observe that it is a case where duty has been demanded as per Rule 18(2) of the CTPM Rules, 2010. The said Rule provides for demanding

duty on deemed basis on certain circumstances. For ready reference, the said Rule is reproduced below.

6.1 Rule 18(2) of the Rules provides that: -

> *"if it is found that goods have been manufactured in or cleared from a unit which is not registered with the jurisdictional Central Excise Office, then, the duty liability of such unit shall be determined on the basis of number of packing machines found available in the premises of the unit and the retail sale price of the pouches manufactured with the aid of such packing machines and unless evidence to the contrary is provided to the satisfaction of the Central Excise Officer, such machines shall be deemed to have been in operation, in case of financial year 2009-10, since the 8th March, 2010, and for subsequent financial years, since the 1st day of April of respective financial year, and shall be construed as operating packing machines for the purposes of rule 7 and dealt with accordingly."*

6.2 The contention of the Revenue is that one FFS packing machine was found installed in the unregistered premises during the search on 24.01.2012. Hence, by virtue of Rule 18(2) cited above, the said packing machine was deemed to be in operation since 08th March, 2010 and duty has been demanded w.e.f. 08.03.2010. In the impugned order, it has been held that as per the aforesaid Rule 18(2) of CTPM Rules, the one FFS packing machine available in the unregistered premises can be considered as operational during the months from 08th March, 2010 to 31st January, 2012 and duty can be demanded even without any evidence of actual manufacturing.

6.3 Thus, we observe that the issues to be decided in this appeal are: -

(i) Whether the evidences available on record indicate that one FFS packing machine installed in the unregistered premises was in working condition and used for manufacturing of Chewing Tobacco?

(ii) Whether evidences available indicate that Rule 18(2) of the CTPM Rules is applicable in this case to demand duty in respect of one FFS packing machine, from 08th March, 2010 onwards, as provided in the said Rules?

(iii) Whether penalty under Section 11AC of the Central Excise Act, 1944, is imposable in this case?

(i) Whether the evidences available on record indicate that one FFS packing machine installed in the unregistered premises was in working condition and used for manufacturing of Chewing Tobacco?

7. The first question raised is whether the evidences available on record indicate that one FFS packing machine available in the unregistered premises was in working condition and used for

manufacturing of Chewing Tobacco. The contention of the Appellant is that the FFS packing machine was not in operative condition as it was not having two main parts namely 'Disc' and 'Suit'. It is a fact on record that the packing machine was not operational at the time of joint verification by the officers. There was no evidence of finished goods or raw materials available in the unregistered premises. The photographs showing the rolls wound on the machine cannot be relied upon as a proof to establish that the machine was in operating condition. In the impugned order, mere presence of the machine has been made as the basis for raising the demand for the period from 08th March, 2010 to 31st January, 2012.

7.1 We observe that the Revenue has never stated that the machine was in operative condition. There is no finding in the impugned order against the claim of the appellant that two vital parts namely, 'Disc' and 'Suit' were not fitted with the machine and it cannot be used to pack Chewing Tobacco. The investigation has not brought in any other evidence such as purchase of raw material, purchase of packing material, excess consumption of power during the period, buyers of the clandestinely cleared material, statements from transporters, etc., to prove clandestine manufacture and clearance of Chewing Tobacco. The investigation must have probed further to establish the manufacture and clandestine clearance by means of other evidences. Instead, the investigation has relied solely on the mere presence of the FFS packing machine in the unregistered premises to demand duty. There is no evidence available on record to disprove the claim of the Appellant that the machine was non-operational and not used for manufacture of Chewing Tobacco. Mere presence of the packing machine alone is not sufficient to establish manufacture and clandestine clearance of chewing tobacco. In the absence of any other evidence, we hold that the investigation has not established that the packing machine was in operating condition and used for clandestine manufacture and clearance of Chewing Tobacco. Accordingly, the answer to question no. (i) above is in the negative.

(ii) Whether evidences available indicate that Rule 18(2) of the CTPM Rules is applicable in this case to demand duty in respect of one FFS packing machine, from 08th March, 2010 onwards, as provided in the said Rules?

