
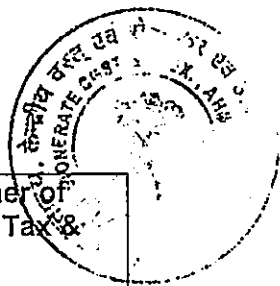


<p>आयुक्त का कार्यालय केंद्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,अहमदाबाद उत्तर, कस्टम हॉउस(तल प्रथम) नवरंगपुरा- अहमदाबाद ,380009</p>		<p>Office of the Commissioner Central Goods & Services Tax Central Excise, Ahmedabad North, Custom House(1st Floor) Navrangpura, Ahmedabad-380009</p>
<p>फ़ोन नंबर./ PHONE No.: 079-2754 4599 फ़ैक्स/ FAX : 079-2754 4463 E-mail:- oaahmedabad2@gmail.com</p>		



निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. V.24/15-11/OA/2017

आदेश की तारीख / Date of Order : 19.03.2020
जारी करने की तारीख / Date of Issue : 19.03.2020

द्वारा पारित/Passed by -

डॉ. बलबीर सिंह / Dr. BALBIR SINGH
आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR-36/2019-20

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति -इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार ,सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,O-20, मेघाणीनगर ,न्यु मेन्टल हॉस्पिटल कम्पाउन्ड , अहमदाबाद -380016 को संबोधित होनी चाहिए।

Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, O-20, Meghani Nagar, Mental Hospital Compound, Ahmedabad-380 016.

2.1 इस आदेश के विरुद्ध अपील न्यायाधिकरण में अपील करने से पहले मांगे गये शुल्क के 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है ।

An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

(as per amendment in Section 35F of Central Excise Act,1944 dated 06.08.2014)

3. उक्त अपील प्रारूप सं .इ.ए 3.में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 ,के नियम 3 के उप नियम (2)में विनिर्दिष्ट व्यक्तियों द्वारा हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियाँ में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई हो ,उसकी भी उतनी ही प्रतियाँ संलग्न की जाएँ)उनमें से कम से कम

एक प्रति प्रमाणित होनी चाहिए। अपील से संबन्धित सभी दस्तावेज भी चार प्रतियाँ में अग्रेषित किए जाने चाहिए।

The Appeal should be filed in Form No. E.A.3. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

4. अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैं चार प्रतियों में दाखिल , उसकी भी उतनी ही , की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उनमें से कम से कम प्रतियाँ संलग्न की जाएंगी एक प्रमाणित प्रति होगी।

(The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

5. अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के बिना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।

The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

6. अधिनियम की धारा 35बी के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है, वहां के किसी भी राष्ट्रीयकृत बैंक की शाखा से न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर रेखांकित माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।

The prescribed fee under the provisions of Section 35 B of the Act shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. न्यायालय शुल्क अधिनियम 1970 ,की अनुसूची ,1-मद 6 के अंतर्गत निर्धारित किए अनुसार संलग्न किए गए आदेश की प्रति पर 1.00रुपया का न्यायालय शुल्क टिकट लगा होना चाहिए।

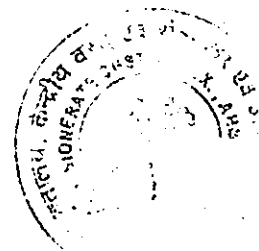
The copy of this order attached therein should bear a court fee stamp of Re. 1.00 as prescribed under Schedule 1, Item 6 of the Court Fees Act, 1970.

8. अपील पर भी रु 4.00 .का न्यायालय शुल्क टिकट लगा होना चाहिए।

Appeal should also bear a court fee stamp of Rs. 4.00.

विषय: -कारण बताओ सूचना:

Subject- Proceedings initiated vide following Show-Cause-Notices F.No. V.24/15-11/OA/2017 dated 11.10.2018 issued to M/s. Unicorn Packaging LLP, 61, Mahagujarat Industrial Estate, Sarkhej-Bavla Highway, Changodar, Ahmedabad-382213.



BRIEF FACTS OF THE CASE:

M/s. Unicorn Packaging LLP, 61, Mahagujarat Industrial Estate, Sarkhej- Bavla Highway, Changodar, Ahmedabad-382213 (hereinafter referred to as 'the said assessee') holding Central Excise Registration Certificate bearing No. AAUFU5939LEM001 is engaged in the manufacture of "Chewing Tobacco/Jarda Scented Tobacco" falling under chapter 24 of the first schedule to the CETA, 1985, which is brought under Compounded Levy Scheme w.e.f. 08.03.2010, as per Chewing Tobacco and Un-manufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 (hereinafter referred to as 'the said Capacity Determination Rules'), notified vide Notification No. 11/2010-C.E. (N.T.), dated 27.02.2010, as amended.

2. For the period November 2016, as per Form 1 & Form 2 filed by the assessee as required under Rule 6 & Rule 9 of Chewing Tobacco Packing Machine (Capacity determination and collection of duty), Rule 2010 and Challans submitted by the assessee and sealing/de-sealing intimations filed by the said assessee with the Assistant/Deputy Commissioner of Central Excise, Division-IV, Ahmedabad-II and the jurisdictional Range Superintendent, it appeared that vide Form 1 dated 15.11.2016, the assessee had opened two Pouch Packaging Machines (PPMs) of MRP Rs.3/- from 15.11.2016. The PPMs were opened in the midnight of 14.11.2016 & 15.11.2016 (w.e.f. 15.11.2016) by the jurisdictional Range Officer. Thereafter, the said assessee had submitted Form 1 for the month of December, 2016 to operate 05 PPMs from the midnight of 30.11.2016 & 01.12.2016 (w.e.f. 01.12.2016). Therefore, the PPMs were operated for only 16 days in the month of November 2016. The said assessee informed the jurisdictional Assistant/Deputy Commissioner and Range Officer vide form-2 dated 15.11.2016 that they had paid duty proportionately amounting to Rs.2,66,70,934/- for 16 days in November 2016 vide Challan No. 50202 dated 15.11.2016. As such, it appeared from the above that the said assessee had paid the duty on the proportionate basis during the month of November 2016.

