CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO.1

Excise Appeal No.359 of 2011
E/Cross/18/2011 (on behalf of Appellant)

[Arising out of Order-in-Appeal No. PIII/VM/286/2010, dt.03.11.2010, passed by the CCE (Appeals), Pune-III]

C.C.E., Pune-III **......Appellant**
ICE House, 41-A, Sasoon Road,
Opp. Wadia College, Pune 411 001

VERSUS

M/s Godfrey Philips India Ltd **......Respondent**
Plot No.A-1/1, MIDC Industrial Area,
Baramati, Pune

WITH

Excise Appeal No.1616,1633 to 1637 of 2011

[Arising out of Order-in-Appeal No.PIII/RS/190-197/2011, dt.25.07.2011, passed by the CCE (Appeals), Pune-III]

M/s Godfrey Philips India Ltd **......Appellant**
Plot No.A-1/1, MIDC Industrial Area,
Baramati, Pune

VERSUS

C.C.E., Pune-III **......Respondent**
ICE House, 41-A, Sasoon Road,
Opp. Wadia College, Pune 411 001

Appearance:
Shri Rajesh Ostwal, Advocate for the Assessee
Shri R.K. Dwivedi, ADC (AR) for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86259-86265/2019

Date of Hearing: 10.07.2019
Date of Decision: 10.07.2019

PER: D.M. MISRA

Out of these seven appeals, one filed by the Revenue and other six filed by the Assessee, against the respective orders, since involve common issues, are taken up together for disposal.

2. Briefly stated the facts of the case are that the Assessees are engaged in the manufacture of Pan Masala falling under Chapter Heading No.21069020 of Central Excise Tariff Act, 1985. The goods manufactured by the Assessee are governed by the provisions of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 (for short PMPM Rules, 2008). During the relevant period i.e. April 2010 to November 2010, the Assessees had installed FFS packing machines in their factory for packing of pan masala into pouches against different Retail sale prices (RSPS) viz. Machine No.2 RSP Rs.6.00, Machine No.3 RSP Rs.2.00 and Machine No.3A is RSP Rs.2.50. Pouches having RSP Rs.2.50 were also being packed on Machine No.3 only which was a multi track machine. Due to the deeming clause under 1st proviso to Rule 8 of the aforesaid rules, Machine No.3 was treated as two machines i.e. Machine No.3 with RSP Rs.2.00 and Machine No.3A with RSP Rs.2.50. The Assessees had filed declaration with the Department intimating that the number of days during which the Machine No.3 would be used for packing of pouches having RSP Rs.2.0 and RSP Rs.2.50. In respect of pouches of RSP Rs.2.50, the Assessees were discharging duty on pro-rata basis in terms of 1st proviso to Rule 9, read with 1st proviso to Rule 8 of the PMPM Rules. Department has alleged that irrespective of actual number of days consumed in packing of pouches of individual RSP Rs.2.00 and RSP Rs.2.50, it would be

considered that there are two machines – one real and another fictional – used for packing of pan masala with different RSPS during the month. Accordingly, duty demand was issued to the Assessee from time to time and on adjudication, confirmed with interest and penalty, hence the present appeals by the Assessee.

3. Revenue is in appeal against the order of the learned Commissioner (Appeals).

4. It is the contention of the learned Advocate for the Assessees that the 1st proviso to Rule 8 of the said Rules is a substantive provision which levies duty when a manufacturer commences manufacture/packing of pouches having a new RSP during the month on an existing machine. The 4th proviso to Rule 9 is the machinery provision prescribes the methodology to arrive at the monthly duty on commencement of new RSP. Therefore, reading both the said provisions simultaneously, it is clear that the basis underlines the provisions is the commencement of manufacture/packing of Pan Masala with new RSP during the month. It is his contention that in the present case, the Assessee had introduced a new RSP i.e. Rs.2.50 on an existing machine i.e. Machine No.3 during the disputed month. Accordingly, the Assessee deemed Machine No.3 as two machines, hence, they complied with 1st proviso to Rule 8 of the said Rules. Further, the Assessees had paid monthly duty on pro-rata basis in respect of pouches having RSP of Rs.2.50. Thus, the Assessees complied with 4th proviso of Rule 9 of said Rules.

5. Further, rebutting the Department's contention that 'new RSP' as used in 4th proviso to Rule 9 refers to RSP manufactured for the first time in the lifetime of the factory, if accepted, then the operation of 1st proviso of Rule 8 becomes redundant. Further assailing the findings of learned Commissioner (Appeals) that they can exercise control only on the use of Machine No.3 and not on packing machines of pouches RSP Rs.2.00 and RSP Rs.2.50, they have submitted that Rule 6 (6) of the said PMPM Rules, 2008, requires the manufacturer to make declaration on commencement of new RSP and jurisdictional Assistant Commissioner is empowered to conduct necessary enquiries. In the present case, the Assessees have, time and again, on monthly basis submitted declaration to jurisdictional authorities about their production plan for the month which includes details of start date and end date of particular RSP and also requested the Department to seal/unseal the machines as per production plan. Hence, at any stage, the Department could carry out the verification and it is wrong to say that the Assessee had no control over the use of machines for different RSPs during the month.

