

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

REGIONAL BENCH – COURT NO. 2

Excise Appeal No. 75978 of 2014

(Arising out of Order-in-Original No. CCE/BBSR-I/05/2014 dated 27.02.2014 passed by the Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-I Commissionerate, C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007, Odisha)

Commissioner of C.Ex., Customs and Service Tax : Appellant

Bhubaneswar-I Commissionerate,
C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007, Odisha

VERSUS

M/s. Arjun Sahu & Sons

: Respondent

Kathamantu Square,
Haridakhandi Road, Berhampur, PIN – 760 006, Odisha

APPEARANCE:

Shri S.K. Mukim, Authorized Representative
For the Revenue-Appellant

Dr. Samir Chakraborty, Senior Advocate
Shri Abhijit Biswas, Advocate
For the Respondent

CORAM:

HON'BLE SHRI R. MURALIDHAR, MEMBER (JUDICIAL)

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

FINAL ORDER NO. 77614 / 2024

DATE OF HEARING / DECISION: 12.09.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

The instant appeal has been filed by the Revenue against the Order-in-Original No. CCE/BBSR-I/05/2014 dated 27.02.2014 wherein the Ld. Commissioner has dropped the proceedings initiated against the respondent in the Show Cause Notice.

2. Brief facts of the case are that M/s. Arjun Sahu & Sons, Kathamentu Square, Haridakhandi Road, Berhampur, PIN – 760 006, Odisha (hereinafter referred to as 'Respondent'/assessee) are manufacturers of different brands of Pan Masala

containing tobacco, known as 'Mawa Masala' and 'Khara Masala'. Shri Brundaban Sahu is the Proprietor of the Respondent-firm. The goods are manufactured with the aid of Form, Fill and Seal (FFS) machines (hereinafter referred to as "packing machines"). The 'Mawa Masala' is having the brand name "New Haridakhandi Mawa Masala" and 'Khara Masala' is having the brand name "Sri Laxmi Nrusimha Ketaki Khara Masala".

2.1."Chewing Tobacco' falling under Chapter Heading 2403 99 10 of the Central Excise Tariff Act, 1985 was governed under the self-removal procedure till 27.02.2010.It was brought under the ambit of Section 3A of the Central Excise Act, 1944 w.e.f. 27.02.2010 vide Notification No. 11/2010-CE (N.T.) dated 27.02.2010. Chewing Tobacco and Un-manufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 (hereinafter referred to as the "CTPM Rules") was introduced vide Notification No.11/2010 and is applicable to manufacture and clearance of "Chewing Tobacco". The said Rules came into force w.e.f. 08.03.2010 with the rates as prescribed under Notification No.16/2010-CE dated 27.02.2010, as amended vide Notification No.19/2010-CE dated 13.04.2010.

2.2. Based on intelligence gathered, the Officers of the Central Excise Commissionerate visited the registered premises of the Respondent on dated 03.12.2010 and found that 7(seven) numbers of packing machines were engaged in packing Pan Masala containing Tobacco and Khara Masala. Out of the said 7(seven) numbers of machines, one machine was found to be packing "Sri Nrusimha Ketaki Khara Masala", in the first floor of the premises, having retail

sale price of Rs.14.50/- per pouch containing 100 gm each. Other six machines in the second floor of the building were engaged in packing Pan Masala containing Tobacco with brand name "New Haridakhandi Mawa Masala", having a retail sale price of Rs.0.75/- per pouch. Since the assessee had only declared one machine for packing of Mawa Masala and not declared any machine for packing of Khara Masala, the six numbers of 'Packing Machines' (one for Khara Masala and other five for Mawa Masala) along with 960260 pouches of 'New Haridakhandi Mawa Masala', 1750 pouches of 'Seetal Delux Mix' and 7140 pouches of 'Swastik Delux Mix' all having MRP of 75 paise and 12000 pouches of 'Sri Nrusimha Ketaki Khara Masala' having MRP of Rs.14.50/- and other goods, including packing materials, were seized under Panchanama dated 03.12.2010.

3. Upon completion of the investigation, a Show Cause Notice dated 21.05.2013 was issued to the respondent *inter alia* demanding Central Excise Duty of Rs.8,03,64,100/- under proviso to sub-section (1) of Section 11A of the Central Excise Act, 1944 read with Rule 18 of the CTPM Rules. The Notice also proposed confiscation of the undeclared packing machines under Rule 25 of the CTPM Rules and penalty under Rule 18 of the said Rules.