3. The determination of duty payable is dependent upon the number of PPMs installed in a factory multiplied by the applicable rate of duty per PPM and governed by Rule 7 & 8 of the said Capacity Determination Rules. The manner of duty on the Notified Goods and liability to pay the rate specified is provided under Rule 9 of the said Capacity Determination Rules. The said Rules 7, 8 & 9 *ibid* are extracted hereunder.

Rule 7. Duty payable to be calculated. -The duty payable for a particular month shall be calculated by application of the appropriate rate of duty specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 16/ 2010-CE, dated the 27th February, 2010 to the number of operating packing machines in the factory during the month.

Rule 8. Alteration in number of operating packing machines.

in case of addition or installation or removal or uninstallation of a packing machine in the factory during the month, the number of operating packing machines for the month shall be taken as the maximum number of packing machines installed on any day during the month :

Provided that in case a manufacturer commences manufacture of goods of a new retail sale price during the month on an existing machine. it shall be deemed to be an addition in the number of operating packing machine for the month :

Provided further that in case of non-working of any installed packing machine during the month, for any reason whatsoever, the same shall be deemed to be a operating packing machine for the month.

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 that monthly duty payable for the period from the 8th day of March, 2010 to the 31st day of March, 2010 shall be calculated on the pro-rata basis of the total number of days in the month of March, 2010 and the number of days remaining in the month starting from and including the 8th day of March, 2010 and the same shall be paid on or before the 15th day of March, 2010:



Provided further that if the manufacturer fails to pay the amount of duty by the due date, he shall be liable to pay the outstanding amount along with the interest at the rate specified by the Central Government vide notification under section 11AB of the Act on the outstanding amount, for the period starting with the first day after the due date till the date of actual payment of the outstanding amount:

Provided also that in case of increase in the number of operating packing machines in the factory during the month on account of addition or installation of packing machines, the differential duty amount, if any, shall be paid by the 5th day of the following 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 prorata 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 3 A 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 manufacturer does not pay the duty payable by the due date, and continues to operate any packing machine, then till the time such non-payment continues, he shall be liable to pay the monthly duty based on the number of operating packing machines declared in the month for which duty was last paid by him or the total number of packing machines found available in his premises at any time thereafter, whichever is higher:

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.

4. Rule 10 of the said Capacity Determination Rules provides for abatement in case a factory did not produce the notified goods. For ease of reference, the said Rule is reproduced hereunder.

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 :

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



manufacturer except that notified goods already produced before the commencement of period may be removed within first two days of the said period

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.

5. From the aforesaid provisions of law, an assessee was required to deposit the duty liability for the month in advance i.e. by 5th of the same month by calculating and applying the appropriate rate of duty specified in the Notification Nos. 16/2010-CE dated 27.02.2010, as amended vide Notification No. 16/2016-CE dated 01.03.2016. It appeared that in case of revision in the rate of duty, the monthly duty payable is to 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. It appeared that as soon as the duty is deposited by the assessee to the Govt, account it will be a property of Govt. The Central Board of Excise &, Customs vide letter F.No.267/16/2009-CX8 dated 12.03.2009 has intimated that in case a factory did not produce notified goods during any continuous period of 15 days or more, abatement of duty has to be given, the jurisdictional Assistant/Deputy Commissioner of Central Excise has to pass an abatement order. In light of this, it appeared that provisions of Section 11B of the Central Excise Act, 1944, shall apply and all procedures prescribed there for have to be followed.

6. The duty liability, the duty actually paid and the differential duty that remained to be paid by the assessee for the month of November 2016 is tabulated hereunder. In terms of Rule 9 of the said Capacity Determination Rules, the assessee was required to pay the duty as mentioned in column No.2 of the Table below. Taking into account the duty liability and the duty paid, it appeared that the assessee had short-paid the duty as shown in column No.4.

Month	Duty liable to Pay	Duty Paid	Difference
(1)	(2)	(3)	(4)
November, 16 (2 PPMs)	5,00,08,000/-	2,66,70,934/-	2,33,37,066/-

7. From the above Table, it was evident that as against the duty liability of Rs. 5,00,08,000/- the assessee has paid only Rs. 2,66,70,394/-. Therefore, the assessee was required to pay the differential duty of Rs. 2,33,37,066/- short-paid under Rule 19 of the said Capacity Determination Rules read with Section 11 A(1) of the Central Excise Act, 1944. The assessee also appeared liable to pay interest in terms of Rule 9 of the said Capacity Determination Rules read with Section 11AA of the Central Excise Act, 1944. Consequently, the assessee also appeared liable to penalty under Rule 18 of the said Capacity Determination Rules read with Rule 25 of the Central Excise Rules, 2002 [by virtue of Rule 19 of the Capacity Determination Rules all provisions of the Central Excise Act and the Rules are applicable mutatis mutandis]

8. Since the goods, having element of Central Excise Duty to the tune of Rs.2,33,37,066/- were cleared in contravention of the provisions of the said Capacity Determination Rules, the goods cleared by the assessee during the aforesaid period, appeared to be liable for confiscation in terms of Rule 18 of the said Capacity Determination Rules read with Rule 25 of the Central Excise Rules, 2002.

