CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 1589 of 2011

[Arising out of Order-in-Appeal No: US/148 to 150/M-II/2011 dated 28th July 2011 passed by the Commissioner of Central Excise (Appeals), Mumbai – II.]

Royal Brushes Pvt Ltd … ***Appellant***
23 Khetani Industrial Estate, Bazar Ward, Kurla (W),
Mumbai – 400 070

versus

Commissioner of Central Excise ***…Respondent***
Mumbai – II, 9th Floor, Piramal Chambers, Jijabhai Lane
Lalbaug, Mumbai – 400 012

WITH

EXCISE APPEAL NO: 1590 of 2011

[Arising out of Order-in-Appeal No: US/148 to 150/M-II/2011 dated 28th July 2011 passed by the Commissioner of Central Excise (Appeals), Mumbai – II.]

Royal Enterprises … ***Appellant***
23 Khetani Industrial Estate, Bazar Ward, Kurla (W),
Mumbai – 400 070

versus

Commissioner of Central Excise ***…Respondent***
Mumbai – II, 9th Floor, Piramal Chambers, Jijabhai Lane
Lalbaug, Mumbai – 400 012

AND

EXCISE APPEAL NO: 1591 of 2011

[Arising out of Order-in-Appeal No: US/148 to 150/M-II/2011 dated 28th July 2011 passed by the Commissioner of Central Excise (Appeals), Mumbai – II.]

Dinesh Hirji Kenia … ***Appellant***
23 Khetani Industrial Estate, Bazar Ward, Kurla (W),
Mumbai – 400 070

versus

Commissioner of Central Excise ***…Respondent***
Mumbai – II, 9th Floor, Piramal Chambers, Jijabhai Lane
Lalbaug, Mumbai – 400 012

APPEARANCE:

Shri Anil Balani, Advocate with Shri Rohan Balani, Advocate for the appellants

Shri NN Prabhudesai, Superintendent (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/87061-87063/2019

DATE OF HEARING:	15/05/2019
DATE OF DECISION:	15/11/2019

PER: C J MATHEW

Though both sides have made elaborate submissions in these appeals of M/s Royal Brushes Pvt Ltd, M/s Royal Enterprises and Shri Dinesh Hirji Kenia against order-in-appeal no. US/148 to 150/M-II/2011 dated 28th July 2011 of Commissioner of Central Excise (Appeals), Mumbai – II, the issue can be decided within the narrow compass of sustainability of the evidence that led to the findings in the order of the original authority that was upheld in the impugned order. M/s Royal Brushes Pvt Ltd were found liable to duties of central excise amounting to ₹ 7,93,370 for the period from April 2007 to December 2008 and M/s Royal Enterprises to liability of ₹ 1,39,546/- for the period from April 2005 to December 2008 besides being imposed with penalties of like amount. Personal penalty of ₹ 1,00,000/- has been imposed on Shri Dinesh Hirji Kenia, proprietor of M/s Royal Enterprises, who was also Director of M/s Royal Brushes Pvt Ltd. In addition, goods valued at ₹ 1,02,23,456/-, seized on 21st October 2009, was ordered to be confiscated under rule 25 of Central Excise Rules, 2002 but allowed to be redeemed on payment of fine of ₹ 5,00,000/-.

2. According to the investigation, the appellants were in the business of manufacture and sale of 'tooth brushes' of brands such as 'EVORA', 'ROYAL' 'MORNING SMILE' and 'NICE'. It is ascertained from the orders of the lower authorities that duty on 'tooth brushes' was to be levied in accordance with 'retail selling price' prescribed under section 4A of Central Excise Act, 1942 with effect from 1st March 2006. Furthermore, it is of important to note that 'tooth brushes' were brought within the ambit of Third Schedule to the Central Excise Tariff Act, 1985 from 1st March 2007, thereby deeming 'labelling or re-labelling' and 'packing or re-packing' to be manufacture. It is on the basis of these, as well as the finding of ineligibility to exemption notification no. 8/2003-CE dated 1st March 2003, applicable to 'small scale units' and claimed by both M/s Royal Enterprises and M/s Royal Brushes Pvt Ltd, that the duty liability has been crystalised.

3. The liability to duty was founded on denial of benefit of the

exemption notification to both the manufacturer for cross-utilisation of brand names belonging to each other. Furthermore, with the finding that imported tooth brushes had been affixed with labels and packed, the value of such goods were also clubbed for the purpose of determining eligibility for exemption.

4. It is seen from the orders of the original, as well as the first appellate, authority that even despite acknowledgement of the timelines of dutiability, which impacted the quantity, and valuation under section 4A of Central Excise Act, 1944 and specific submission that the imported goods were sold as such, there is a marked absence of any suggestion to segregate the value for determination of liability. It is, therefore, not ascertainable from the record if the imported goods had been segregated, in terms of the claim of the appellants herein that 90% of the goods were branded and that only 10% remained unbranded or of the denial of exemption notification extended to the entire clearance instead of being restricted to goods on which ineligible 'brand names' were affixed.

5. In rendering our finding of absence of certainty in duty liability and thereby leading to doubts that the submissions of the noticees had been ignored, we are guided by the conclusion

> '*in CCE v/s Johnson & Johnson Ltd (Supra) relied upon by the appellants does not help them. In the said case the respondents were importing assorted medicines of varying potency and were repacking them for marketing. It was held by the Hon'ble*

> *court that to be covered by the definition of manufacture, repacking would have to be from bulk packs to retail packs so as to render the product marketable. The appellants are admittedly packing tooth brushes which could be only from the tooth brushes packed in bulk. Import of loose tooth brushes would not be feasible.'*

in the impugned order. It is not clear that this conclusion, without narration of facts with reference to panchanama of the seizure, adverting to such inference or is tenable. It is also seen that the first appellate authority has merely referred to the fourth paragraph of the notification no. 8/2003-CE dated 1st March 2003 to exclude entitlement for the benefit without ascertainment of the extent to which the brands were used on products of the other.

6. In these circumstances, we find that the impugned order lacks the base essentials that signify disposal of grounds in appeal. Accordingly, we set aside the impugned order and direct the first appellate authority to hear the matter afresh and pass appropriate orders after taking into account the factual and legal submissions made by the noticees.

7. The appeals are disposed off accordingly.

(Order pronounced in the open court on 15/11/2019)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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