

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 24 of 2012-DB

[Arising out of Order-in-Original/Appeal No COMMR-A-376-VDR-I-2011 dated 11.10.2011 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-I]

Suresh Tobacco Co

Vasad Road, At-Borsad,
ANAND, GUJARAT

.... Appellant

VERSUS

Commissioner of Central Excise & ST, Vadodara-i.... Respondent

1st Floor, Central Excise Building,
Race Course Circle, Vadodara, Gujarat-390007

APPEARANCE :

Shri Rohan Thakrar, Chartered Accountant for the Appellant
Shri P. Ganesan, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

DATE OF HEARING : 01.05.2023

DATE OF DECISION: 08.08.2023

FINAL ORDER NO. 11671/2023

C.L. MAHAR :

Brief facts of the matter are that the appellant are engaged in the manufacture of branded unmanufactured tobacco without lime tube having brand name "Suresh Tamaku" for retail sale price of Rs. 1.50 per pouch of 5gms, classified under Chapter sub-heading 2401 of Central Excise Tariff Act, 1985. Since the product bearing brand name manufactured with the aid of packing machine and packed in pouches are notified goods under Section 3A of the Central Excise Act, 1944 and accordingly, the appellant was paying Central Excise duty as prescribed under Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 (hereinafter referred to as 'the said Rules, 2010').

2. It is matter of record that appellant had filed declaration on 26.04.2010 under Rule 6 of Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 requesting to allow two machines bearing No. 'Bhavya-01/Suresh' and 'Bhavya-02/Suresh' for manufacturing of branded and unmanufactured tobacco without lime tube appearing brand name of 'Suresh Tamaku'.

2.2 The appellant on 12.05.2010 applied to the department for sealing of their one machine 'Bhavya-01/Suresh' with effect from 15.05.2010. The jurisdictional range officer working on the request of the appellant sealed the machine bearing No. 'Bhavya-01/Suresh' on the mid-night of 14.05.2010.

2.3 The dispute in this case arose when the appellant filed claim of abatement in the form of refund vide his letter dated 01.06.2010 in terms of Rule of 10 of the said Rules, 2010 which were notified vide Notification No. 11/2010-CE (NT) dated 27.02.2010 on account of non-production of notified goods i.e. branded and unmanufactured without lime tube for the continues period for 17 days i.e. 15.05.2010 to 31.05.2010 thus the amount of Rs. 4,66,129/- was demanded by the appellant as refund of duty deposited by him in the beginning of the month on proportionate basis for the machines not working in 17 days in the month of May 2010. On the receipt of refund claim from the appellant, the jurisdictional Assistant Commissioner issued show cause notice dated 17.08.2010, saying that as per the provisions to Rule 10 it was mandatory for the appellant to get both the machines sealed so as to get the benefit of abatement of above referred Rules and since one machine was in working condition and therefore refund of duty deposited in advance was denied.

2.4 The matter got adjudicated vide order dated 21.09.2010 holding that since the appellant has not followed the statutory provisions of Rule 10 in the sense that appellant have all the packing machines available in the factory for during the period of abatement and therefore, the abatement claim in the form of refund has been rejected. The appellant have made appeal before learned Commissioner (Appeals), who vide his order dated 11.10.2010 has held as follows:-

“8. In view of above, it is seen that the in terms of the provisions of SECTION 3A of the Central Excise Act, 1944 the annual capacity was determined by the JAC vide Order No. Suresh/003/2010 dated 03.05.10 and accordingly the Appellants had paid duty amounting to Rs. 17,00,000/- for two machines for the whole month of May'10 on 03.05.10. Further, in terms of the provision (3) of the section 3A, the Appellants have requested/ intimated the JAC vide letter dated 12.05.10 for sealing the one packing machine w.e.f.15.05.10. Accordingly, one Packing Machine no. Bhavya-01 sealed on 14.05.10 at mid-night. Therefore, the Appellants have not intimated to the JAC prior to three days of sealing the Packing Machine no. Bhavya-01, as one machine Bhavya-02 already in production during the period 01.05.10 to 31.05.10. Hence, the factory was in working condition / produced the goods during the period from 01.05.10 to 31.05.10 continuous period of 31 days and hence no abatement in respect of such period can be allowed in terms of the provisions of Rule 10 of capacity Determination and Collection of Duty Rules, 2010.

9. In view of above, the Appellants have not fulfilled the statutory condition of provisions of abatement in terms of Rule 10 prescribed under Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 and Appellants are not allowed to abate the duty calculated on a proportionate basis for 17 days in respect of such period.”

3. Learned Chartered Accountant appearing for the appellant has contended that a close scrutiny of Rule 10 of the said Rules, 2010, if are made applicable prudently it clearly reveals that manufacturer is required to give an intimation to the proper Central Excise officer at least three working days prior to the commencement of the period for non functioning of the packing machines, intended to be sealed by the authorities so that the manufacturer is not able to run such machine. It is matter of record that out of two machines one machine was not in operation and this machine was sealed. It is further pressed that it was never the legislative intent that all

the machines working need to be sealed and in case there is breakdown of a particular machine only that is to be sealed. The learned Advocate has relied upon several decisions of this Tribunal as well as High Courts with regard to above mentioned issue:-

(a) ACME Industries v. CCE (2011) 2 TMI 611 (Tri. New Delhi)

(b) Paradise Steels P. Limited v. CCE (2018 9 TMI 1480 (Tri. New Delhi)

