


<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 of Central Goods & Services Tax & Central Excise, Ahmedabad North, Custom House(1st Floor) Navrangpura, Ahmedabad-380009</p>
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निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. STC/15-15/OA/2018

आदेश की तारीख / Date of Order : 19.05.2020

जारी करने की तारीख / Date of Issue : 19.05.2020

द्वारा पारित/Passed by -

डॉ. बलबीर सिंह / Dr. BALBIR SINGH

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR-01/2020-21

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 कम्पाउण्ड , 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.

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 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 Show-Cause-Notice F.No. V.24/15-03/OA/2017 dated 17.05.2018 issued to M/s Laxmi Tobacco Company,9/B, Panchratna Industrial Estate, Sarkhej-Bavla Highway, Changodar, Ahmedabad - 382213.



BRIEF FACTS OF THE CASE:

M/s. Laxmi Tobacco Company, 9/B, Panchratna Industrial Estate, Sarkhej-Bavla Highway, Changodar, Ahmedabad-382213 (hereinafter referred to as 'the said assessee') holding Central Excise Registration Certificate bearing No. AAAFL5610RXM002 is engaged in the manufacture of "Unmanufactured Tobacco without Lime (Brand Super Laxmi Tobacco)" falling under Chapter 2401 10 90 of the schedule to the Central Excise Tariff Act, 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 Rules'), vide Notification No. 11/2010-C.E. (N.T.), dated 27.02.2010. The said assessee had 01 PPM machine of MRP Rs. 4/-.

2. For the period from June 2016 to March 2017 as per form 1 & form 2 filed by the assessee as required under rule 6 & rule 9 Chewing Tobacco and Un-manufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010, Challans submitted by the assessee and sealing/de-sealing intimations filed by the said assessee with the Assistant/Deputy Commissioner of Division IV with copy to The Superintendent of Range II of Division IV of Ahmedabad-II, it appeared that-

- i) In June 2016, the assessee had opened one PPM of MRP Rs. 4/- from 26.06.2016. The PPM was opened in the midnight of 25.06.2016 & 26.06.2016 (w.e.f. 26.06.2016) by the jurisdictional range officer. The said PPM was sealed in the midnight 30.06.2016 & 01.07.2016 w.e.f. 01.07.2016 as per the request of the assessee. Therefore, the machine was operated for 04 days. The said assessee informed The Assistant/Deputy Commissioner and JRS vide form-2 that they had paid duty proportionately amounting to Rs. 8,58,000/- for 05 days in June 2016 vide Challan no. 00017 dtd. 27.06.2016.
- ii) In July 2016, the assessee had opened one PPM of MRP Rs. 4/- from 27.07.2016. The PPM was opened in the midnight of 26.07.2016 & 27.07.2016 (w.e.f. 27.07.2016) by the jurisdictional range officer. The said PPM was sealed in the midnight 31.07.2016 & 01.08.2016 w.e.f. 01.08.2016 as per the request of the assessee. Therefore, the machine was operated for 05 days. The said assessee informed The Assistant/Deputy Commissioner and JRS vide form-2 that they had paid duty proportionately amounting to Rs. 8,30,323/- for 05 days in July 2016 vide Challan no. 00049 dtd. 27.07.2016.
- iii) In August 2016, the assessee had opened one PPM of MRP Rs. 4/- from 29.08.2016. The PPM was opened in the midnight of 28.08.2016 & 29.08.2016 (w.e.f. 29.08.2016) by the jurisdictional range officer. The said PPM was sealed in the midnight 31.08.2016 & 01.09.2016 w.e.f. 01.09.2016 as per the request of the assessee. Therefore, the machine was operated for 03 days. The said assessee informed The Assistant/Deputy Commissioner and JRS vide form-2 that they had paid duty proportionately amounting to Rs. 4,98,194/- for 03 days in August 2016 vide Challan no. 00045 dtd. 26.08.2016.
- iv) In September 2016, the assessee had opened one PPM of MRP Rs. 4/- from 27.09.2016. The PPM was opened in the midnight of 26.09.2016 & 27.09.2016 (w.e.f. 27.09.2016) by the jurisdictional range officer. The said PPM was sealed in the midnight 30.09.2016 & 01.10.2016 w.e.f. 01.10.2016 as per the request of the assessee. Therefore, the machine was operated for 04 days. The said assessee informed The Assistant/Deputy Commissioner and JRS vide form-2 that they had paid duty proportionately amounting to Rs. 6,86,400/- for 04 days in September 2016 vide Challan no. 00043 dtd. 27.09.2016.
- v) In October 2016, the assessee had opened one PPM of MRP Rs. 4/- from 21.10.2016. The PPM was opened in the midnight of 20.10.2016 & 21.10.2016 (w.e.f. 21.10.2016) by the jurisdictional range officer. The said PPM was sealed in the midnight 24.10.2016 & 25.10.2016 w.e.f. 25.10.2016 as per the request of the assessee. Therefore, the machine was operated for 04 days. The said assessee informed The Assistant/Deputy Commissioner and JRS vide form-2 that they had paid duty proportionately amounting to Rs. 6,64,258/- for 04 days in October 2016 vide Challan no. 00031 dtd. 19.10.2016.
- vi) In November 2016, the assessee had opened one PPM of MRP Rs. 4/- from 27.11.2016. The PPM was opened in the midnight of 26.11.2016 & 27.11.2016 (w.e.f. 27.11.2016) by the jurisdictional range officer. The said PPM was sealed in the midnight 30.11.2016 & 01.12.2016 w.e.f. 01.12.2016 as per the request of the assessee. Therefore, the machine was operated for 04 days. The said assessee informed The Assistant/Deputy Commissioner and JRS vide form-2 that they had paid duty proportionately amounting to Rs. 6,86,400/- for 04 days in November 2016 vide Challan no. 00007 dtd. 22.11.2016.



