IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
APPEAL NO: E/1581,1584/2010

[Arising out of Order -in-Appeal No: AKP/161/NSK/2009 dated 31.5.2010 passed by the Commissioner of Central Excise Customs (Appeals), Nashik.]

Commissioner of Central Excise,
Nashik … ***Appellant***

versus

Prakash Products …***Respondent***

<u>*Appearance*</u>:

Shri A.B. Kulgod, Assistant Commissioner (AR) for appellant

Shri D. H. Nadkarni, Advocate for respondent

Prakash Products … ***Appellant***

versus

Commissioner of Central Excise,
Nashik …***Respondent***

<u>*Appearance*</u>:

Shri D. H. Nadkarni, Advocate for appellant

Shri A.B. Kulgod, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Dr. Suvendu Kumar Pati, Member (Judicial)
Hon'ble Shri P. Anjani Kumar, Member (Technical)

Date of hearing: 24/10/2018
Date of decision: 28/02/2019

<u>ORDER NO: A/85417-85418/2019</u>

Per: S.K. Pati

Masala Packing machines (Capacity Determination and Collection of Duty) Rules, 2008 effective from 01/07/2008 on pro-rata basis for the factory closed on 03/07/2008 is assailed in this appeal.

2. Factual backdrop of the case is that appellant in appeal no. 1584/2010 was in the process of manufacture of "Gutka", a mixture of Pan Masala and Tobacco on job work basis but after introduction of the above rules imposing duty liability on the capacity of manufacturing and packing machines on 01/07/2008, appellant had duly closed production of Pan Masala and sealed its machines on 03/07/2008 in the presence of Superintendent of Central Excise. It was subsequently put to show cause vide notice dated 25/06/2009 vide which duty demand of Rs. 37,50,000/- was made from him for the entire month of July 2008, including the duty of 69,340/- which was paid by it for the said month. The matter was adjudicated, duty demand was confirmed against which appellant preferred appeal before the Commissioner (Appeals) Central Excise and Customs, Nasik who vide his order dated 31.05.2010, reduced the duty demand to Rs. 2,93,563/- on pro rata basis, taking into account closure of production dated as 3rd day of July month, 2008. Appellant M/s Prakash is before us challenging the legality of the said order in appeal no. E/1584/2010 and department is in appeal also before us in

from one month to three days.

3. In the memo of appeal and during course of hearing of the appeal, learned AR for appellant department Mr. A.B. Kulgod contended that under Rule 10 of the said Pan Masala Rules abatement is available in case, the factory did not produce the notified goods during any continues period of 15 days or more and duty can then be calculated on proportionate basis provided Deputy Commissioner or Assistant Commissioner of Central Excise is intimated and on his direction sealing of packing machine is done under the supervision of the Superintendent of Excise provided that during such period no manufacturing activity had taken place and no removal of goods would be effected by the manufacture. As the appellant had failed to comply with the same and manufactured goods on 1st July as well as removed packed Pan Masala sachet of 700 numbers on 17th July, it was liable to pay the duty fixed on production capacity for the month and, therefore, the order of Commissioner Excise fixing duty liability for three days is erroneous and the same is required to be set aside.

4. In response to such submissions of the department and in support of its appeal, with reference to appeal memo, advocate for the respondent Mr. D.H. Nandkarni in appeal no. E/1581/2010 who is

(Appeals) that no manufacturing had taken place in the month of July and few packing (700) of manufactured Pan Masala was done on 1st July was not accepted by them that resulted in imposition of duty liability on his client M/s Prakash. He further contended that the first *proviso* to Rule 10 indicates that both manufacturing and removal could not have taken place during such closure period and removal of goods which were already manufactured and packed before sealing of machines though had taken place, the same cannot be considered as violation of proviso to Rule 10 and same had been lost sight of by the adjudicating authority as well as Commissioner (Appeals). He further contended that notification came into effect on 01/07/2008 after which date, no manufacturing had taken place and the machines were sealed in compliance to the said rules for which appellants should not be burdened with the duty liability fastened on it.

5. We have heard from both the sides on both the appeals and peruse the relevant rule which came into force on 01/07/2008, M/s Prakash appellant contends that the said rules had gone to its knowledge on 3rd July 2008 and immediately its sought closure of the factory. It also had not produced any Gutka in the month of July and as per RG-1 wherein manufacturing of 700 pouch indicated was manufactured on 30th June and packed on 1st July. Ld. Commissioner

which it had to be treated as manufactured on 01/07/2008 as reflected in RG-1. We do not find any irregularities in such order. Further, his observation that notification no. 42/2008-CE dated 01/07/2008 vide which Pan Masala Rule came into force is effective from that day and not from 02.07.2008 as contended by appellant M/s. Prakash and the same in inconfirmity to the prospective application of the rule and needs no interference by the Tribunal.

6. In respect of clearance of goods during such stoppage of production and sealing of machinery, though no express provision or clarification is available as to if clearance of previously manufactured goods is to be included or excluded, in borrowing Rule 92 ZND dealing with procedure for claiming abatement on textiles vis-a-vis Board's circular no. B.04.06.2001 dated 30.04.2001 whereby clarification was given that the stock of stentered fabrics lying in the factory could be allowed to be removed during the period of closure, which is conterminous to Rule 10 of Pan Masala Rules, he gave his findings that on removal of previously manufactured Pan Masala which is not included in the proviso dealing with such removal, the benefit of abatement granted under Rule 10 of the Pan Masala Rules can be extended to the Appellant. We find no irregularity in holding such a finding in the Order-in-Appeal No: AKP/161/NSK/2009 dated

dismissed and the order of Commissioner (Appeals) passed on 27.02.2019 in O-I-A no. SM/CGST &CX/Bhiwandi/APP-38/17-18 is hereby confirmed.

(Pronounced in Court on 28/02/2019)

(P. Anjani Kumar)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

**/sb*