9. Therefore, a Show Cause Notice was issued M/s. Unicorn Packaging LLP, 61, Mahagujarat Industrial Estate, Sarkhej-Bavla Highway, Changodar, Ahmedabad-382213, calling upon them as to why:

- (i) The Central Excise Duty amounting to Rs. 2,33,37,066/- (Rupees two Crore thirty three Lakh thirty seven Thousand sixty six only) should not be recovered from them under the provision of Rule 19 of the Chewing Tobacco and Un-manufactured Tobacco Packing Machine (Capacity Determination and Collection of Duty) Rules, 2010, read with Section 11 A(I) of the Central Excise Act, 1944.
- (ii) Interest at the applicable rate should not be recovered from them under Rule 9 of the said Capacity Determination Rules read with Section 11AA of the Central Excise Act, 1944

(iii) Penalty should not be imposed on them under Rule 18 of the Chewing Tobacco and Un-manufactured Tobacco Packing Machine (Capacity Determination and Collection of Duty) Rules, 2010 read with Rule 25 of the Central Excise Rules, 2002.

(iv) Goods having element of Central Excise Duty to the tune of Rs.2,33,37,066/- cleared during the respective period should not be confiscated under Rule 18 of the Chewing Tobacco and Unmanufactured Tobacco packing machine (Capacity Determination and Collection of Duty) Rules, 2010 read with Rule 25 of the Central Excise Rules, 2002.

10. Vide their letter dated March 06, 2020, the assessee has filed their defence reply to the Show Cause Notice and interalia, stated as under:

(a) They denied all the allegations, averments and contentions leveled against us vide the show cause notice

(b) They put forth the following facts:

(i) That during the period it is an undisputed fact on record that the pouch packing machines were installed after 5th day of the month during November, 2016;

(ii) That during the period under consideration, the entire factory remained closed continuously for a period from 27.10.2016 to 14.11.2016 exceeding 15 days; and

(iii) That the duty on the two operating Pouch Packing Machines operational from 15.11.2016, was paid on proportionate basis.

(c) The subject notice refers to Rule 9 of the said Rules. The said Rule 9 provides that monthly duty on notified goods shall be paid by the 5th day of the same month. They relied on Rule 6 of the said Rules, which provides for filing of declaration at least three working days in advance in case of addition or removal pouch packing machines. The said period of three days is given only to approve the declaration and re-determine the annual capacity, based on which the duty is required to be paid.

(d) They submitted that the said Rule 9 of the said Rules does not stipulate that the monthly duty in all cases payable has to be paid by 5th of the same month, even if no pouch packing machine was installed or operating for the whole month or a part of the month. They submitted that the said Rule 9 comes into play only in case the manufacturer is required to pay the duty for the complete month. They have taken support from the fifth proviso to Rule 9 of the said Rules, which provides that in case of increase of operating packing machines during the month on account of addition or installation, the differential duty amount, if any, is required to be paid by 5th day of following month. The fifth proviso to Rule 9 of the said Rules, which is reproduced below:

"Provided also that in case of increase in the number of operating packing machines in the factory during the month on account of addition or installation of packing machines, the differential duty amount, if any, shall be paid by the 5 day of the following month.

(e) If the duty is required to be paid by 5th day of the same month, then in that case, the fifth proviso of the said Rule 9 would be redundant and nugatory. The legislature has deliberately incorporated the said proviso in order to take care of the payment of duty in case the pouch packing machines are installed after 5th day of the month.

(f) It is well settled that a specific provision always prevails over the general provisions. The fifth proviso to Rule 9 of the said Rules, specifically provides that in case of any addition or installation of Pouch Packing Machines, the duty is required to be paid by 5th day of the next of the month.

(g) It is further submitted that the allegation made vide the subject notice cannot be accepted that in all cases the duty has to be deposited by 5th day of the same month for the reason that the deposit of duty is directly linked with the number of PPMs operating and installed. Thus, if the said number of PPMs is not ascertainable or known, the manufacturer cannot be expected to deposit the duty on any hypothetical basis. In the present case, in all the months, there was no manufacturing operation by them during the period in which the due date fell i.e. on 5th day of the month, no pouch packing machines were operational and therefore the duty could not be determined by 5 day of the month, consequently no duty and interest was



payable. In support of above contention, we place reliance on the decision of the Hon'ble Tribunal in the case of Trimurti Fragrance P. Ltd. Vs Commissioner reported at 2016 (335) ELT 167 (Tribunal) and Taste Well Product Vs Commissioner reported at 2016 (335) ELT 55 (Tri. Del.)

(h) It is submitted that the payment of interest for alleged delay in payment of duty is not applicable in the facts of the case on hand. The interest liability can be fastened, only when a person fails to pay the duty by due date. In the present case, the production activity was not in operation continuously for a period of more than 15 days. No pouch packing machines were operational before the 5th day of the month and as such, we were not even aware as to how long their factory would remain closed. They have deposited the duty promptly on resumption of production and therefore there is no question of payment of interest. In support of above contention, they placed reliance on the decision of the Hon'ble Tribunal in the case of Jaiswal Products Vs Commissioner reported at 2016-T10L-1277-CESTAT-DEL.

(i) They further submitted the said Rule 9 of the said Rules, no where stipulates that the duty in all cases has to be paid by 5th day of the same month. It is well settled law that in any fiscal statute, there is no room for intendment meaning thereby that if a word has not been used, the same cannot be read in and conversely, if a word has been mentioned in the statute, it cannot be read out. There being no stipulation of payment of duty by 5th day of the month even when the PPMs were not installed, no interest is payable. Consequently, the proceedings initiated vide the subject notice is not sustainable.

(j) They submitted that in the subject show cause notice, it has been assumed that only differential duty in case of increase is covered under the fifth proviso to Rule 9 of the said Rules. A plain reading of the said 5 proviso does not making any such stipulation as alleged in the show cause notice. The word differential duty has not been mentioned in the said 5 proviso to Rule 9 and therefore the same could not have been added for charging any interest on the alleged ground of delay in depositing the duty.