8. The next question to be answered is whether Rule 18(2) of the CTPM Rules can be made applicable in this case to demand duty in respect of the one FFS packing machine found in the unregistered premises, for the period from 08th March, 2010 onwards, as provided in the said Rules. Rule 18(2) of CTPM Rules states that: -

> *"if it is found that goods have been manufactured in or cleared from a unit which is not registered with the jurisdictional Central Excise Office, then, the duty liability of such unit shall be determined on the basis of number of packing machines found available in the premises of the unit and the retail sale price of the pouches manufactured with the aid of such packing machines and unless evidence to the contrary is provided to the satisfaction of the Central Excise Officer, such machines shall be deemed to have been in operation, in case of financial year 2009-10, since the 8th March, 2010,*

> *and for subsequent financial years, since the 1st day of April of respective financial year, and shall be construed as operating packing machines for the purposes of rule 7 and dealt with accordingly."*

8.1 From the above, we observe that the deemed provision in Rule 18(2) would not come into operation if it is established to the satisfaction of the Central Excise Officer that the packing machine was not capable of being used in the manufacture of Chewing Tobacco. From the discussions as mentioned in paragraph 7.1 (*supra*), we observe that the investigation has not brought in any other evidence such as purchase of raw material, purchase of packing material, excess consumption of power during the period, buyers of the clandestinely cleared material, statements from transporters, etc., to establish clandestine manufacture and clearance of Chewing Tobacco from the unregistered premises. We observe that the one FFS packing machine found in the unregistered premises has not been fixed with two vital parts, without which the machine cannot be operationalized. In such circumstances, the investigation must have probed further to establish the manufacture and clandestine clearance of Chewing Tobacco by means of other evidences. Instead, the investigation has relied solely on the mere presence of the machine in the unregistered premises to demand duty. There is no evidence available on record to disprove the claim of the Appellant that the machine was non-operational and not used for manufacture of Chewing Tobacco. Mere presence of the packing machine alone is not sufficient to establish manufacture and clandestine clearance of chewing tobacco. This view has been held in the case of *Goyal Tobacco Co. Pvt Ltd. v. Commissioner of Central Excise and Service Tax, Jaipur-I [2017 (348) E.L.T. 720 (Tri.-Del)].* The relevant portion of the decision is reproduced below:

> *"7. The whole case of the demand against the appellant is on the basis of the availability of three machines in the premises verified by the Central Excise Officers. The demand was confirmed by considering these machines as having been used for illicit packing of excisable goods which were later cleared resulting in non-payment of duty. Admittedly, no other corroborative evidence has either been collected or presented by the officers in confirmation of such demand. In such situation, the actual condition of the machine at the time of detention of the said machines has become crucial. We note that the appellant on various occasions (25-2-2011, 18-3-2011, 19-5-2011, 4-7-2011, 8-7-2011, 14-7-2011) repeatedly requested for examination of the machines by the experts. The same was not accepted by the Department. We are not able to understand as to why such a vital aspect of investigation, that too on repeated requests of the appellant, was not accepted by the Revenue. Apparently, such examination by experts would have clearly brought out the exact status of the machines, the possibility of such machines having been put to use for clandestine manufacture, etc. The inference by the Commissioner that the machines were plugged in, the motor can be fitted at any time to run the machine, is fallacious. The Original Authority himself records that some of the essential parts in the machines were missing and in absence of recovery of these missing parts from the premises it can be actually argued that the said machines were not in working conditions on the date of visit by the officers. The Original Authority records that though the machines may not be in working condition on the date of visit by the officers (18-1-2011), there is no evidence to show that they were not in working condition since 8-3-2010. We find that such inference apart from being fallacious is legally untenable. The demand was made based on presumption that these machines were working from 8-3-2010 without interruption. The Original Authority emphasized that in terms of Compounded Levy Scheme, the goods shall be determined to have been manufactured with the help of installed packing machines irrespective of whether it is in use or not, or is in working condition or not. He held that non-working of any machine is not relevant to determine the duty liability. However, we note that in the present case the submission of the appellant is that these machines were*

scrapped and were lying unutilised and cannot be considered as packing machines "installed" for operation in terms of the Explanation II to Rule 19. If the inference of the Original Authority is considered as a legal ratio, then wherever the packing machines were lying, in any premises, including the premises of the manufacturer or seller of such machines, then the duty can be demanded from them in terms of the Compounded Levy Scheme. Apparently no such situation is covered by the Scheme. Presumptive duty liability as envisaged in the Compounded Levy Scheme of 2010 Rules cannot be extended to a level that automatic duty liability will arise in all cases, where some packing machines are found in a premises.

