


<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>
<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.24/15-69/OA/2018

आदेश की तारीख / Date of Order :29.09.2020

जारी करने की तारीख / Date of Issue : 29.09.2020

द्वारा पारित/Passed by -

डॉ. बलबीर सिंह / Dr. BALBIR SINGH

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR-22/2020-21

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 , द्वितीय तल, बाहुमली भवन असरवा, गिरधर नगर पुल के पास, गिरधर नगर, अहमदाबाद, गुजरात 380004 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, 2nd Floor, Bahumali Bhavan Asarwa, Near Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad, Gujarat 380004.

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 क उनमें से कम से) 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 1.00रूपया का न्यायालय शुल्क टिकट लगा होना चाहिए।

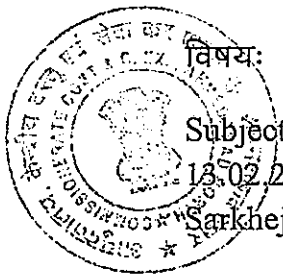
The copy of this order attached therein should bear a court fee stamp of Re. 1.00 as prescribed under Schedule 1, Item 6 of the Court Fees Act, 1970.

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 Show Cause Notice No. V.24/15-69/OA/2018 dated 13.02.2019 issued to M/s Vishnu Tobacco, Unit-III, 36, Changodar Industrial Estate, Sarkhej-Bavla Highway, Changodar, Ahmedabad-382213.



BRIEF FACTS OF THE CASE:

M/s. Vishnu Tobacco Product, Unit-III, 36, Changodar Industrial Estate, Sarkhej-Bavla Highway, Changodar, Ahmedabad-382213(hereinafter referred to as 'the said assessee) holding Central Excise Registration Certificate bearing No. AAGPG5722PEM003 is engaged in the manufacture of "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.

2. During the period April 2017 to June 2017, Form-1 & Form-2 as required under Rule 6 & Rule 9 of Chewing Tobacco Packing Machine (Capacity Determination and Collection of Duty), Rule 2010 were filed by the assessee, Challans were submitted and sealing/de-sealing intimations were 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 11.04.2017, that the assessee had opened 4 PPMs of MRP Rs.1/- from 17.04.2017. The PPMs were opened in the midnight of 16.04.2017 (w.e.f. 17.04.2017) by the jurisdictional Range officer. Thereafter, the assessee vide letter dated 26.04.2017 had submitted that they will continue to operate 04 PPMs of MRP Rs. 1 w.e.f. 01.05.2017. Therefore, in the month of April, 2017 the machine was operated for 14 days. The said assessee informed the jurisdictional Assistant/Deputy Commissioner and Range Officer vide Form-2 dated 24.04.2017 that they had paid duty proportionately amounting to Rs.1,83,56,800/- for 14 days in April,2017 vide Challan No. 53105 dated 24.04.2017. It appeared from the above that the said assessee has paid the duty on the proportionate basis during the month of April, 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 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 un-installation 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 :

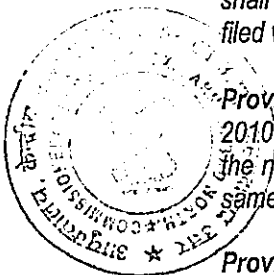
Provided that in case a manufacturer commences manufacture of goods of a new retail sale price during the month on an existing machine, it shall be deemed to be an addition in the number of operating packing machine for the month.:

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 an 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 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 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.

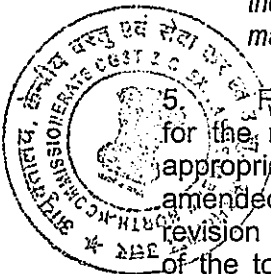
4. Rule 10 of the said Capacity Determination Rules provides for abatement in case a factory did not produce the notified goods. For ease of reference, the said Rule is reproduced hereunder.

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 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 is 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 No. 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 therefore 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 April-2017 to June-2017 are 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.6 of the Table below. Taking into account the duty liability and the duty paid, it appeared that the assessee has short-paid the duty as shown in column No.9.

Month	Form-1 filed date	Installed	For Period	Installed for No. of Days	Duty Payable	Duty Paid	Challan No. & Date	Differential & Recoverable
	Form-2 filed date							
1	2	3	4	5	6	7	8	9
April- 2017	11.04.2017 & 24.04.2017	4 PPMs of MRP Rs.1	From 17.04.2017 to 30.04.2017	14 days	39336000	18356800	53105 dt. 24.04.2017	20979200
May - 2017	26.04.2017 & 26.04.2017	4 PPMs of MRP Rs.1	From 01.05.2017 to 31.05.2017	31 days	39336000	39336000	50539 dt. 3.05.2017	Nil
June- 2017	NIL	NIL	From 01.06.2017 to 30.06.2017	30 days	N.A.	N.A.	N.A.	N.A.

7. From the above Table, it is evident that during the month of April-2017, as against the duty liability of Rs.3,93,36,000/- the assessee has paid only Rs.1,83,56,800/-. Therefore, the assessee is required to pay the differential duty of Rs.2,09,79,200/-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 for 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].