4. The above Notice was adjudicated by the Ld. Commissioner vide the impugned order wherein he has dropped the proceedings initiated against the respondent.

4.1. Aggrieved against the dropping of the demand, the Revenue has filed this appeal.

5. The Revenue, in their grounds of appeal, submits that the Ld. Commissioner has dropped the demand in the impugned order by holding that the said product is classifiable under Chapter Heading 24039920 and thus duty cannot be demanded under Section 3A of the Act read with the provisions of the CTPM Rules. However, it is the contention of the Revenue that he has failed to appreciate that in such an eventuality, the rate of duty should have been on *advalorem* basis, and therefore the assessment and the demand of duty should have been accordingly confirmed.

5.1. The Revenue has also made the submission that the Respondent had, on 06.12.2010, much after the registration of the case, belatedly on his own filed Form ER-I for the month of November 2010 classifying the product under the heading of 24039920 and himself assessed duty at the *advalorem* rate; that the said ER-1 is available in the adjudication file as the respondent has enclosed this along with their reply. The Revenue therefore contends that the Ld. Commissioner erred in dropping the demand in toto, as he should have confirmed the demand at the prevailing *advalorem* rate of duty after taking into account the clandestinely manufactured and removed Khara Masala.

5.2. Apart from the above, the Revenue also contends that the Id. adjudicating authority has failed to appreciate the following issues discussed hereinbelow: -

A. On the date of search operation i.e. on 03.12.2010, at the factory premises, the officers had unearthed the following facts as is

appearing from the Panchanama dated 03.12.2010:

(i) One Form Fill and Seal (FFS) machine, which is a very advanced form of automatic production, and the packing machine was in operation for filling and packing Khara Masala.

(ii) The officers further noticed 30 sacks containing 12000 packets of Khara Masala which were ready for removal, each having a MRP of Rs. 14.50/-, which were seized.

B. Search of the residence premises of the Proprietor on 03.12.2010 revealed 1080 kgs. of loose Khara Masala as well as 57 rolls for packing material of Khara Masala lying in his premises which were seized.

C. The authorized representative namely, Shri Bibhudutt Sahu, the Noticee No.3, in his statement dated 04.12.2010 admitted that the seized Khara Masala was manufactured on the night of 2nd December, 2010. This statement has not been retracted.

D. Statements of the workers who were present during search, were taken. They have informed that the Khara Masala packing machine (FFS) were in regular operation. These statements have not been retracted.

E. Search at the premises of the buyers have revealed that they have been procuring such pouches since long, as old dated pouches were also seized from their premises.

F. The authorised representative has also admitted that they procured the packing materials for Khara Masala which are without any printing of the manufacturing date and they print the date on the packing material as per the manufacturing plan.

G. The quantum of Khara Masala clandestinely manufactured & removed and duty evaded thereon in the impugned period at the *advalorem* rate of duty, could have been calculated by multiplying the number of days to the admitted quantum manufactured in a day and their value. The Ld. Commissioner ought to have worked out the demand after taking these factors into account.

6. The Respondent submits that in the instant Show Cause Notice dated 21.05.2013, Khara Masala was proposed to be classified under the Chapter Heading 2403 99 10 considering the same as Chewing Tobacco as notified goods under Section 3A of the Central Excise Act, 1944. They submit in this regard that the Joint Director of Health Services (PH), in-charge-of the Deputy Director-cum-Public Analyst to the Government of Odisha, Bhubaneswar has drawn samples of the product and their test report has come in the month of May 2012 certifying that tobacco content in the Khara Masala manufactured by them is only 17.4%. It is also stated that the Khara Masala manufactured by the Respondent contains Tobacco, Dhania (Coriander), Panmouri (Sounf), Kalajeera, Poppy Seed and Chua Oil. They contend that Chewing Tobacco and Pan Masala have been treated differently.