(k) Further at the time of sealing of the pouch packing machines, the same are uninstalled and therefore at the time of installation, it is an addition of machine for which the 5 proviso to the Rule 9 of the said Rules is attracted. The duty having been deposited within the time limit prescribed under the 5 proviso to Rule 9 of the said Rules, no interest is payable and the proceedings vide the subject notice are required to be withdrawn,

(l) The parent provisions of Section 3A of the Central Excise Act, 1944 (said Act) itself provides for calculation of the duty on the proportionate basis and there is no provision what so ever under the said Act or the Rules made there under to conclude that the duty is required to be paid, when no PPM is installed or operative.

(m) It is submitted that a statute is an edict of the legislature and the conventional way of interpreting or construing a statute is to seek the intention of the maker. A statute is to be construed according to the intent of them that make it. In the present case, it cannot be the intention to charge duty, when the entire factory is closed and no Pouch Packing Machine is installed in the factory. The question of payment is only after it is held that the duty was required to be paid and the same had not been paid. In the present case, no duty was required to be paid for the period during which the pouch packing machines were not installed and installed in all cases after the 5th day of the month. As such, the question of payment of interest does not arise.

(n) It is further submitted that duty of excise is levied on the goods manufactured as per the Union List (List 1). The nature of tax imposed by a statute has to be determined by examining the pith and substance of the statute. There are three components of a taxing statute viz; subject of tax, person liable to pay the tax and the rate of tax. Besides, there is always charging section in a fiscal statute. In the central excise act, the duty is required to be paid on the goods manufactured and if no goods are manufactured, no duty is payable, and consequently no interest is payable.

(o) Further, while interpreting a fiscal statute, a harmonious reading should be adopted. Any interpretation of the statute which leads to absurdity should be avoided. If the interpretation as canvassed in the impugned order is to be considered, it would mean that in all cases, whether a manufacturer has any Pouch Packing machines installed in his factory or not, the duty for the month is required to be paid by 5th day of the month. It is submitted that such an interpretation

would make the third proviso to Rule 9 of the said Rules redundant and nugatory. The assessee submitted that such cannot be the intention in collecting the interest on the duty which is admittedly not payable by the manufacturer.

(p) The subject notice proposes to impose penalty on us under section Rule 18 of the said Rules read with Rule 25 of the said Central Excise Rules, 2002. They submitted that the various Courts and Tribunals have consistently held that the penalty should not be imposed in an ordinary course, unless it can be shown that the appellant had acted deliberately in defiance of Law. The Hon'ble Supreme Court in case of Hindustan Steel Ltd. v/s. State of Orissa reported at AIR 1970 SC (253) (1979 ELT (J402) has held that for imposition of penalty, it is to be brought on record that the party had acted deliberately in defiance of the Law. In the present case there is nothing on the record which reveals that we had acted in any way in defiance of Law. As such, the subject notice having been passed without any material evidence on record, is legally not tenable and the same deserves to be withdrawn

(q) It is submitted that before imposing penalty the requisite mens rea has to be established, as held by the Hon'ble Supreme Court in the case of Akbar Badruddin Jiwani v/s. Collector of Customs reported at 1990 (47) ELT 161 (SC). The words typically imposing a mens rea requirement include wilfully, maliciously, fraudulently, recklessly, negligently, corruptly, feloniously and wantonly. In the present proceeding, the element of mens rea being absent, the imposition of penalty is not warranted.

(r) They submitted that the issue involved in the present case is of interpretation of a provision of law which provides the date of payment of duty. According, to us the duty is required to be paid as per the 5 proviso to Rule 9 of the said Rules. In any case, the issue involved being of interpretation of statutory provisions, no penalty is imposable.

(s) They submitted that the demand of duty and interest made vide the subject notice being not sustainable, without authority of law and is required to be withdrawn in the interest of justice.

PERSONAL HEARING:

11. Personal hearing in this matter was held on 9.3.2020, wherein Shri N.K. Tiwari, Consultant and Shri Viresh H. Shah, C.A., appeared before me on behalf of the assessee. They filed written submissions during the course of personal hearing. They cited a plethora of decisions of the Tribunal and judgments passed by various Courts, in support of their contention. They have relied upon the judgment passed by the Hon'ble High Court of Allahabad, in the case of M/s. Steel Industries of Hindustan Industrial Area reported in 2013 (293) ELT 191 (All.) and the decision of the Tribunal in the case of M/s. Thakkar Tobacco Products P. Ltd. reported in 2015-TIOL-690-CESTAT-AHM. In view of the said decisions of the Tribunal and judgment of the Hon'ble Court of Allahabad, they requested that the proceedings initiated against the assessee may be dropped.

DISCUSSION AND FINDINGS:

12. I have gone through the records of the case, the submissions made by the assessee in their written submissions and also taken note of the oral submissions made by the assessee at the time of the personal hearing.

13. From the records of the case, I find that the assessee had operated the PPMs for only 16 days in the month of November 2016. The said assessee informed the jurisdictional Assistant/Deputy Commissioner and Range Officer vide form-2 dated 15.11.2016 that they had paid duty proportionately amounting to Rs.2,66,70,934/- for 16 days in November 2016 vide Challan No. 50202 dated 15.11.2016. As such, it appeared from the above that the said assessee had paid duty on the proportionate basis during the month of November 2016.

14. The issue to be decided is whether the assessee, who is engaged in the manufacture of "Chewing Tobacco/Jarda Scented Tobacco" falling under chapter 24 of the first schedule to the CETA, 1985, which was brought under Compounded Levy Scheme w.e.f. 08.03.2010, as per Chewing Tobacco and Un-manufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010, as amended, notified vide Notification No.



