

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

**APPEAL NOS: E/85695, 86428 to 86437/2017
CROSS-OBJECTION NO. E/CO-91086/2017
MISCELLANEOUS APPLICATION NO: E/MISC/85893/2018**

[Arising out of Order-in-Original No: 40-41PS/COMMR/Th-II/2016 dated 30th December 2016 passed by the Commissioner of Central Excise, Thane – II and Order-in-Appeal No: SK/80 to 89/Th-II/2017 dated 15th March, 2017 passed by the Commissioner of Central Excise (Appeals), Mumbai– I.]

Commissioner of Central Excise
Thane – II

... Appellant

versus

New Kamath Tobacco Co Pvt Ltd

...Respondent

Appearance:

Shri V Sridharan, Senior Advocate with Shri Gajendra Jain, Advocate
for appellant

Shri KM Mondal, Special Counsel for respondent

CORAM:

**Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)**

Date of hearing: 10/01/2019

Date of decision: 17/01/2019

ORDER NO: A/85096-85106/2019

Per: C J Mathew

The dispute in these appeals of Revenue arises from the

assessment of duty on 'un-manufactured tobacco' produced by M/s New Kamath Tobacco Co Pvt Ltd following the introduction of levy under the Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 notified under section 3A of Central Excise Act, 1944 from 8th March 2010 onwards. Commissioner of Central Excise, Thane – II, *vide* order-in-original no. 40-41PS/COMMR/Th-II/2016 dated 30th December 2016, dropped the demands pertaining to the period from 8th March 2010 to 31st December 2014 and for the period from January 2015 to September 2015; the other ten appeals arise from order-in-appeal no. SK/80 to 89/Th-II/2017 dated 15th March, 2017 of Commissioner of Central Excise (Appeals), Mumbai– I setting aside the order of the original authority determining the production capacity on which duties of central excise was to be calculated. As the disputes are not dissimilar, we dispose of these appeals by a common order.

2. With the substitution of *ad valorem* duty effective from 8th March 2010 by liability to be determined on the basis of the capacity of production of the assessee, the discovery that M/s New Kamath Tobacco Co Pvt Ltd had deployed new machines, capable of producing far in excess of that considered normal, led to detailed investigations. According to central excise authorities, the existing machines had been replaced with new machines having capacity of

nine lines each in May 2010 and expanded in August 2012 to fifteen lines each. Citing the explanation to rule 5 of the said Rules, that

‘for the purpose of this rule, if there are multiple track or multiple line packing machines, one such track or line shall be deemed to be one individual packing machine for the purposes of calculation of the number of pouches per operating packing machine per month.’

and relying upon the technical opinion furnished by Veermata Jijabai Technological Institute that each filling station is to be considered as a separate line, demand for differential duty was sought to be recovered for these periods.

3. However, the adjudicating authority and the first appellate authority, in their respective decisions, did not agree with the proposal for recovery and, placing reliance on the opinion furnished by the Indian Institute of Technology, Mumbai, Indian Institute of Technology, Roorkee, the certificate of Shri SG Desphande, Chartered Engineer as well as the physical verification report of a committee of departmental officers, dropped further proceedings. These authorities also placed reliance on the decision of the Tribunal in *Dharampal Satyapal Ltd v. Commissioner of Central Excise, Noida* [2016 (343) ELT 662 (Tri.Del.)] upheld by the Hon’ble High Court of Allahabad in *Commissioner of Central Excise v. Dharampal Satyapal Ltd* [2016 (333) ELT 283 (All.)], and circular no. 980/04/2014-CX dated 24th

January 2014 of Central Board of Excise and Customs directing recovery to be strictly in accordance with the deemed production and not on the actual production.

4. Initiating the arguments on behalf of Revenue, Learned Special Counsel informed that the respondent had installed ‘form, fill and seal’ machines which packed retail pouches and that, according to rule 4 of the said Rules, the number of packing machines is the critical factor for computation of the duty liability, with the definition of ‘packing machines’ in rule 2(b), along with the *Explanation* to rule 5 narrated *supra*, sufficing to uphold the recovery proposed in the show cause notice. His primary contention is that there is no definition of ‘multi track/multi line’ or ‘single track/single line’ machines in the said Rules or in the notifications and that the original authority, as well as the appellate authority, had erred in relying on the technical opinion of faculty of certain institutions. It is his further contention that reliance upon the decision in *re Dharampal Satyapal Ltd* is also erroneous as the dispute in that matter was the levability of duty under the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 which, based on rule 5 therein and notification no. 42/2008-CE dated 1st July 2008, is distinct from ‘single and multiple track machines’ and the application of the *Explanation* pertaining to the additional process negated the conclusion of deployment of multiple tracks. According to him, the

opinion of Indian Institute of Technology, Roorkee must be appreciated in the light of the production facility and he went on to discount the second report of the Veermata Jijabai Technological Institute for not being categorical.