6.1. The Respondent has stated that the the impugned goods namely Sri Laxmi Nrusimha Ketaki Khara Masala, (in short, Khara Masala) manufactured by them were classifiable as 'Pan Masala containing tobacco', falling under Chapter Heading 24039990 and covered under Notification No.29/2008 and 30/2008 as notified goods under Section 3A of the Act; the assessee refuted the classification and stated it to be classifiable under the heading 24039920 as 'Preparations containing chewing tobacco'; to sort out the disputes of classification, a sample of the Khara Masala was drawn out of the goods seized in the presence of the representative of the respondent and was sent to Chemical laboratory, Custom House Kolkata, vide letter C.No.IV(6)58/CPU/CE/BBSR-1/2010/7150 dated 07.01.2011 to find out the presence of betel nut, lime and Katha (katechu) and the percentage of all ingredients; in its report, Lab.No.2421/SZD(m).90 dated 11.01.2011, the Laboratory informed that the sample is in the form of dark brown heterogeneous mixture having spicy odour consisting of tobacco, whole seeds of natural spices like cardamom, cloves, coriander and cinnamon, etc.; the presence of lime could not be established as the sample is a mixture containing many natural products; The sample did not answer to the test for catechu; the presence of betel nut could not be detected for want of instrumental analysis by GCMS; It was advised that the sample may be send to any Government Food Laboratory for confirmation whether the preparation contained lime; Accordingly, sample was sent to the Deputy Director cum Public Analyst, State Public Health Laboratory, Satyanagar, Bhubaneswar vide letter. C.NoIV(6)58/CPU/CE/BBSR-1/2010/ dated 28.03.2011. The Respondent submits

that in its report No.438/DDPA dated 01.06.2011, Joint Director of the said laboratory informed that the ingredients of the preparation were Tobacco, betel nut, coriander, snuff, clove, etc., but test of lime was negative.

6.2. The Respondent further submits that when there was dispute regarding classification of goods under seizure, the Asst. Commissioner (Adjn) vide letter C.No.V(24)15/Adjn/B- 1/CPU/35/2011/11906 dated 01.06.2012 asked the Preventive section(the seizing authority) about the opinion on the classification of the goods; The Superintendent (P) who had initiated the search and seizure of the case, in its letter C.No.IV(6)58/CPU/CE/BBSR-1/2010/12057A dated 04.06.2012 informed that based on the chemical report Lab.No.2421/SZD(m).90 dated 11.01.2011 of the Chemical Examiner, Custom House Kolkata and the report No.438/DDPA dated 01.06.2011 of Joint Director, State Public Health Laboratory, Odisha, Bhubaneswar, the impugned goods were Khara Masala falling under Chapter Heading 2403 99 20 described as preparations containing chewing tobacco. The Respondent contends that from the test reports it is proved beyond doubt that the Khara Masala is neither defined as Pan Masala nor is covered under the Pan Masala Packing Machine Rules, 2008 as notified goods, rather it is classified under the heading 2403 99 20 of the Act. In this regard, the Respondent puts forth that in an earlier Order-in-Original bearing No.CCE/BBSR-1/04/2014 dated 17.02.2014. it was held that the impugned goods viz. Khara Masala is classifiable under Chapter Heading 24039920.

6.3. The Respondent also points out that in the Show Cause Notice C.No. IV(6)58/CPU/BBSR-I/CE/2010/16983A dated 06.08.2012, the department had sought to classify the goods i.e. Khara Masala under 24039920 as 'preparations containing chewing tobacco' which is not a notified goods under notification No.11/2010-CE(N.T.) dated 27.02.2010; however, in the instant notice, the said goods i.e. Khara Masala is alleged to be classifiable as Chewing Tobacco falling under the heading of 24039910, covered under Chewing Tobacco and Un-manufactured Tobacco Packing Machine (Capacity Determination and Collection of Duty) Rules 2010, as notified goods under Section 3A of the Act. The Respondent has therefore refuted the classification of Khara Masala under Chapter Heading 24039910 arguing that as in the above Show Cause Notice the said goods were already classified as preparations containing chewing tobacco under 24039920, the same goods could not again be classified under 24039910 as chewing tobacco.

6.4. The Respondent has also made the contention that in the Central Excise Tariff Act, 1985, there is no specific definition of either 'chewing tobacco' or 'preparations containing chewing tobacco'. However, they submit, that a plain reading of the heading shows that 'chewing tobacco' is exclusively tobacco whereas the 'preparations containing chewing tobacco' covers preparations containing chewing tobacco as one of the ingredients of the preparations that includes other items as well.