11/2010-C.E. (N.T.), dated 27.02.2010, as amended, is required to pay the duty on the basis of the number of packing machines in the factory for the entire month, when they have operated the PPMs for only 16 days of the month or alternatively whether the assessee can pay the duty only for the number of days the machines were in operational.

15. The goods manufactured by the assessee was chargeable to excise duty under Section 3A of Central Excise Act, 1944 as the said goods are notified by Notification No. 11/2010-C.E. (N.T.), dated 27.02.2010. The determination of duty payable was dependent upon the number of machines installed in a factory multiplied by the applicable rate of duty per machine and governed by Rule 7 & 8. The said Rules 7 & 8 *ibid* are extracted hereunder.

Rule 7. Duty payable to be calculated. - *The duty payable for a particular month shall be calculated by application of the appropriate rate of duty specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.16/2010-CE, dated the 27th February, 2010 to the number of operating packing machines in the factory during the month*

Rule 8. Alteration in number of operating packing machines. - *In case of addition or installation or removal or un-installation of a packing machine in the factory during the month, the number of operating packing machine for the month shall be taken as the maximum number of packing machines installed on any day during the month:*

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:

Provided further that in case of non-working of any installed packing machine during the month, for any reason whatsoever, the same shall be deemed to be operating packing machine for the month.

16. From the plain reading of Rule 7 it is clear that duty payable for a particular month shall be calculated on the basis of number of operating packing machines in the factory during the month by application of appropriate rate of duty specified in the notification. As per Rule 8 the number of operating packing machine for the month shall be taken as the maximum number of packing machines installed on any day during the month. It is provided clearly at proviso to Rule 8 that in case of non-working of any packing machine during the month the same shall be deemed to be operating packing machine for the month. Therefore the factor relevant for determining the duty payable is the number of packing machines installed in the factory, whether it is working or not. Therefore, in a particular month, the duty payable is determined on the basis of the number of packing machines installed in a factory.

17. The manner of payment of duty and interest has been provided under Rule 9 *ibid*, which is reproduced below.

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

Provided that monthly duty payable for the period from the 8th of March, 2010 to the 31st day of March, 2010 shall be calculated on the pro rate basis of the total number of days in the month of March, 2010 and the number of days remaining in the month starting from and including the 8th day of March, 2010 and the same shall be paid on or before the 15 day of March, 2010 :

Provided further that if the manufacturer fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with the interest at the rate specified by the Central Government vide notification under section 1 IAB of the Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount:

Provided also that in case of increase in the number of operating packing machines in the factory during the month on account of addition or installation of packing machines,

the differential duty amount, if any, shall be paid by the 5 day of the following month:

Provided also that in case a manufacturer permanently discontinues manufacturing of goods of existing retail sale price or commences manufacturing of goods of a new retail sale price during the month, the monthly duty payable shall be recalculated pro-rata on the 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 discontinuation or commencement and the duty liability for the month shall not be discharged unless the differential duty is paid by the 5 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 20 day of the following month;

Provided also that if there is revision in the rate of duty livable 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 5 day of the following month and in case the amount of duty so recalculated is less than the duty paid for the month, balance shall be refunded to the manufacturer by the 20 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 manufacturer does not pay the duty payable, and continues to operate any packing machine, then till the time such non payment continue, he shall be liable to pay the monthly duty based on the number of operating packing machines declare in the month for which duty was last paid by him or the total number of packing machines found available in his premises at any time thereafter, which is higher;

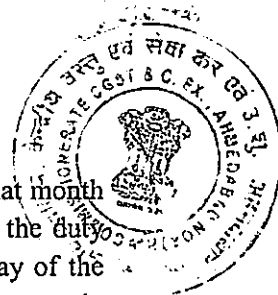
Provided also that in case a new manufacturer commence production of notified goods in a particular month, his monthly duty payable for the month shall be calculated pro-rata on the basis of total number of days in the month and the number of days remaining in that month starting from the date of commencement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

18. Thus Rule 9 of the said Capacity determination Rules makes it obligatory on the manufacturer to pay duty by 5th of the same month. As already discussed above, the duty payable is based on the number of packing machines installed in the factory, whether working or not. In the instant case the assessee did not fully discharge the duty payable for the month of November 2016. Instead the assessee had paid duty proportionately on the number of days its machine operated in that month.

19. The assessee in their defence reply has submitted that the said Rule 9 of the said Rules does not stipulate that the monthly duty in all cases payable, has to be paid by 5th of the same month, even if no pouch packing machine was installed or operating for the whole month or a part of the month. They submitted that the said Rule 9 comes into play only in case the manufacturer is required to pay the duty for the complete month. They have taken support from the "fifth" proviso to Rule 9 of the said Rules, which provides that in case of increase of operating packing machines during the month on account of addition or installation, the differential duty amount, if any, is required to be paid by 5th day of following month. There was no manufacturing operation by them during the period in which the due date fell i.e. on 5th day of the month. As no pouch packing machines were operational, thus the duty could not be determined by 5th day of the month, consequently no duty and interest was payable.

20. I find that the assessee has relied on the 5th proviso of Rule 9 in their written submission, which stipulates as under:

Provided also that if there is revision in the rate of duty leviable under section 3 A 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 :

20.1. However, they have quoted the third proviso of Rule 9 which states as under:

Provided also that in case of increase in the number of operating packing machines in the factory during the month on account of addition or installation of packing machines, the differential duty amount, if any, shall be paid by the 5th day of the following month :

21. The third proviso to Rule 9 provides that in case of increase in the number of operating packing machines in the factory during the month on account of addition or installation of packing machines, the differential duty amount, if any, shall be paid by the 5th day of the following month. The said proviso does not stipulate that the duty has to be discharged on pro-rata basis. Even the fourth proviso to Rule 9 is also of no help to the assessee as it deals with a situation where manufacturing of goods of a new retail sale price is commenced during the month. The fifth proviso to Rule 9 pertains to a situation, where there is revision in the rate of duty leviable under section 3 A of the Act, which is not the case of the assessee. In that case also the manufacture will have to pay duty for the entire month on the basis of maximum number of machines installed in his factory at any time during the month.