- vii) In December 2016, the assessee had opened one PPM of MRP Rs. 4/- from 29.12.2016. The PPM was opened in the midnight of 28.12.2016 & 29.12.2016 (w.e.f. 29.12.2016) by the jurisdictional range officer. The said PPM was sealed in the midnight 31.12.2016 & 01.01.2017 w.e.f. 01.01.2017 as per the request of the assessee. Therefore, the machine was operated for 03 days. The said assessee informed The Assistant/Deputy Commissioner and JRS vide form-2 that they had paid duty proportionately amounting to Rs. 4,98,194/- for 03 days in December 2016 vide Challan no. 00014 dtd. 23.12.2016.
- viii) In January 2017, the assessee had opened one PPM of MRP Rs. 4/- from 27.01.2017. The PPM was opened in the midnight of 26.01.2017 & 27.01.2017 (w.e.f. 27.01.2017) by the jurisdictional range officer. The said PPM was sealed in the midnight 31.01.2017 & 01.02.2017 w.e.f. 01.02.2017 as per the request of the assessee. Therefore, the machine was operated for 05 days. The said assessee informed The Assistant/Deputy Commissioner and JRS vide form-2 that they had paid duty proportionately amounting to Rs. 8,30,323/- for 05 days in January 2017 vide Challan no. 00023 dtd. 20.01.2017.
- ix) In February 2017, the assessee had opened one PPM of MRP Rs. 4/- from 25.02.2017. The PPM was opened in the midnight of 24.02.2017 & 25.02.2017 (w.e.f. 25.02.2017) by the jurisdictional range officer. The said PPM was sealed in the midnight 28.02.2017 & 01.03.2017 w.e.f. 01.03.2017 as per the request of the assessee. Therefore, the machine was operated for 04 days. The said assessee informed The Assistant/Deputy Commissioner and JRS vide form-2 that they had paid duty proportionately amounting to Rs. 7,79,572/- for 04 days in February 2017 vide Challan no. 00033 dtd. 21.02.2017
- x) In March 2017, the assessee had opened one PPM of MRP Rs. 4/- from 28.03.2017. The PPM was opened in the midnight of 27.03.2017 & 28.03.2017 (w.e.f. 28.03.2017) by the jurisdictional range officer. The said PPM was sealed in the midnight 31.03.2017 & 01.04.2017 w.e.f. 01.04.2017 as per the request of the assessee. Therefore, the machine was operated for 04 days. The said assessee informed The Assistant/Deputy Commissioner and JRS vide form-2 that they had paid duty proportionately amounting to Rs. 7,04,129/- for 04 days in March 2017 vide Challan no. 50949 dtd. 21.03.2017.