(c) Thakkar Tobacco Products Pvt. Limited, M/s. Vishnu Pouch Packaging Pvt. Limited v. CCE Ahmedabad-I - (2015) 2 TMI 606 (Tri. Ahmedabad)

(d) Trimurthy Fragrances P. Limited v. CCE - (2015) 8 TMI 34 (Tri. Delhi)

(e) Dharampal Satyapal Limited v. CCE - (2021) 5 TMI 605- (Tripura HC)

4. We have heard the learned Departmental Representative.

5. We find that it is matter of record that out of two installed machines, during the month of May, the appellant had not put to use one machine in the second half of the month for 17 days in May, 2010. It is also on record that machine which was not in operation has been sealed by the department for remaining period of May 2010. There is also no denying of the fact that required amount of duty i.e. 8.50 Lakh per machine was deposited by the appellant in advance. The only question which need to be answered by us is whether for the purpose of availing abatement under Rule 10 of the said Rules, 2010, the appellant statutorily need to stop manufacturing from both the machines which are installed in his factory. Any prudent person will reach to the conclusion that only machine which is working need to pay the required amount of compounded Central Excise duty and if any machine in a month is not working for more than 15 days, as per Rule the duty deposited

in advance need to be abated in their favour. Before proceeding further in this regard, it will be proper to have a look of concerned provisions of Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010:-

“Rule 9. Manner of payment of duty and interest. - The monthly duty payable on notified goods shall be paid by the 5th day of the same month and an intimation in Form - 2 annexed to these rules shall be filed with the Jurisdictional Superintendent of Central Excise before the 10th day of the same month:

***Provided** also that in case a manufacturer permanently discontinues manufacture of goods of existing retail sale price or commences manufacture of goods of a new retail sale price during the month, the monthly duty payable shall be recalculated on the pro-rata basis of the total number of days in that month and the number of days remaining in that month starting from the date of such discontinuation or commencement and the duty liability for the month shall not be deemed to have been discharged unless the differential duty is paid by the 5th day of the following month and in case the amount of duty so recalculated is less than the duty paid for the month, the balance shall be refunded to the manufacturer by the 20th day of the following month :*

***Provided** also that if there is revision in the rate of duty leviable under section 3A of the Act, the monthly duty payable shall be recalculated on the pro-rata basis of the total number of days in that month and the number of days remaining in that month counting from the date of such revision and the duty liability for the month shall not be discharged unless the differential duty is paid by the 5th day of the following month and in case the amount of duty so recalculated is less than the duty paid for the month, the balance shall be refunded to the manufacturer by the 20th day of the following month :*

***Provided** also that in case it is found that a manufacturer has manufactured goods of those retail sale prices, which have not been declared by him in accordance with provisions of these rules or has manufactured goods in contravention of his declaration regarding the plan or details of the part or section of the factory premises intended to be used by him for manufacture of notified goods of different retail sale prices and the number of machines intended to be used by him in each of such part or section, the rate of duty applicable to goods of highest retail sale price so manufactured by him shall be payable in respect of all the packing machines operated by him for the period during which such manufacturing took place :*

***Provided** also that in case a new manufacturer commences production of notified goods in a particular month, his monthly duty payable for that month shall be calculated on the pro-rata basis of the total number of days in the month and the number of days remaining in that month starting from the date of such commencement and shall be paid within five days of such commencement.*

Rule 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 three working 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 the packing machines so sealed cannot be operated during the said period :

.....

.....

Rule13 Addition or removal of packing machines and other restrictions.-(1) In case a manufacturer does not intend to further operate a packing machines, he shall intimate the same to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, at least three working days in advance from the date so intended, whereupon the same shall be uninstalled and sealed by the Superintendent of Central Excise and removed from the factory premises under his physical supervision.”

6. We are of the view that the above provisions of the Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 makes it very clear that the manufacturer of Chewing Tobacco and Unmanufactured Tobacco, as per the said Rules, 2010, require to pay compounded Central Excise duty for the period from which the machines are in operation in a particular month. Abatement of Central Excise duty is restricted to the situation where the provisions of the notified goods does not take place for the period 15 days or more. We find that in this case, since the one of the machines of the manufacturer was not engaged in the manufacture of notified goods for more than 15 days and therefore, we are of the clear view that they are entitled for abatement of the duty which has been deposited by them in advance in the beginning of the month.

7. We also take note of CBEC Circular No. 980/04/2014-CE dated 24 Jan 2014:-

“3. Presently, the mandatory compounded levy scheme is applicable to Pan Masala, Gutkha and chewing tobacco manufactured with the aid of packing machine & packed in pouches. The factor relevant to the production on which excise duty is leviable has been notified to be the number of packing machines in the factory of the manufacturer under the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 and the Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 read with section 3A(2) and

(3) of the Central Excise Act, 1944. The monthly deemed production per operating machine per month is prescribed based on the average speed of packing machines and average working hours of a factory. Excise duty is chargeable at the rates notified on the basis of Retail Sale Price (RSP) slabs on per machine basis (notification No. 42/2008-C.E., dated 1-7-2008 and notification No. **16/2010-C.E.**, dated 27-2-2010 refer). 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.”

It is clear from the reading of the above Circular that the assessee need to pay duty on deemed production in respect of per operating machine working in factory during the month taking other factors into consideration like retail sale price of the pouch etc. Therefore, since one machine of the appellant has not worked for 17 days in the month of May 2010, we are of the view that they are legally entitled for refund of the amount deposited by them in advance.

8. In view of the above we hold that order-in-appeal is without any merit and therefore, we allow the appeal.

(Pronounced in the open court on 08.08.2023)

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)