22. The CESTAT, New Delhi, has also taken *prima facie* view that even if an installed packing machine was not working during a month, the same shall be deemed to be operating packing machines during the whole month and accordingly duty in respect of that machine should be charged as if it had been operated during the entire month and not for a fraction of the month for which it was actually operational. In the case of *Dharampal Satyapal Ltd. - 2012 (284) ELT.223 (Tri.-Del)* the Tribunal held that;

*Provisions of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 cannot be interpreted from the language used in Notification No. 42/2008-C.E., the number of packing machines shall be determined in terms of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 and in view of second proviso to Rule 8 *ibid*, even if an installed packing machine was not working during a month, the same shall be deemed to be operating packing machines during the whole month and accordingly duty in respect of that machines would be charged as if it had been operated during the entire month and not for a fraction of the month for which it was actually operational [paras 6, 7]*

6.2 From the perusal of the above mentioned Rules, it will be seen that under Rule 7, the duty payable for a particular month is to be calculated by applying appropriate rate of duty specified in Notification No. 42/2008-C.E., to the number of operating packing machines in the factory during the month. From Rule 8, it is clear that even if the number of operating packing machines have been changed during the month or that some machines were not working during the entire month, the number of operative packing machines shall be taken as the maximum number of packing machines installed on any day during the month and even if, a machine was not working for certain periods in a month, the same shall be deemed to be operating packing machines for the entire month. Thus, if out of 10 operating packing machines declared by the assessee, one machine during a particular month was operated for only 20 days, for the purpose of calculation of duty, all the ten machines shall be deemed to have operated for the entire month and the machine which operated only for 20 days will not be treated as having operated for 2/3 month but will be treated as having operated for full month. The provisions of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 cannot be interpreted from the language used in the Notification No. 42/2008-C.E., more so, when in terms of para 2 of the Notification No. 42/2008-C.E., the number of packing machines shall be determined in terms of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 and in view of the second proviso to Rule 8, even if an installed packing machine was not working during a month, the same shall be deemed to be operating packing machines during the whole month and accordingly duty in respect of that machine



would be charged as if it had been operated during the entire month and not for a fraction of the month for which it was actually operational. We, therefore, are of the prima facie view that on this point also, the appellants have not been able to establish prima facie case in their favour.

23. The CESTAT, New Delhi, in the case of Shiv Shakti Agrifood Pvt. Ltd., reported in 2012 (285) ELT.286 (Tri.-Del.), has held as under:

- Pan masala packing machine - Abatement of duty - Each month during the period of dispute, certain number of machines had been got sealed and these machines had not been operated for whole month but had been operated only for part of the month - Prima facie abatement under Rule 10 of Pan Masala Packing Machine (Capacity Determination and Collection of Duty) Rules, 2008 cannot be given in respect of individual machines, which may have been sealed for a continuous period of 15 days or more, when during that period, other machines were functioning - Other than Rule 10 ibid, no provision for charging duty on pro rata basis in respect of machines which for the reason of being sealed, were operating only during part of the month - Prima facie case not made out, hence no case for total waiver from provisions of Section 35F of Central Excise Act, 1944 - Notification No. 42/2008-C.E. [paras 9, 10, 11]

Precedent - One wrong decision cannot be the basis for another wrong decision. [para 10]

9. In the case of *Godwin Steels (P) Ltd. v. CCE, Chandigarh (supra)* cited by learned Counsel for the appellant, the appellant had commenced production from middle of the month while the Department wanted duty under Rule 96ZP(2) for the whole of the month and in these circumstances Hon'ble High Court held that duty cannot be charged for the period when the assessee had not even commenced the production. In this case, the dispute is of totally different nature and hence we are of prima facie view that the ratio of this judgment is not applicable to the facts of this case.

10. Another plea of the appellant that the same Commissioner in case of *M/s. Rajat Industries Pvt. Ltd.* in similar set of facts has held the payment of duty on pro rata basis as valid, is not acceptable as one wrong decision cannot be the basis for another wrong decision.

24. I find that the assessee has largely relied on the following cases:

- (i) Decision of CESTAT, Pr. Bench, New Delhi, in the case of *M/s. Trimurti Fragrance P. Ltd.*
- (ii) Decision CESTAT, Pr. Bench, New Delhi, in the case of *M/s. Taste Well Product* reported at 2016 (335) ELT 55 (Tri.-Del.)
- (iii) Decision of CESTAT, Pr. Bench, New Delhi, in the case of *M/s. Jaiswal Products*, reported in 2016 (344) E.L.T. 636 (Tri.)
- (iv) Judgment passed by the Hon'ble High Court of Allahabad, in the case of *M/s. Steel Industries of Hindustan Industrial Area* reported in 2013 (293) ELT 191 (All.)
- (v) Decision of the Tribunal in the case of *M/s. Thakkar Tobacco Products P. Ltd.* reported in 2015-TIOL-690-CESTAT-AHM., affirmed by the Hon'ble High Court of Gujarat in its judgment reported in 2016 (332) ELT 785.

25. I find that all the above cases pertain to Rule 10 of the Capacity Determination Rules, which stipulates the conditions for availing abatement in case of non-production of goods. Rule 10 of the said Capacity Determination Rules provides for abatement in case a factory did not produce the notified goods. For ease of reference, the said Rule is reproduced hereunder.