It appeared from the above that the said assessee have paid the duty on the proportionate basis for the month of June 2016 to March 2017.

3 The determination of duty payable is dependent upon the number of machines installed in a factory multiplied by the applicable rate of duty per machine and governed by the Rule 7 & 8. 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-Central Excise, 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. -

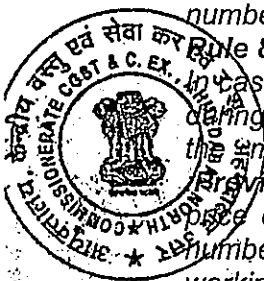
In case of addition or installation or removal or uninstallation of a packing machine in the factory during the month, the number of operating packing machines for the month shall be taken as the maximum number of packing machines installed on any day during the month. Provided that in case a manufacturer commences manufacture of goods of a new retail sale 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 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 had manufactured goods of those retail sale prices, which have not been declared by him in accordance with provisions of these rules or had 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 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.

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 had intimated that in case a factory did not produce notified goods during any continuous period of 15 days or more abatement of duty had to be given, the jurisdictional Assistant/Deputy Commissioner of Central Excise had 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 month-wise duty liability, the duty actually paid and the differential duty that remained to be paid by the assessee 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)
June,16 (1 PPMs of M.R.P 4/-)	51,48,000/-	8,58,000	42,90,000
July,16 (1 PPMs of M.R.P 4/-)	51,48,000/-	8,30,323	43,17,677
August,16 (1 PPMs of M.R.P 4/-)	51,48,000/-	4,98,194	46,49,806
September,16 (1 PPMs of M.R.P 4/-)	51,48,000/-	6,86,400	44,61,600
October,16 (1 PPMs of M.R.P 4/-)	51,48,000/-	6,64,258/-	44,83,742/-
November,16 (1 PPMs of M.R.P 4/-)	51,48,000/-	6,86,400/-	44,61,600/-
December,16 (1 PPMs of M.R.P 4/-)	51,48,000/-	4,98,194/-	46,49,806/-
January 2017(1 PPMs of M.R.P 4/-)	51,48,0007/-	8,30,323/-	43,17,677/-
February 2017(1 PPMs of M.R.P 4/-)	54,57,000/-	7,79,572/-	46,77,428/-
March 2017(1 PPMs of M.R.P 4/-)	54,57,000/-	7,04,129/-	47,52,871/-
TOTAL	5,20,98,000/-	70,35,793/-	4,50,62,207/-

6.1 From the above Table, it was evident that as against the duty liability of Rs. 5,20,98,000/- the assessee had paid only Rs. 70,35,793/-. Therefore, the assessee is required to pay the differential duty of Rs. 4,50,62,207/- short-paid under Rule 19 of the said Capacity Determination Rules read with Section 11A(1) of the Central Excise Act, 1944. The assessee also appeared liable for 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 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.

7. Since the goods valued at Rs. 1,59,73,480/- 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.

8. Therefore, M/s. Laxmi Tobacco Company, 9/B, Panchratna Industrial Estate, Sarkhej-Bavla Highway, Changodar, Ahmedabad-382213, was hereby called upon to Show Cause as to why:

- (i) The Central Excise Duty amounting to Rs. 4,50,62,207/- (Rupees Four Crore Fifty Lakh Sixty Two Thousand Two Hundred Seven 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 11A(1) 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 1 IAA 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 valued at Rs. 1,59,73,480/- cleared during the respective period should not be confiscated 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.