5. Learned Special Counsel informs us that the packing machines used by the assessee has multiple volumetric cups in which pre-determined quantity of tobacco is filled and these are placed on a rotary platform with each cup positioned over the prepared pouch in sequence. Therefore, he contends that the claim of the assessee that each of these machines contains only one filling station is not reflective of the fact that each of these cups has the capacity to fill the pouch and therefore requiring that the number of lines be determined by the number of volumetric cups. The picture that emerges from this description is a speedier filling up of pouches as other cups are replenished while a pouch is being packed without having to wait for the pre-determined quantity to be made available for dispensing after the empty pouch is placed below the line; effectively, speed of filling is multiplied many times over. He contends that the Tribunal, in its decision in *re Dharampal Satyapal Ltd*, was called upon to decide whether the process of preparing laminated packages in duplex machines could be considered to create a separate line merely because one laminated roll could be converted into two pouches simultaneously at any given point in time.

6. According to Learned Senior Counsel appearing for the assessee, the Rules offer no scope for rendering beyond the letter therein and drew our attention to the provisions as it stood prior to 1st March 2015, for the period between 1st March 2015 and 1st March 2016, and for the period thereafter. It is his submission that reliance on the decision of the Hon'ble High Court of Allahabad in *Commissioner of Central Excise v. Dharampal Satyapal Ltd [2016 (333) ELT 283 (All.)]* is appropriate as the primary opinion relied upon in the show cause notice stood discredited with the second report of the Veermata Jijabai Technological Institute and that of the reputed Indian Institute of Technology opining similarly.

7. It would appear that the complexities of levy on *ad valorem* basis on goods produced for the retail market and the imperative to safeguard the interest of the public exchequer prompted the Central Government to invoke this alternative method of assessment enabled by section 3A of Central Excise Act, 1944. The pre-requisite for the alternative is the notification of rules providing for the manner in which annual capacity of production of the factory is to be determined by a competent authority which would then be deemed to be the annual production or by notifying the factor relevant to the production with computed application of such factor as the deemed annual capacity of production. Thereafter, excise duty is to be levied by the application of such rate, as notified by the Central Government, on the

unit of production or such factor of element of the production. It is also clear that the present rules from which the dispute arose applies to unmanufactured tobacco bearing a brand name in which, as per rule 4, the factor relevant to the production has been identified as number of 'packing machines' and the quantity produced by a packing machine per month to be as specified in the table for the three periods that have been brought to our notice by the Learned Senior Counsel. For the period up to March 2005, the table indicates the capacity of production per packing machine per month. In the table pertaining to the following year 2015-16 'speed' is indicated for 'chewing tobacco' (other than 'filter khaini') but no such distinction marks 'unmanufactured tobacco'. For the period after 1st April, 2016, 'speed' was not considered as a relevant factor for 'filter khaini' and 'unmanufactured tobacco' but added 'speed' as a determinant for 'chewing tobacco' though not for 'filter khaini' and 'jarda scented tobacco'. It also significant to note that there has been a revision in the capacity of production of unmanufactured tobacco for the period prior to 1st March 2015 and the period thereafter. It would, therefore, appear that the factor for the purpose of section 3A(2) has been notified as also the quantity deemed to be produced. It would therefore, appear that the capacity enumerated in the table is to be multiplied by the number of packing machines for the determination of the duty liability. The rate which has to be applied is specified in

notification no. 16/2010-CE dated 27th February 2010 as per rule 7 of the said Rules.

8. While the Rules have been framed under section 3A(2) and 3A(3) of Central Excise Act, 1944, the Central Government had specified 'unmanufactured tobacco' to be assessed subject to section 3A *vide* notification no. 10/2010-CE (NT) and for the purpose of such levy defined 'packing machine' and 'brand name'. The very same definition of 'packing machine' was incorporated in the rules with the notification of 'packing machines' as the relevant factor. On a perusal of the Rules, it is seen that the Deputy Commissioner/Assistant Commissioner is, on receipt of the declaration filed by the manufacturer under rule 6(1) upon the notification coming into force or upon a new unit coming into existence, required to determine the capacity of production. As per rule 6(3), the annual capacity is to be computed by application of the appropriate quantity, *i.e.* deemed to be produced by use of one packing machine, as per the table, to the number of packing machines in the factory during the month beginning with the one when the capacity is determined. The *Explanation* that has been sought to be relied upon by the central excise authorities prescribes the multiplication of the number of pouches by the number of tracks or lines if multiple tracks or multiple line machines are installed in the factory. The declaration to be filed by the manufacturer was also to specify the number of multiple track

or multiple line machines that are available, installed and intended to be operated.