8. Rule 4 of the said Rules states that the factor relevant to the production of notified goods shall be the number of packing machines in the factory of the manufacturer. Rule 5 stipulates that the quantity of goods shall be determined to be as per the table appended therein. Rule 18(2) stipulates that if it is found that the goods have been manufactured or cleared from a unit, which is not registered with the jurisdictional Central Excise Officers, then the duty liability of such unit shall be determined on the basis of number of packing machines found available in the premises of the unit, unless evidence to the contrary is provided to the satisfaction of the central excise officers, such machine shall be determined to have been in operation. Keeping in view the above provisions of the Rules, we find that the non-functional scrap condition of the machines have been repeatedly asserted by the appellants on many occasions during the course of investigations. No verification or technical examination of the machines have been carried out by the department to establish the functional capability of the machines. Since the machines were detained and were under custody of the department, the repeated prayer of the appellant for technical examination is the only rebuttal the appellant could make in terms of Rule 18(2). Admittedly, the machines were not in operation at the time of the visit by the officers and were not having many essential parts including motors. This has been recorded in the impugned order. However, the Original Authority inferred that the machines can be made operational easily and the appellant failed to establish that they were not in operation during the impugned period. We find that such inference is not supported either by fact or by law. We note that the status of each machine with details of essential parts that were not found were submitted by the appellant before the Original Authority. However, the Original Authority chose to give a finding that the mere presence of machines along with the statements of admission *regarding manufacture of dutiable items is sufficient to invoke the provisions of 2010 Rules to confirm the demand.*

9. Further, we note that the Original Authority categorically concluded that when the machines were found in an unregistered premises and the manufacturer and clearance is established, the duty demand is correctly made. While the presence of machines is an admitted fact, the manufacture and clearance has not been evidenced with any corroborative evidence established during investigation. For this the only reliance was on the statements given by the Accountant of the appellant's unit, labourer and the driver of the tempo. There is no verification of procurement of raw materials, packing material, bank statements, etc. to corroborate the illicit manufacture and clearance of dutiable items. We also note that the Commissioner did not permit the cross-examination of the witnesses with reference to prayer of the appellant regarding serious irregularities in panchnama and search proceedings. We find that the Commissioner recorded since the machines were found in an unauthorized premises, the cross-examination of the witnesses would not make any change. Similarly, cross-examination of the officers conducting search operation was also denied. We further note that the Hon'ble High Court of Rajasthan in Jupitor Industries and Another in Tax Reference Case No. 28 of 2004, decided on 7-4-2006 [2006 (206) E.L.T. 1195 (Raj.)], while examining the duty liability with reference to another Compounded Levy Scheme, held that the manufacture of goods is a condition precedent for charging excise duty without which no levy can be made. The Rule cannot be made to go beyond the scope of the charging provisions.