DEFENCE REPLY:

9. The assessee filed their defence reply to the Show Cause Notice, vide their reply dated 3.8.2018, wherein, they interalia stated as under:

1. That they are a small manufacturer of branded unmanufactured tobacco named 'Super Laxmi' with only one pouch packing machine in our factory. And we hold the central excise registration number at above mentioned address for our said pouch packing machine.
2. With the introduction of compounded levy on their product, they cannot afford to operate the machine for the whole month due to lack of enough market for their product. For this reason, they operate their machine only for a small period in a month, say 7 to 11 days, looking to the requirement of the product in the market and availing abatement of duty corresponding to the period of closure of the factory. Accordingly, they gave intimation to the department for sealing de-sealing of machine to operate the same for a pre decided period, as intimated in the letter.
3. It is submitted that they had followed all the procedures prescribed under the aid Rules for sealing and de-sealing of the packing machine during the relevant period for non production of the goods prescribed under Rule 10 of the said rules.

There is no dispute regarding procedure followed by them for sealing and de-sealing of the packing machines and also regarding the intimation for operation of machine for particular days/period and payment of appropriate duty for the said period by 5th day of the same month.

In regard the action proposed in the notice for demand of differential duty, it is submitted that the notice referred and relied the provisions of the said rules rigidly and without considering Rule 10 of the said rules, though reproduced in the notice.

6. It is submitted that as per Rule 7 the duty payable for a particular month shall be calculated by application of appropriate rate of duty specified in Noti. No.16/2010-CE dtd.27-2-2010 to number of operating packing machines in the factory during the month. Therefore, Rule 7 provides for calculation of monthly duty of a particular machine operated during the month means entire month. Here, in the present matter, the packing machine is not operated for the entire month, and therefore, as pre determined by us for operation of the packing machine for particular days i.e. 3, 4, or 5 days during the month, they have calculated the duty payable for that month by application of appropriate rate of duty specified in Noti. No. 16/2010 read with Rule 10 of the said rules. In this regard they invited attention to the provisions of Rule 10 of the said rules.
7. From the above provision of Rule 10 of the said rules, it is clear that in case a factory did not produce the notified goods during any continuous period of 15 days or more which is in the present matter admitted in the notice itself, the duty



calculated on proportionate basis shall be abated in respect such period. Therefore, as per this provision the proportionate duty shall be abated from the duty determined under Rule 7 of the said rule and accordingly the monthly duty shall be calculated which they have calculated in the present matter and also paid the duty during the particular month. This fact is also admitted in the notice. They also submitted that the provision of Rule 10 is not properly considered while issuing the present show cause notice.

8. From the above, it is clear that as provided under Rule 10 of the said rules as they are entitled for abatement for the relevant month, they have correctly determined the duty payable during the said month and accordingly correctly paid the duty under Rule 9 of the said rules. They have also filed intimation for payment of duty to the jurisdictional Asstt. Commissioner which itself is a claim of abatement. Even subsequently also they have made specific request for abatement but no Order passed by him.
9. The C.B.E.C. Circular dtd. 12-03-2009 referred in the notice is also not correct with reference to Rule 10 for abatement. Because as per abatement it reduced the duty liability means by way of payment of duty at reduced liability or in case duty already paid it is abated by way of Refund. Thus, only in case of Refund the procedure for audit/pre audit is applicable, but, it never interpreted that in all cases duty first to be deposited and then claim for refund. Even Rule 10 also not provided or interpreted by that way, and therefore, the present show cause notice is totally bad in Law and beyond the provisions of the Law.
10. They also submitted that when there is no production of excisable goods for a particular period, duty cannot be demanded/recovered in terms of Section 3 and Section 3(A) of Central Excise Act because, Section 3 is main charging Section which provides that there shall be levied and collected excise duty on excisable goods which are produced and manufactured in India. Therefore, the provisions of any Rules framed under the same Section cannot over-ride the provisions of the Act, and hence, the duty cannot be demanded for a period of non production of excisable goods during the month.
11. They also drew attention to the Board Circular No. 485/51/99-CX dtd. 15-09-1999, wherein, a clarification has been issued by the Government of India regarding grant of abatement on closure of stenter machine of the independent processor covered under Section 3A. Here, in the present case also a similar issue involved except the kind of manufacturer and number of relevant Rules. In the said Circular the Board has also decided that it should decide first whether the processor otherwise eligible for the abatement or not and in case he is eligible and had not paid the duty, the abatement should be granted without asking him to pay the duty first. Therefore, they submit that even the Government of India has also considered that under Section 3A of the Act, the abatement granted without asking the assessee to pay the duty. Therefore, the demand of differential duty under the notice is not at all correct and legal as being beyond the provisions of the Law.