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 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 notified goods shall be effected by the manufacturer except that notified goods already produced before the commencement of said period may be removed within first two days of the said period;

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.

26. Rule 10 *ibid* provides that in case a factory did not produce notified goods during any continuous period of 15 days or more, the duty shall be abated on a proportionate basis. But it does not take away the liability of the manufacturer to pay duty by the 5th of the month determined on the basis of number of packing machines installed in the factory.

27. Rule 10 of the said Capacity Determination Rules does not stipulate that the manufacturer is required to pay duty on proportionate basis. What the Rule says is that the duty shall be abated on proportionate basis subject to the condition that the manufacturer files intimation to this effect with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise at least three working days prior to the commencement of said period. Nowhere in the said Rules it provided that the manufacturer is required to pay duty on the basis of number of days the machines operated. Rule 10 stipulate that in case of stoppage and commencement of production to the Deputy Commissioner and Range Superintendent. Therefore the abatement is also required to be decided by the proper officer. Had the intention of the legislature been to tax duty on the basis of number of days the machines operated such provisions would have been made explicit in the Rules. But the legislature had, in its wisdom, carefully used the word '**abatement**', the dictionary meaning of which is '*to reduce in amount, degree, intensity etc.; lessen; diminish; to deduct or subtract*' etc. This means that the abatement is by way of reducing the burden or the suffering. There can be no "reduction" or "deduction" or "diminution", when there is no suffering or burden. Thus in the context of payment of duty, it is understood that abatement can be granted only if there has been payment of duty, not otherwise and it is crystal clear that the abatement is given after the payment of duty and not before that.

28. Further the abatement under Rule 10 of the said Rules is subject to conditions. Non-fulfillment of any conditions would render the manufacturer ineligible to abatement. It is in this backdrop, Central Board of Excise & Customs, vide Circular letter F.No.267/16/2009-OX.8 dated 12.03.2009 clarified that an order of abatement of duty has to be passed by the jurisdictional Assistant/Deputy Commissioner of Central Excise and that the abatement order in the nature of refund. I find the procedure to claim benefit of abatement is stipulated in Rule 10 *ibid* and such abatement is subject to review. Board vide the above Circular has also stated that the abatement orders, being in the nature of refund, are required to be subjected to the same administrative procedure of pre- and post-audit. However, in this case under consideration, we are examining the payment of duty as per Rule 9 of the said Rules and not claim of abatement under Rule 10 of the said Rules.

29. In case of closure of machine for more than 15 days, the correct course for them was to apply for abatement under Rule 10 of the said Rules following the procedures of Section 11B of Central Excise Act, 1944. Hon'ble Supreme Court in the case of *Mafatlal Industries Ltd- 1997 (89) ELT.247 (S.C)* held that all refund claims except those collected contrary to law have to be and must be filed and adjudicated under the provisions of Central Excise Act, 1944 as the case may be. The Larger Bench of CESTAT in the case of *BDH Industries Ltd2008 (229) ELT.364 (Tri.-LB)* also held that all types of refund have to be filed under Central Excise Act and Rules

made thereunder and no *suo moto* credit of the duty paid in excess may be taken by the assessee.

Thus, in view of the above, the decisions and judgments, relied upon by the assessee are not relevant to this case and consequently, I do not agree with the contention of the assessee.

31. In view of the above discussions, I hold that the assessee was required to discharge duty for the entire month on the basis of the number of packing machines in the factory during a month and not for the number of days the machines were in operational. Consequently the differential duty of Rs.2,33,37,066/- short-paid during the month of November 2016 is required to be confirmed under Rule 19 of the said Capacity Determination Rules read with Section 11A(1) of the Central Excise Act, 1944. The assessee shall also pay interest at the applicable rate in terms of 2nd proviso to Rule 9 and Rule 19 of the Chewing Tobacco and Unmanufactured Tobacco Packing Machine (Capacity Determination and Collection of Duty) Rules, 2010, read with Section 11AA of the Central Excise Act, 1944.

32. Coming to the question of confiscation of the goods already cleared, as proposed in the notice under Rule 18 of the Chewing Tobacco and Unmanufactured Tobacco Packing Machine (Capacity Determination and Collection of Duty) Rules, 2010 read with Rule 25 of the Central Excise Rules, 2002, I find that in the case of *Mis Shiv Kripa Ispat Pvt. Ltd. - 2009 (235) elt.623 (Tri-LB)* the Tribunal relied upon paras 12 & 13 of the decision of Hon'ble High Court of Punjab & Haryana in the case *Raja Impex - 2008 (229) ELT.185 (P &H)*, wherein it was held that for confiscation the condition precedent is that the goods should have been seized and released provisionally on execution of bond. In the present case the goods were neither seized nor are available for seizure. Hon'ble Bombay High Court in the case of *Finesse Creation Inc - 2009 (248) ELT.122 (Bom)* and *Sudarshan Cargo Pvt. Ltd-2010 (258) EL T.197 (Bom)* has upheld the decisions of Tribunal to the effect that fine in lieu of confiscation was not imposable when goods were not available. Therefore confiscation of goods or imposition of redemption fine is not warranted.