6.5. It is their further contention that the test report shows that item in question i.e., Khara Masala, is a preparation containing tobacco, betel nut, coriander,

saunf, clove, etc., and is not just chewing tobacco but a preparation containing tobacco classifiable under Chapter Heading 24039920. Thus, they contend that it is not covered by Notification No.11/2010-CE(N.T.) dated 27.02.2010, and/or the Chewing Tobacco and Un-manufactured Tobacco Packing Machine (Capacity Determination and Collection of Duty) Rules 2010, as notified goods under Section 3A of the Central Excise Act, 1944. They also submit that after going through the test reports of Chemical laboratory, Custom House Kolkata, the State Public Health Laboratory, Odisha, Bhubaneswar and the report of the investigating authority, it is inferred that the impugned goods i.e., Khara Masala are not chewing tobacco, but a heterogeneous mixture of tobacco, betel nut, coriander, saunf, clove, etc. Further, they pointed out that in an earlier Order-in-Original No. CCE/BBSR-1/04/2014 dated 17.02.2014, the Department had already accepted that the goods i.e., Khara Masala is classifiable under 2403 99 20.

6.6. The Respondent therefore contended that once the goods i.e. Sri Laxmi Nrusimha Ketaki Khara Masala are proved to be not covered under the CTPM Rules, as notified goods under Section 3A of the Act, by Notification No.11/2010-CE(N.T.) dated 27.02.2010, the demand of duty as notified goods is not legally correct. Accordingly, they submit that once demand of duty is not sustained, the imposition of penalty also does not hold good.

7. Heard both sides and perused the appeal records.

8. We observe that samples of the goods manufactured by the respondent has been drawn and sent to Chemical Laboratory, Custom House, Kolkata.

The test report shows that item in question i.e., Khara Masala, is a preparation containing tobacco, betel nut, coriander, saunf, clove, etc., and is not just chewing tobacco but a preparation containing tobacco classifiable under Chapter Heading 24039920. This sub-heading is not covered by Notification No.11/2010-CE(N.T.) dated 27.02.2010, and/or the Chewing Tobacco and Un-manufactured Tobacco Packing Machine (Capacity Determination and Collection of Duty) Rules 2010, as notified goods under Section 3A of the Central Excise Act, 1944. We also observe that after going through the test reports of Chemical laboratory, Custom House Kolkata, the State Public Health Laboratory, Odisha, Bhubaneswar and the report of the investigating authority, inferred that the impugned goods i.e., Khara Masala are not chewing tobacco, but a heterogeneous mixture of tobacco, betel nut, coriander, saunf, clove, etc. Further, we observe that in an earlier Order-in-Original No. CCE/BBSR-1/04/2014 dated 17.02.2014, the Department had already accepted that the goods i.e., Khara Masala is classifiable under 2403 99 20.

8.1. We find that the Id. adjudicating authority has given a categorical finding for arriving at the conclusion that the 'Khara Masala', as manufactured by the Respondent, is classifiable under the Heading 2403 9920 which are not notified goods under Section 3A of the Central Excise Act, 1944. Hence, we do not find any infirmity in the impugned order and accordingly, we uphold the classification of the impugned goods viz. Khara Masala manufactured by the respondent under the heading of 2403 9920. Thus, we uphold the dropping of the demands of duty and dropping of the proposal for imposition of penalty raised in the Notice, by the Id. adjudicating authority.

9. Further, we observe that it is the claim of the Revenue in their grounds of appeal that the respondent themselves had filed ER-1 Return in the month of November 2010 classifying the product under 2403 9920 and themselves assessed the same to *advalorem* rate of duty. The Revenue has submitted in this regard that the Ld. Commissioner should have confirmed the duty at the *ad valorem* rate after taking into account the clandestine manufacture and removal of Khara Masala the demand separately. In this regard, we observe that this is not a demand raised in the instant Show Cause Notice. Therefore, we hold that the said demand is beyond the scope of the Show Cause Notice. Accordingly, this submission of the Revenue cannot be entertained at this stage, as the duty has not been demanded at *advalorem* rate in the Show Cause Notice.

10. In view of the above, we uphold the impugned order and reject the appeal filed by the Revenue.

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

Sd/-

(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd