

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
MUMBAI**

**WEST ZONAL BENCH**

**Excise Appeal No. 88061 of 2013**

(Arising out of Order-in-Appeal No. PIII/RP/128/2013/326 dated 09.05.2013 passed by the Commissioner (Appeals-III), Central Excise, Pune III)

**Godfrey Philips India Ltd.**  
**MIDC Indl. Area, Baramati, Pune**

**.....Appellant**

*VERSUS*

**Commissioner of Central Excise, Pune III .....Respondent**  
**Opp.Wadia College, 41A, Sasoon Road,**  
**ICE House, Pune**

**APPEARANCE:**

Shri Rajesh Ostwal, Advocate for the appellant  
Shri Bhilegaonkar Deepak, (AR) for the respondent

**CORAM:**

**HON'BLE MR. C J MATHEW, MEMBER (TECHNICAL)**  
**HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)**

**FINAL ORDER No: A/86341/2023**

DATE OF HEARING : 23.06.2023  
DATE OF DECISION : 06.09.2023

**Per: AJAY SHARMA**

The instant appeal has been filed assailing the order dated 2.5.2013 passed by Commissioner (Appeals-III) Central Excise, Pune rejecting the appeal filed by the appellant and upholding the determination of capacity of production/Order-in-Original dated 4.12.2012.

2. The issues involved in the instant appeal are as under:-

(i) Whether the packing machine which has been sealed/uninstalled by the jurisdictional superintendent, but not removed from the factory, is to be treated as operating packing machine in terms of Chewing tobacco & Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010?

(ii) Whether the determination order passed by the adjudicating authority is within time as prescribed under the said Rules?

(iii) Whether the adjudicating authority is within jurisdiction to determine the monthly duty liability?

3. The facts leading to the filing the instant appeal are stated in brief as follows. The appellant is the holder of Central Excise Registration for manufacture of chewing tobacco without lime tube, the excise duty on which is charged on the basis of capacity of production and the same is governed by the *Chewing Tobacco & Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010*. In compliance with the said Rules, the appellant vide letter dated 27.2.2012 requested the Range Superintendent "to seal/uninstall the machine no.1 on closing hours of 29.02.12". Rule 6 *ibid* requires the manufacturer to file declaration in prescribed Form-1 with the concerned authorities and based on the said declaration the concerned authority determines and pass order on the Annual capacity of Production of the factory. Accordingly, the appellant vide letter dated 23.10.2012 intimated the authorities concerned about installing of one FFS Packing

machine w.e.f. 30.10.2012 and requested them to determine annual production capacity w.e.f. 30.10.2012 in terms of Rule 6(2) ibid and alongwith the said communication they filed Form-1. In the said communication they specifically mentioned that since the Machine No.1 (SL110S,L2) was uninstalled & sealed by the jurisdictional authorities on 29.2.2012 therefore it should not be considered as installed machine for the purpose of determining annual capacity of production. Accordingly on 29.10.2012 at 11.30 pm, Superintendent Central Excise visited the factory of the appellant and drew panchnama which continued upto 01.30 hours on 30.10.2012. In the panchnama, the Superintendent, Central Excise mentioned about the machine SL110 stating that the same is covered with plastic sheets and electric supply is not connected to the same and that the sealant portion of the machine stands sealed with button seal. He further recorded that *there is no activity of packing of chewing tobacco going on at the moment.*

4. Since the machine No.1 (SL110S,L2), which was sealed/un-installed by the jurisdictional authorities on 29.2.2012, was lying in the factory premises, the adjudicating authority vide determination order dated 4.12.2012 concluded that the said machine is available in the factory therefore this machine alongwith the additional machine, both have to be considered for calculating the annual capacity of production and monthly duty liability and accordingly he calculated the annual production capacity and revised the same. For reaching at this

conclusion the adjudicating authority relied upon one Order-in-Appeal No. P-III/RS/59/2012 dated 29.02.2012 in some other matter, which according to him, is binding on him. In the said Order-in-Appeal it has been held that *'unless the packing machine is un-installed, sealed and thereafter removed under the physical supervision of the officer from the factory, the packing machine installed in the factory, whether or not in use, is treated as operating packing machine for the purpose of payment of excise duty.'* Aggrieved, the appellant herein filed appeal before the 1<sup>st</sup> Appellate Authority and the Commissioner (Appeals-III) Central Excise, Pune vide impugned order dated 9.5.2013 rejected the same while upholding the adjudicating order.

5. Learned counsel for the appellant submits that declaration in Form-1, in accordance with Rule 6 *ibid*, was filed by them on 23.10.2012 whereas the order approving the said declaration (with modification) was issued on 4.12.2012 and communicated to them only on 17.12.2012 which is much beyond the statutory time limit prescribed by the Rules, 2010, hence as per 2<sup>nd</sup> proviso to Rule 6(2) *ibid* the annual capacity of production stood determined finally in accordance with the declaration made by the appellants in Form-1 and therefore both the authorities below have acted in violation of the Rules, 2010. He further submits that only one machine i.e. *Machine No. 2 R-52G/4* was installed in the factory on the relevant date when the jurisdictional superintendent visited the factory and drew

panchnama on 29/30.10.2012 and no other machine was operative in the factory premises as per the said panchnama, therefore both the authorities below erred in taking into consideration the Machine No. 1(SL110S, L2) which was lying sealed/uninstalled, while determining the production capacity w.e.f.30.10.2012. He also submits that under the Rules, 2010 the adjudicating authority was only required to determine the annual capacity of production, however, the said authority also determined the monthly duty liability which is beyond his jurisdiction and in support of his submission learned counsel placed reliance on the decision of the Tribunal in Appellant's own case in the matter of *Godfrey Phillips India Ltd. vs. CCE; 2017(352) ELT 232 (T.)*. Per contra learned Authorised Representative appearing for Revenue supported the findings recorded by the authorities below and prayed for dismissal of appeal.

6. We have heard learned counsel for the appellant and learned Authorised Representative for the Revenue and perused the case records including the written submissions alongwith case laws placed on record. Rule 6 ibid provides for the declaration to be filed by the manufacturer and under this rule the declaration has been made by the appellant in Form-1. One important thing which is to be noted in that rule and more particularly Rule 6(1)(i) ,(ii) & (iii) is that while the former i.e. (i) refers to number of single track packing machines *available* in the factory and clause (ii) uses the words number of packing

machines *installed* in the factory out of (i) whereas clause (iii) refers to packing machines *intends to operate in factory* out of (i). Therefore the legislature has very carefully used the words and the words 'available' and 'installed' have been used in different context. That means that it's not necessary that all available packing machines can be considered as installed or operating in the factory and that has to be determined on the facts of each case. Similar words have been used in Rule 6(1)(iv), (v) &(vi) *ibid* for multiple line packing machines. Mere existence/availability of a packing machine in the factory would not entitle Revenue to count its capacity for imposing duty and the words used in the aforesaid clauses itself makes the distinction between the operating/installed machines as compared to available machine. For deciding the issue involved herein Rule 6(2),(4) & (5) *ibid* are also relevant which are reproduced as under:-

*"6(2) On receipt of the declaration referred to in sub-rule (1), the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, shall, after making such inquiry as may be necessary including physical verification, approve the declaration and determine and pass order concerning the annual capacity of production of the factory within three working days in accordance with the provisions of these rules :*

*Provided that the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, may direct for*

*modifications in the plan or details of the part or section of the factory premises intended to be used by the manufacturer for manufacture of notified goods of different retail sale prices, as he thinks proper, for effective segregation of the parts or sections of the premises and the machines to be used in such parts or sections before granting the approval:*

*Provided further that if the manufacturer does not receive the approval in respect of his declaration within the said period of three working days, the approval shall be deemed to have been granted subject to the modifications, if any, which the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, may communicate later on but not later than thirty days of filing of the declaration.*

*Xxx*

*xxx*

*xxx*

*(4) The number of operating packing machines during any month shall be equal to the number of packing machines installed in the factory during that month.*

*(5) The machines which the manufacturer does not intend to operate shall be uninstalled and sealed by the Superintendent of Central Excise and removed from the factory premises under his physical supervision.*

*Provided that in case it is not feasible to remove such packing machine out of the factory premises, it shall be uninstalled and sealed by the Superintendent of Central Excise in such a manner that it cannot be operated."*

7. As per sub-rule (2) to Rule 6 *ibid* the annual capacity of production of the factory has to be approved within *three working days* on receipt of the declaration referred to in sub-rule (1) i.e. Form 1 and there is a deeming provision also by way of 2<sup>nd</sup> proviso to the said sub-rule which provides that if the manufacturer does not receive the approval of his declaration within *three working days* then the approval shall be deemed to have been granted and if the concerned authority is desirous of making any modification to the said declaration made by the manufacturer then the same can be communicated later also but not beyond *thirty days* of filing of the declaration.

8. The appellant did not intend to operate machine No.1 (SL110S,L2), therefore they requested for sealing/uninstalling of the same vide request letter dated 27.2.2012 in accordance with Rule 6(5) *ibid* and the same was uninstalled & sealed by the jurisdictional authorities on 29.2.2012. No reasoning is available on record as to why the same was not removed from the factory premises and that does not mean that wherever a sealed/uninstalled machine is available in the factory it necessarily has to be taken into account while determining the annual production capacity as there is an exception provided in Rule 6(5) by way of proviso stating that where it is not feasible to remove packing machine out of factory premises, it shall be uninstalled and sealed by the Superintendent in such a manner that it cannot be operated. It is not the case of revenue anywhere that there is any deliberate attempt on the part of the

appellant to operate the machine illegally. Even the Panchnama dated 29/30.10.2012 by the Superintendent, Central Excise, while inspecting the factory premises for installation of Machine No. 2R-52G/4 by the appellant, specifically records that no activity of packing of chewing tobacco is going on in the factory premises.

9. Merely because the sealed/uninstalled packing machine is available in the factory premises is not sufficient to saddle the manufacturer with the duty liability except if it falls under Rule 18 (2) *ibid* which provides for *Penalty for contravention etc.* . According to this rule “ *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.....[emphasis supplied]*”. This rule is applicable only where the manufacturing activity is carried out from an unregistered unit, which is not the case herein therefore this rule has no application. We do not agree with the finding recorded by learned Commissioner in the impugned order that although the sealing of the machine No.1 is confirmed but its un-installation is not established. When once the appellant has written to the jurisdictional authorities for sealing/uninstallation of the said machine then it's the bounden duty of the authorities concerned to do the needful and if they failed to do their part then the appellant cannot be blamed or made to suffer for that and

therefore Rule 8 *ibid*, which has been relied upon by the authority below, cannot be applied. Although the authorities below expect appellant to ensure compliance regarding un-installation and removal of the machine from the factory as per rule 6(5) *ibid* but at the same time they failed to notice the non-compliance from their own officials who, as per the letter dated 27.2.2012 of the appellant, were under obligation to seal/uninstall and thereafter to ensure the removal of machine No.1 from the factory premises. The learned Commissioner also records that the packing machines are *sophisticated machinery of reasonably big size* and the superintendent of central excise is neither trained nor competent to do the skilled technical job of un-installation of the said machinery which, according to us, is totally contrary to the intent of the legislature as the Rules, 2010 and in particular Rule 6(5) *ibid* which, in clear term provides that the machines which the manufacture does not intend to operate shall be *uninstalled and sealed* by the Superintendent of Central Excise. If the machine has not been un-installed then certainly there is dereliction of duty on the part of the officer concerned of central excise department and learned Commissioner is trying to protect such erring officer at the cost of the appellant, which we cannot approve under any circumstance. There is no allegation anywhere that the seal was broken or that despite seal the manufacturing activity was continued on Machine No.1. It is correct that there is no mention of 'removal' of the said machine No.1 in appellant's letter dated 23.10.2012 but there is specific

mention therein about the sealing and un-installation of the said machine on 29.2.2012 by the jurisdictional authority. Learned commissioner himself mentions that packing machines are of big size and sophisticated, if that is so then the superintendent concerned is required to uninstall and seal the same in such a manner that it cannot be operated as per proviso to Rule 6(5) *ibid* instead of its removal. Therefore no fault lies with the appellant. While interpreting Rule 6 *ibid* the Principal Bench of the Tribunal in the matter of *Trimurti Fragrance Pvt. Ltd. vs. CCE, Delhi-II; 2016(335) ELT 167 (Tri.-Del.)* has held that "*on true, fair and interactive analysis of the Rules and in particular Rules 6 to 13 the conclusion is irresistible and compelling that where during any period, a manufacturer intimates not to operate a packing machine and the same is sealed by the authorised officers, such machine is deemed to have been uninstalled in terms of Rule 6(5).*"

10. The appellant has also raised the issue about the deeming acceptance of the declaration given by them in Form-1 as per Rule 6 *ibid*. Although it has been recorded as the very first ground by the learned commissioner in paragraph 3 of the impugned order but he failed to give any finding on it. Few dates are relevant to decide this issue. The declaration in Form-1 was filed by the appellant on 23.10.2012 whereas the order approving the said declaration with modification was issued only on 4.12.2012 and communicated to the appellant on 17.12.2012. Both these dates are not disputed anywhere by the

revenue. 2<sup>nd</sup> proviso to Rule 6(2) specifically provides that if the manufacturer does not receive the approval of his declaration within *three working days* then the approval shall be deemed to have been granted and if the concerned authority is desirous of making any modification to the said declaration made by the manufacturer then the same can be communicated later also but not beyond *thirty days* of filing of the declaration. The upper time limit for any modification to be made by the concerned authority is of *thirty days* and it means that after thirty days the declaration made by the manufacturer in Form-1 cannot be modified by the revenue under any circumstance. Admittedly in the present case the modification has been made by way of determination order/Order-in-Original dated 4.12.2012 whereas the declaration Form-1 was filed by the appellant on 23.10.2012, which is certainly beyond the period prescribed by the statute for making any modification by the revenue authorities and therefore the same is without any authority of law.

11. So far as the issue regarding jurisdiction to determine the monthly tax liability is concerned, we are of the view that as per Rules, 2010 the adjudicating/capacity determining authority was required to only determine the annual capacity of production and determining the duty payable per month certainly is beyond his jurisdiction in view of Rule 6(2) *ibid* as the said rule require the said authority to determine and pass order concerning the *annual capacity of production of the factory*.

12. In view of the discussions made hereinabove, we are of the view that the appeal filed by the appellant deserve to be allowed and the impugned order is liable to be set aside. Resultantly the appeal is allowed with consequential relief, if any, in accordance with law.

(Pronounced in open Court on 06.09.2023)

**(C J Mathew)**  
**Member (Technical)**

**(Ajay Sharma)**  
**Member (Judicial)**

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