33. Regarding the issue of penalty, I find that Hon'ble Supreme Court in the case of *Dharmendra Textile Processors & Ors - 2008 (231) EL T.3(SC)*, addressing the issue of imposition of penalty under Section 11AC of the Central Excise Act, 1944 for breach of Rule 96ZQ of the erstwhile Central Excise Rules, 1944 has held as under:

33. This Court in a catena of decisions has held that mens rea is not an essential element for imposing penalty for breach of civil obligations :

(a) Director of Enforcement v. MCTM Corpn. (P) Ltd. : (SCC pp. 478 & 480-81, paras 8 & 12-13)

"8. It is thus the breach of a 'civil obligation' which attracts 'penalty' under Section 23(1)(a), FERA, 1947 and a finding that the delinquent has contravened the provisions of Section 10, FERA, 1947 that would immediately attract the levy of 'penalty' under Section 23, irrespective of the fact whether the contravention was made by the defaulter with any 'guilty intention' or not. Therefore, unlike in a criminal case, where it is essential for the 'prosecution' to establish that the 'accused' had the necessary guilty intention or in other words the requisite 'mens rea' to commit the alleged offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA, would be discharged where it is shown that the 'blameworthy conduct' of the delinquent had been established by wilful contravention by him of the provisions of Section 10, FERA, 1947. It is the delinquency of the defaulter itself which establishes his 'blameworthy' conduct, attracting the provisions of Section 23(1)(a) of FERA, 1947 without any further proof of the existence of 'mens rea'. Even after an adjudication by the authorities and levy of penalty under Section 23(1)(a) of FERA, 1947, the defaulter can still be tried and punished for the commission of an offence under the penal law....."

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12. *In Corpus Juris Secundum, Vol. 85, at p. 580, para 1023, it is stated thus :*

'A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws.'

13. We are in agreement with the aforesaid view and in our opinion, what applies to 'tax delinquency' equally holds good for the 'blameworthy' conduct for contravention of the provisions of FERA, 1947. We, therefore, hold that mens rea (as is understood in criminal law) is not an essential ingredient for holding a delinquent liable to pay penalty under Section 23(1)(a) of FERA, 1947 for contravention of the provisions of Section 10 of FERA, 1947 and that penalty is attracted under Section 23(1)(a) as soon as contravention of the statutory obligation contemplated by Section 10(1)(a) is established. The High Court apparently fell in error in treating the 'blameworthy conduct' under the Act as equivalent to the commission of a 'criminal offence', overlooking the position that the 'blameworthy conduct' in the adjudicatory proceedings is established by proof only of the breach of a civil obligation under the Act, for which the defaulter is obliged to make amends by payment of the penalty imposed under Section 23(1)(a) of the Act irrespective of the fact whether he committed the breach with or without any guilty intention."

Paras 12 and Para 13 of the order states as under:

12. The stand of learned counsel for the assessee is that the absence of specific reference to mens rea is a case of casus omissus. If the contention of learned counsel for the assessee is accepted that the use of the expression "assessee shall be liable" proves the existence of discretion, it would lead to a very absurd result. In fact in the same provision there is an expression used i.e. "liability to pay duty". It can by no stretch of imagination be said that the adjudicating authority has even a discretion to levy duty less than what is legally and statutorily leviable. Most of cases relied upon by learned counsel for the assessee had their foundation on Bharat Heavy Electrical's case (supra). As noted above, the same is based on concession and in any event did not indicate the correct position in law.

13. It is a well-settled principle in law that the court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent.

33.1. The Apex Court concluded that the penalty under that provision is a civil liability and that willful concealment is not an essential ingredient for attracting civil liability. In view of this, the assessee has rendered themselves liable for penalty. As the assessee has contravened the provisions of Rule 7, 8, 9 & 10 of the Chewing Tobacco and Un-manufactured Tobacco Packing Machine (Capacity Determination and Collection of Duty) Rules, 2010, I hold that they are liable to penalty under Rule 18 of the said Rules read with Rule 25 of the Central Excise Rules, 2002.

34. In view of the above discussions and findings, I pass the following order.

ORDER

- (i) I confirm the demand of Central Excise Duty amounting to Rs. 2,33,37,066/- (Rupees Two Crore, Thirty three Lakhs, Thirty seven Thousand, sixty six only) and order the same to be recovered from them under the provision of Rule 19 of the Chewing Tobacco and Un-manufactured Tobacco Packing Machine (Capacity Determination and Collection of Duty) Rules, 2010, read with Section 11 A(I) of the Central Excise Act, 1944.
- (ii) I order that Interest at the applicable rate should not be recovered from them under Rule 9 of the said Capacity Determination Rules read with Section 11AA of the Central Excise Act, 1944
- (iii) I impose Penalty amounting to Rs. 2,33,37,066/- (Rupees Two Crore Thirty three Lakhs Thirty seven Thousand, sixty six only) on the assessee under Rule 18 of the Chewing Tobacco and Un-manufactured Tobacco Packing Machine (Capacity Determination and Collection of Duty) Rules, 2010 read with Rule 25 of the Central Excise Rules, 2002.

However in view of the proviso (b) of Section 11AC if the duty confirmed above, is paid along with interest under section 11AA within thirty days of the date of communication of this order, the amount of penalty liable to be paid shall be twenty-five per cent of the penalty imposed, subject to the condition that such reduced penalty is also paid within the period so specified;

35. The SCN no. V.24/15-11/OA/2017 dated 11.10.2018, is hereby disposed off.


Dr. Balbir Singh

Commissioner
C.G.S.T & Central Excise,
Ahmedabad North

Date: 19/03/2020

F. No. V.24/15-11/OA/2017

By Regd. Post AD./Hand Delivery/ S.P.A.D

To

M/s. Unicorn Packaging LLP, ,
61, Mahagujarat Industrial Estate,
Sarkhej-Bavla Highway, Changodar,
Ahmedabad-382213

Copy to:

1. The Principal Chief Commissioner, CGST, Ahmedabad Zone, Ahmedabad
2. The Assistant Commissioner, Div-IV, CGST, Ahmedabad North.
3. The Superintendent, AR-IV, Div-IV, C.G.S.T., Ahmedabad North
4. ✓ Guard File.

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