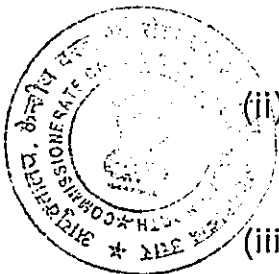
8. Further, since the goods valued at Rs.2,62,20,000/- were cleared during the month of April,2017 in contravention of the provisions of the said Capacity Determination Rules, the goods cleared by the assessee during the aforesaid period, appear to be liable for confiscation in terms of Rule 18 of the said Capacity Determination Rules read with Rule 25 of the Central Excise Rules, 2002.

9. Therefore, M/s. Vishnu Tobacco Product, Unit-III, 36, Changodar Industrial Estate, Sarkhej-Bavla Highway, Changodar, Ahmedabad-382213, were called upon to show cause as to why:

(i) The Central Excise Duty amounting to Rs.2,09,79,200/-(Rupees Two Crore Nine Lakh Seventy Nine Thousand Two Hundred 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 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 valued at Rs.2,62,20,000/- 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

10. The assessee vide their letters dated 8.7.2019 and 15.9.2020, had filed their defence reply to the Show Cause Notice, wherein they interalia stated as under:

(i) The subject Show Cause notice refers to Rule 9 of the Chewing Tobacco & Unmanufactured Tobacco Packing Machines (Capacity Determination & Collection of Duty) Rules, 2010, (the said Rules), The said Rule 9 provides that monthly duty on notified goods shall be paid by 5th day of the same month. 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 to determine/or the annual capacity, based on which the duty is required to be paid.

(ii) The said Rule 9 does not stipulate that the monthly duty in all cases payable has to be paid by the 5th of the same month, even if no pouch packing machine is installed or operating for the whole month or a part of the month. They submitted that the said Rule 9 comes into play in case where the manufacturer is required to pay the duty for the complete month.

(iii) They have taken support from the fifth proviso to Rule 9 of the said Rules, which provide 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 5 day of following month. They relied on 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."

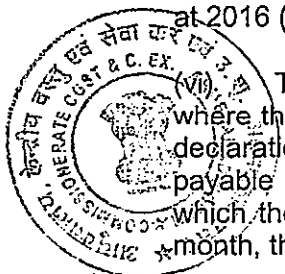
The assessee submitted that if the contention and the allegation made in the subject notice is to be accepted and in all cases, the duty is required to be paid by 5 day of the same month, then in that case, the fifth proviso of the said Rule 9 would be redundant and nugatory. The legislature has deliberately incorporated the said proviso in order to take care of the payment of duty in case the pouch packing machines are installed after 5 day of the month.

(iv) 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 5 day of the next of the month.

(v) 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 5 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 on or before 5 day of the month then the manufacturer cannot be expected to deposit the duty on any hypothetical basis. In the present case, in April,2017, there was no manufacturing operation during the period in which the due date falls i.e. on 5h day of the month, no pouch packing machines were operational and therefore the duty could not be determined by 5th day of the month, consequently no interest was payable. In support of above contention, they placed 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.).

The duty in all cases is not required to be paid by fifth day of the month, it is only in case where the manufacturer had installed the machines prior to fifth day of the month and for which declaration has been filed that he is required to pay duty by fifth day of the month. The amount payable during the month is dependent on the number of machines installed and the MRP for which they are used. In the instant case, no machines were installed on or before 5th day of month, the amount of duty payable could not be ascertained and deposited.

(vii) The duty of excise is on manufacture and if there is no manufacture the duty of excise cannot be charged. In the present case, as no manufacturing activity was undertaken for first 16 days of the month and no goods were manufactured, the question of payment of duty of first 16



days of the month does not arise. Therefore, demand of duty for the entire month alongwith interest is not sustainable.

(viii) Further, there is proposal in the notice to impose penalty and confiscation of goods under Rule 18 of the said Rules read with Rules 25 of the Central Excise Rules, 2002. It is undisputed fact that pouch packing machines were installed with effect from 17.04.2017 i.e. after 5th of the month. Since the appropriate duty has been discharged on the goods manufactured on or after 17.04.2017, the proposal of penalty and confiscation of goods is not sustainable and the impugned show cause requires to be quashed and set aside in the interest of justice.

(ix) 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 commenced from 17.04.2017. No pouch packing machines were operational before the 5th day of the month and as such, they were not even aware as to how long our 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-TIOL-1277-CESTAT-DEL.

(x) It is 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 readout. 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. 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 5th proviso to the Rule 9 of the said Rules is attracted. The duty having been deposited within the time limit prescribed under the 5th proviso to Rule 9 of the said Rules, no duty with interest and penalty is payable and the proceedings vide the subject notice are required to be withdrawn.

(xi) 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.

(xii) 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.

(xiii) 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 operational in all cases after the 5 day of the month. As such, the question of payment of interest does not arise.

(xiv) 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.

(xv) 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 fifth proviso to Rule 9 of the said Rules redundant and nugatory. It is submitted that such cannot be the intention in collecting the interest on the duty which is admittedly not payable by the manufacturer.