6. Further, they have submitted that in view of the retrospective amendment to Rule 8 of said PMPM Rules, 2008, made effective from 13.04.2010, in the 1st proviso to Rule 8 of the said Rules, it is clear that where a manufacturer uses a machine to produce pouches of different RSPs during the month, the manufacturer shall be liable to pay the duty applicable to pouches of the highest RSP for the whole month. They have submitted that since retrospective amendment had been effective from 13.04.2010, therefore, duty

demanded and its confirmation in the present case is incorrect. In support, they have referred to the judgment of this Tribunal in the case of Trimurti Fragrances Pvt. Ltd Vs CCE – 2015 (329) ELT 680 (T), Kay Pan Sugandh Pvt. Ltd Vs CCE – 2017 (3) TMI 982 – CESTAT NEW DELHI, S.A. Refreshers Pvt. Ltd Vs CCE – 2018 (3) TMI 18 CESTAT NEW DELHI.

7. Further, they have submitted that the findings in respect of the demand relating to pouches of RSP Rs.6.00 is incorrect and unsustainable inasmuch as the duty is determined on the basis of number of unsealed machines lying in the factory of the manufacturer. It is their contention that if any machine is packed and sealed by the Department in the factory, then no duty can be demanded by the Department on the said sealed machine. It is their submission that in their case Machine No.3 was used for packing of pouches having RSP of Rs.6.00 for 3 days in the month of October 2010 for the remaining number of days, the machine was sealed and packed by the Department. Hence, the question of demanding duty in respect of said RSP for the number of days factory is open is incorrect and unsustainable. It is their contention that if the number of days for which the factory is open or closed is considered as basis to determine the duty under the aforesaid rules, then entire proceedings would be otious. Therefore, Rule 10 of the PMPM Rules, 2008, which provides for abatement, should be in harmony with the said rules and not in isolation. Consequently, even if only one machine is sealed and not the entire factory, abatement is admissible. Hence, the order passed by the learned

Commissioner (Appeals) in Appeal No.E/1636/2011 is correct and sustainable.

8. Per contra, learned A.R. for the Revenue has submitted that the retrospective amendment to PMPM Rules, 2008 has been made effective from 13.04.2010, but it has been passed by the legislature in 2014, i.e. subsequent to the impugned orders, hence not before the Adjudicating authority for consideration. It is his contention that, therefore, the matter may be remanded to the Adjudicating authority on the said issue. On the issue of whether abatement would be allowed in the event only one machine become non-functional and sealed, it is his argument that in view of the clear wordings of the relevant provision i.e. Rule 10 of PMPM Rules, 2008, abatement would be allowed only when the entire 'factory' remains closed for the period specified under the relevant rules and not applicable to the machine which has been sealed.

9. We have carefully considered the submissions advanced by both sides. The issue for consideration in the present case is, if Pan Masala when packed in the pouches of different RSPs using same machine during the month, then whether duty should be paid on pro-rata basis attributable to the number of days used for manufacturing a particular RSP or duty required to be paid considering that pouches with new RSP is manufactured for the whole month as if a new machine deemed to have been used for the purpose of packing Pan Masala. In our opinion, there is need to go into the details of arguments advanced by the learned Advocate for the Appellant, in view of the retrospective amendment brought to 1st

proviso to Rule 8 of the PMPM Rules, 2008, w.e.f. 13.04.2010, by virtue of Section 109 read with 4th Schedule of Finance Act No.2 of 2014. The proviso inserted into the said Rule reads as follows:-

> "Provided that where a manufacturer uses an operating machine to produce pouches of different retail sale prices during a month, he shall be liable to pay the duty applicable to the pouch bearing the highest retail sale price for the whole month."

10. The learned A.R. for the Revenue has fairly submitted that the impugned orders have been passed much earlier to the Finance Act, 2014 and since the amendment brought to Rule 8 has been made effective retrospectively i.e. from 13.04.2010, therefore, the matter be remanded to the Adjudicating authority for considering the said amendment and decide the issue accordingly. There is no objection from the learned Advocate for the Appellant. Consequently, we remand the said issue to the Adjudicating authority for determination afresh the same in the light of retrospective amendment mentioned as above.

11. On the issue of abatement on sealing of machines, Revenue's contention is that if one machine is sealed and the remaining machines available in factory are functional, then abatement for the closure period for that machine is not allowed, unless the 'factory' as a whole remain closed for the period for which the abatement is claimed. The relevant Rule 10 of PMPM Rules, 2008 reads as under:-

> "10. Abatement in case of non-production of goods. - In case a factory did not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period provided the manufacturer of such goods files an intimation to this effect with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, with a copy to the Superintendent of Central Excise, at least seven days prior to

the commencement of said period, who on receipt of such intimation shall direct for sealing of all the packing machines available in the factory for the said period under the physical supervision of Superintendent of Central Excise, in the manner that these cannot be operated during the said period

Provided that during such period, no manufacturing activity, whatsoever, in respect of notified goods shall be undertaken and no removal of goods shall be effected by the manufacturer :

Provided further that when the manufacturer intends to restart his production of notified goods, he shall inform to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, of the date from which he would restart production, whereupon the seal fixed on packing machines would be opened under the physical supervision of Superintendent of Central Excise."

A plain reading of the said provisions makes it clear that unless all packing machines available in the factory have been sealed and factory remains completely closed, abatement for the sealing of one machine cannot be allowed. Since we are remanding the matter to the Adjudicating authority, the issue of abatement may also be considered, keeping in view our aforesaid observations.

12. All respective impugned orders are set aside and all appeals are disposed of by way of remand to the Adjudicating authority. CO disposed of.

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

(D.M. Misra)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

Bahalkar