9. Rule 6(6) also prescribes that in the event of replacement, alteration or introduction of any new machine, or disposal, discontinuation or alteration of retail price, the assessee was obliged to make known such changes and have the annual capacity of production re-determined. The show cause notice alleges that the assessee had replaced the existing machines with new sophisticated machines: however, evidence of the procurement of the new machines is not available on record. It is also clear from the statements cited in the show cause notice that this aspect has not been subjected to any investigation or corroboration. On the other hand, the show cause notices itself relies upon statements that the speeding up of production is a consequence of installing more volumetric cups and the elimination of lead time in filling from one single cup, which has not been controverted. Therefore, though the number of pouches produced from machine did increase substantially, the circumstances specified in rule 6(1) for determination does not appear to apply.

10. It is also noteworthy that the said Rules do not throw light on the intent in distinguishing 'single track/single line' and 'multiple track/multiple line' packing machines. Therefore, we, as well as the central excise authorities and the assessee, are bereft of any means of

interpreting the qualifying expression 'multiple'. No evidence has been produced for us to entertain a conclusion that trade parlance has a connotation which could be adopted for determination. The focus on portions of the show cause notice in the impugned orders, as well as the submission of Learned Special Counsel, would make it appear that a technical opinion from experts in engineering seem to be the only source of enlightenment. That, however, would not be in consonance with the principles that govern levy and collection of tax. The comprehension of the intent of the taxing provision by a person endowed with a normal reasonable mind should clarify the object of levy. We are, therefore, constrained to discard the different opinions that have been placed before us. In doing so, we leave no room for doubt that identical treatment is accorded to that relied upon by the investigators as well as those submitted to counter the proposal of central excise authorities.

11. In our opinion, providing for multiplication of capacity when 'multiple track/multiple line' machines are deployed, implies the acknowledgement of simultaneous emergence of the pouches. That does not appear to be so. The absence of parallel processing of pouches inclines us to discard the contention of Learned Special Counsel for Revenue that the machines installed by the assessee are 'multiple track/multiple line'. Despite the elimination of lead time in collecting the 'unmanufactured tobacco' for each pouch, it is yet only

one pouch that can be filled at any single point in time.

12. Undoubtedly, production has speeded up and the total production was enhanced by leaps and bounds after introduction of the capacity regime. The wherefores and whyfores notwithstanding, in circular no. 980/4/2014-CX dated 24th June 2014 of the Central Board of Excise and Customs, which have been relied upon in the impugned orders, particular significance is attached to

'2. Under the compounded levy scheme, excise duty is chargeable with respect to deemed production based on the number of packing machines in the factory of the manufacturer. The issue raised is whether excise duty can be re-determined based on the speed of the packing machine and actual production thereof, which may be higher than the deemed production.

3. In order to minimize the element of subjectivity and to ensure certainty and objectivity, the number of packing machines installed in the factory has been notified to be the only factor relevant to the production of the notified goods under the said rules.

5. Accordingly, it is clarified that the duty payable under notification No. 42/2008-C.E., dated 1-7-2008 and notification No. 16/2010-C.E., dated 27-2-2010 may be determined based on deemed production with respect to the number of operating packing machines in the factory during the month and the Retail Sale Price printed on the pouches and not on the basis of actual production by a unit.'

That is a clear articulation of the intent. The lure of revenue maximization that may have motivated the initiation of proceedings cannot support the stated intent.

13. The reliance placed upon the decision of the Tribunal in *re Dharampal Satyapal Ltd*, and upheld by the Hon'ble High Court of Allahabad, though sought to be distinguished by the Learned Special Counsel, is not in dissimilar circumstances. Therein, the process of speeding up by adjustment of the single line was not approved as the determinant of doubling of the production capacity as claimed by the tax authorities. In the absence of any evidence that the higher capacity was not merely a consequence of enhancing efficiency of existing machines, the grounds of appeal cannot sustain.

14. In view of the above, we find no merit in the appeals of Revenue, which are dismissed. Miscellaneous application and Cross-Objection also disposed off.

(Pronounced in Court on 17/01/2019)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)