They also submitted that now the issue is settled by various decisions of Hon'ble Tribunal as well as Hon'ble various High Court and also by Hon'ble Supreme Court deciding the matter in favour of the assessee that suo moto abatement is proper, and not in violation of provisions of Rule-10 of relevant Rules and then no need to pay duty in advance for the entire month when the closure of the unit is for more than 15 days.

13. In support of their this contention they rely upon the following decisions.

1. 2012 (284) ELT 581 (Tri.-Del.) Rajat Inds. P. Ltd. v. CCE, Delhi-I.
2. 2015 (328) ELT 473 (Tri.-Ahm.)
Thakkar Tobacco Products P. Ltd. v. CCE, Ahmedabad-11.
This decision of Hon'ble Tribunal also confirmed by the Hon'ble High Court of Gujarat vide Order dtd. 1-10-2015.
3. 2016 (344) ELT 497 (Tri.- Bang.)
Pan Parag India Ltd. v. CCE, Bangalore.
4. 2017 (352) ELT 60 (Tri.-Allah.) Satyaprakash & Co. v. CCE & ST, Agra.
5. 2017 (345) ELT 75 (Tri.-Allah.)
CCE, Gaziabad v. Steel Ind.s of Hindustan.
6. 2015 (3250) ELT 228 (SC)
CCE, Gaziabad v. Angadpad Indl. P. Ltd ..



14. They also submitted that the action proposed for interest is also not correct because whatever duty payable during the relevant month has been paid by them by the 5th day of the same month. Hence, no interest is leviable from them
15. As regards the penalty proposed under Rule 18 of the said Rules read with Rule 25 of the CERs, it is submitted that the said penalty cannot be imposed because the provision under Rule 18 can and Rule 25 can be attracted subject to the provisions of Section 11 AC of the Act and as per the provision of Section 11 AC the penalty can be imposed where any duty of excise has not been paid or short paid by reason of fraud or collusion or any willful mis-statement or suppression of fact or contravention of any of the provisions of the Act or the Rules with an intent to evade payment of duty shall be liable to pay a penalty equal to the duty. Here, in the present matter, the ingredients of Section 11 AC of the Act are totally absent and also there is no intention to evade duty in contravention of any provision of the Act or the Rules as can be seen from the facts of the show cause notice itself. Even in the present matter as explained in the earlier paras there is no duty liability on us. Apart from the above, it is also clear that there is an issue of interpretation of the provisions of Rules and Act for which penalty cannot be imposed as per the settled Law.
16. As regard the action proposed in the notice for confiscation of the goods, it is submitted that the goods cannot be confiscated because all goods produced and cleared during the period of particular month for which duty has already paid by them as admitted in the notice. Therefore, the said goods cannot be considered as non duty paid goods, hence, cannot be confiscated under Rule 18 of the said rules read with Rule 25 of CERs, 2002, because it permits to confiscate the goods which are cleared without payment of duty. It is also submitted that even otherwise it cannot be confiscated as it is not available/liable for seizure.