10. Apart from the physical availability of three packing machines, the Revenue relied on the statements of Shri Rajesh Goyal (second appellant), Shri Rakesh Kumar, Shri Pramod Kumar Sharma, Shri Deepak Sharma, Shri Dinesh Jogi and Shri Babu Lal Meema. Shri Rajesh Goyal retracted his statement immediately at the earliest possible occasion. Though the other persons did not retract their statements, their cross-examination was sought by the appellant, which was not allowed by the Adjudicating Authority. However, reliance was placed on these statements as a corroborative evidence to conclude that these machines were in fact used for packing dutiable items. As such, in terms of 2010 Rules, duty liability was determined. In this connection, we note that denial of cross-examination and relying on the statements, put the impugned order in legal jeopardy. The provisions of Section 9D of the Central Excise Act, 1944 is very clear. By now, it is well-settled legal position that the Adjudicating Authority, if he intends to *rely on the contents of any statement recorded under the Central Excise Act, 1944, then the procedure, as prescribed under Section 9D, has to be followed scrupulously. In fact, in a recent decision, the Hon'ble Punjab & Haryana High Court in the case of Jindal Drugs Pvt. Ltd. - 2016 (340) E.L.T. 67 (P&H) held that Adjudicating Authority cannot straightaway rely upon the statement recorded during the investigation before the central excise officer, unless and until, he can legitimately invoke clause (a) of Section 9D(1). The statements given under Section 14 are to be examined before the Adjudicating Authority and if the same is not done, it cannot be taken as reliable evidence. If the maker of the statement is examined by the Department, cross-examination of the said person must be allowed, if sought for by the assessee. We find legal ratio regarding cross-examination of the person, whose statement has been relied upon by the Department, has been laid down by the Hon'ble Delhi High Court in Basudev Garg - 2013 (294) E.L.T. 353 (Delhi) = 2017 (48) S.T.R. 427 (Del.) and Hon'ble Allahabad High Court in Parmarth Iron Pvt. Ltd. - 2010 (260) E.L.T. 514 (All.). Further, reference can be made to the decision of Hon'ble Delhi High Court in J.K. Cigarettes Ltd. - 2009 (242) E.L.T. 189 (Delhi) = 2011 (22) S.T.R. 225 (Del.)and Hon'ble Allahabad High Court in Govind Mills Ltd. - 2013 (294) E.L.T. 361 (All.). In the present case, we find that the statements were relied upon as corroborative evidences and the cross-examination of witnesses who made such statements was denied without valid ground. We find that there is no other corroboration evidencing operation of these machines even for a single day during the impugned period. The presence of machines and certain statements of labourers and accountants were the only evidences, which resulted in confirmation of demand. We find that these evidences, the admissibility of which itself is legally not sustainable, cannot be the basis for confirmation of duty on the goods allegedly manufactured and cleared by the appellant. The investigation in the present case has been very sketchy and will not support the findings in the impugned order.*

11. After careful consideration of the impugned order and the grounds of appeal, we find that the impugned order has fallen short in appreciating the factual position, evidence gathered and applicable legal provisions in arriving at the findings of non-payment of duty. The order is not sustainable for more than one reason as recorded above.

12. Accordingly, we set aside the impugned order. The appeals are allowed."

8.2 We observe that the facts and circumstances of the case mentioned above is similar to that of the case on hand and hence, the ratio of this decision is squarely applicable to the present case on hand. By following the decision cited above we hold that the provisions of Rule 18(2) cannot be invoked in this case to demand duty for the period from 08th March, 2010 to 31st January, 2012. Accordingly, the answer to question no. (ii) at paragraph 6.3 of this Order is in the negative.

(iii) Whether penalty under Section 11AC of the Central Excise Act, 1944 is imposable in this case?

9. We observe that penalty is imposable under Rule 18 of the CTPM Rules read with Section 11AC of the Central Excise Act, 1944, only when it is established that Chewing Tobacco was produced and clandestinely removed. In view of the above findings, we hold that the investigation has not established manufacture and clandestine clearance of Chewing Tobacco. Hence, the penalty provisions cited above are not applicable in this case. Accordingly, the penalty imposed on the Appellant is liable to be set aside. Hence, the answer to question no. (iii) at paragraph 6.3 is in the negative.

10. In view of the above findings, we answer the questions raised at paragraph 6.3, as below: -

(i) The evidences available on record do not indicate that the one FFS packing machine found in the unregistered premises was in working condition and used for manufacturing of Chewing Tobacco.

(ii) Rule 18(2) of the CTPM Rules is not applicable in this case to demand duty in respect of the one FFS packing machine found in the unregistered premises, from 08th March, 2010 to 31st January, 2012.

(iii) Penalty under Section 11AC of the Central Excise Act, 1944 cannot be imposed in this case.

11. In view of the above discussion, we hold that the demand of Central Excise Duty confirmed in the impugned order is not sustainable. As the duty demand of duty is not sustainable, the demands of interest and penalty are also not sustainable.

12. Accordingly, we allow the appeal filed by the Appellant, with consequential relief, if any, available as per law.

(Order pronounced in the open court on **21.03.2024**)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sdd