PERSONAL HEARING:

10. Personal hearing in the matter was held on 6.3.2018, wherein Shri Vijay B. Joshi, Advocate and Shri Ajay R. Gandhi, Partner of the assessee appeared before me. They reiterated the written submissions filed vide their letter dated 3.8.2018. They produced a copy of the Circular No. 1063/2/2018-CX, dated 16.02.2018 and relied on the Para No. 7 of the said circular. They also relied on the decision of Hon'ble High Court of Allahabad, in the case of M/s. Trimurti Fragrances P. Ltd., reported in 2019 (370) ELT 257 (All.) and also relied on the decision of Larger Bench in the case of M/s. Shiv Krupa Ispat Pvt. Ltd., which has confirmed by the Hon'ble Bombay High Court, reported in 2015 (318) ELT A 259 (BOM), in respect of issue related to confiscation. They requested that the proceedings initiated against the assessee may be dropped.

DISCUSSION AND FINDINGS:

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

In the records of the case I find that the said assessee has paid the duty on the proportionate basis for the month of June 2016 to March 2017. The determination of duty payable is dependent upon the number of machines installed in a factory multiplied by the applicable rate of duty per machine and is governed by the Rule 7 & 8. The manner of duty on the notified goods and liability to pay at the rate specified is provided under Rule 9 of the said Capacity Determination Rules.

13. The issue to be decided is whether the assessee, who is a manufacturer of 'unmanufactured tobacco', falling under Chapter 24 of the first schedule to CETA, 1985, which was brought under Compounded Levy Scheme w.e.f. 8.3.2010, as per Chewing Tobacco and Un-manufactured Tobacco Packing Machine (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 or alternatively whether the assessee can pay the duty only for the number of days the machines were in operational.

14. The goods manufactured by the assessee were 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.

15. 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.

16. 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 :

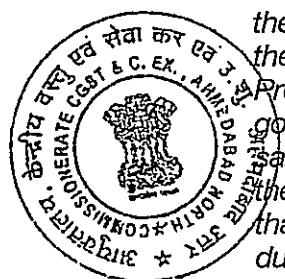
Provided further that if the manufacturer fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with the interest at the rate specified by the Central Government vide notification under section 1 IAB of the Act on the outstanding amount, for the period starting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

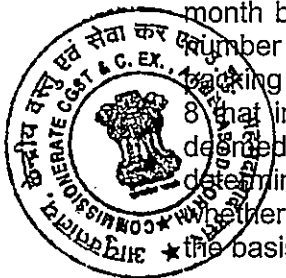
17. Thus Rule 9 of the said Capacity determination Rules makes it obligatory on the manufacturer to pay duty by 5th of the same month. As already discussed above, the duty payable is based on the number of packing machines installed in the factory, whether working or not. In the instant case the assessee 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.

18. The assessee in their defence reply has submitted that as per the provision of Rule 10 of the said rules, in case a factory did not produce the notified goods during any continuous period of 15 days or more (which is in the present matter admitted in the notice itself), the duty calculated on proportionate basis shall be abated in respect of such period. Therefore, as per this provision the proportionate duty shall be abated from the duty determined under Rule 7 of the said rules and accordingly the monthly duty shall be calculated, which they have calculated in the present matter and also paid during the particular month claiming that they are entitled for abatement for the relevant month.

19. **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.*

20. 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 lucidly 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.

21. The manner of payment of duty and interest has been provided under Rule 9 *ibid*, which is reproduced above. Thus Rule 9 of the said Capacity determination Rules makes it obligatory on the manufacturer to pay duty by 5th of the same month. 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 months of June 2016 to March 2017. Instead, they had paid duty proportionately on the number of days its machine were operated in that month. The argument fielded by them for such short payment of duty is that the packing machines were not operated for the entire month and therefore full duty was not payable. 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 also would not come to the rescue of the assessee as it deals with a situation where commencing manufacturing of goods of a new retail sale price during the month. In the present case the assessee was manufacturing the goods of same retail price in the previous months also. Therefore the manufacturer has no option to pay duty on pro-rata basis when the machines are de-sealed and production is started in the middle of the



month. 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. 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.

23. Further the abatement under Rule 10 of the said rules is subjected to conditions. Non-fulfillment of any conditions would render the manufacturer ineligible to abatement. It is in this backdrop the Central Board of Excise & Customs, by letter F.No.267/16/2009-0X.8 dated 12.03.2009 clarified that order of abatement of duty has to be passed by the jurisdictional Assistant/Deputy Commissioner of Central Excise and that the abatement order is in the nature of refund.

24. The assessee shall also pay interest at the applicable rate in terms of 2^o proviso to rule 9 of the Chewing Tobacco and Un-manufactured Tobacco Packing Machine (Capacity Determination and Collection of Duty) Rules, 2010 read with Section 11AA of the Central Excise Act, 1944.

25. 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 appellant have not been able to establish *prima facie* case in their favour.

26. 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.

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

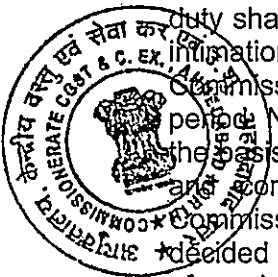
- (i) Decision of CESTAT, Pr. Bench, New Delhi, in the case of *M/s. Trimurti Fragrance P. Ltd.*
- (ii) Decision CESTAT, Pr. Bench, New Delhi, in the case of *M/s. Taste Well Product* reported at 2016 (335) ELT 55 (Tri.-Del.)
- (iii) Decision of CESTAT, Pr. Bench, New Delhi, in the case of *M/s. Jaiswal 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.

28. 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.

29. 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.

30. I reiterate that 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, the assessee shall give intimation 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 levy 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.

31. 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.

32. 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 Ltd 2008 (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.

33. 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.

34. From the above discussion, it is clear that the 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. The Central Board of Excise & Customs vide letter F.No.267/16/2009-CX8 dated 12.03.2009 had intimated that in case a factory did not produce notified goods during any continuous period of 15 days or more abatement of duty had to be given, the jurisdictional Assistant/Deputy Commissioner of Central Excise had to pass an abatement order. In this case, no such procedure was followed, failing which, 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.4,50,62,207/-** short-paid during the period from June 2016 to March 2017, 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 Un-manufactured Tobacco Packing Machine (Capacity Determination and Collection of Duty) Rules, 2010, read with Section 11AA of the Central Excise Act, 1944.

35. 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 held 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.

Regarding the issue of penalty, I find that Hon'ble Supreme Court in the case of *Mundra 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.

36.1. 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.

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

ORDER

I confirm the demand of Central Excise Duty amounting to Rs. 4,50,62,207/- (Rupees Four Crores, Fifty Lakhs, Sixty two Thousand, Two Hundred and Seven only) and order the same to be recovered from them under the provisions 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. 4,50,62,207/- (Rupees Four Crores, Fifty Lakhs, Sixty two Thousand, Two Hundred and Seven 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.24/15-03/OA/2017** dated 17.5.2018, is hereby disposed off.



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

F. No. V.24/15-03/OA/2017
By Regd. Post AD./Hand Delivery/ R.P.A.D

Date: 19.05.2020

To,
M/s. Laxmi Tobacco Company,
9/B, Panchratna Industrial Estate,
Sarkhej-Bavla Highway,
Changodar, Ahmedabad-382213.

Copy to:

- (1) The Chief Commissioner, C.G.S.T., Ahmedabad Zone.
- (2) The Dy Commissioner of C.G.S.T., Division-IV, Ahmedabad North.
- (3) The Supdt. Of C.G.S.T., AR-II, Division-IV, Ahmedabad North
- (4) Guard file