(xvi) The subject notice proposes to confiscate goods valued at Rs.2,62,20,000/- alleged to have been removed under the provisions of Rule 18 of the said Rules read with Rule 25 of the Central Excise Rules, 2002. It is well settled law that if the goods are not available, the same could not be confiscated. In the present case, the goods were cleared on payment of appropriate duty and therefore, the said goods could not be held as liable to confiscation. It may also be submitted that no contravention of the said rules in respect of the goods manufactured on or after 17.04.2017 could be alleged. As such the proposal to confiscate the said goods made vide the subject show cause notice is not sustainable.

(xvii) The subject notice proposes to impose penalty under Rule 18 of the said Rules read with Rule 25 of the Central excise Rules, 2002. It has consistently been held by various courts and Tribunals that penalty should not be imposed in an ordinary course. For imposition of penalty, it has to be brought on record that there was a deliberate defiance of law by the assessee. In the present case, except alleging to impose penalty there is no evidence to show that we had acted in defiance of law so as to invoke penal provisions against us for imposition of penalty.

(xviii) Without prejudice to aforesaid contentions, it is submitted that the issue involved in the present case is with regards to interpretation of a provision of a statute. It is equally well settled that in cases where interpretation is required, no penalty should be imposed. In the present case, the issue is as to whether we are required to pay duty even when no machines were installed or operational. In view of above settled position, no penalty is imposable on us.

(xix) The provisions of Rule 7 of the Chewing Tobacco & Unmanufactured Tobacco Packing Machines (Capacity Determination & Collection of Duty) Rules, 2010, (the said Rules), provides for payment of duty for a particular month. According to the said Rules, the duty payable shall be calculated by application of appropriate rate of duty specified in the Notification No.16/2010-CE, dated 27.10.2010, as amended, to the number of operating packing machines in the factory during the month. In the present case, it is an undisputed fact that during the month of April, 2017, they had operated 4 Pouch Packing Machines with effect from 17.04.2017. Thus, during the month of April, 2017, they had operated four pouch packing machines for 14 days only and the duty was calculated proportionately by applying appropriate rate of duty. Thus, the duty was correctly paid for the days for which their pouch packing machines were operational.

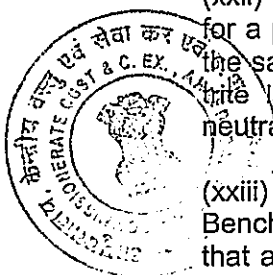
(xx) The provisions of Rule 10 of the said Rules, which provides that in case the factory did not produce the notified goods during any continuous period of 15 days or more, the duty calculated on proportionate basis shall be abated in respect of such period. Therefore, on joint reading of Rule 7 and 10 of the said Rules, the duty on proportionate basis shall be abated when the pouch packing machines were not in operational and required to be paid only for the days for which pouch packing machines were operational.

(xxi) The word "abate" or "abatement" used in the said Rule 10 has not been defined in the statute and therefore natural meaning assigned to the said word has to be considered. The said word as per the dictionary meaning means to reduce, therefore, it cannot be interpreted that abatement would mean refund. The use of word "abatement" clearly reflects the intention of the legislature means to reduce the duty liability. Therefore, the proposal made in the Show Cause Notice asking them to pay the entire amount of duty for the entire month even though from 01.04.2017 to 16.04.2017, the PPMs were not operational, is not justified.

(xxii) It is not the case of the department that their factory did not remain closed continuously for a period of 15 days or more and that they were not entitled for abatement under Rule 10 of the said Rules. Thus, the entire exercise in the present proceedings are revenue neutral. It is a well settled law that in case of revenue neutrality, no demand can be made. Based on revenue neutrality, the proceedings initiated are required to be dropped in the interest of justice.

(xxiii) It is also submitted that the issue of suo moto abatement had come up before various Benches of the Tribunal, High Courts and even Supreme Court. It has consistently been held that availing suo moto abatement is proper and not in violation of the provisions of Rule 10 of the said Rules. In support of above contentions, they placed reliance on the following decisions:

1. Rajat Industries Pvt. Ltd., vs. CCE, Delhi reported at 2012 (284) ELT 581 (Tri.-Del);



2. Thakkar Tobacco Products Pvt. Ltd., vs. CCE reported at 2015 (328) ELT 473 (Tri.-AHM). The said decision was upheld by the Hon'ble High Court of Gujarat;
3. Pan Parag India Ltd., vs. CCE reported at 2016 (344) ELT 497 (Tri.-Bang);
4. Satyaprakash & Co. vs. CCE reported at 2017 (352) ELT 60 (Tri.-All);
5. CCE vs. Steel Industries of Hindustan Area reported at 2017 (345) ELT 75 (Alla). The said case was based on the decision of the Hon 'ble High Court reported at Steel Industries of Hindustan Industrial Area Vs CCE reported at 2013 (293) ELT 191 (All.)
6. CCE Vs Angadpad Industries Pvt Ltd. Reported at 2015 (325) ELT 228 (SC)

(xxiv) They referred to Circular No. 485/51/99-CX, dated 15.09.1999, wherein, a clarification with regards to grant of abatement on closure of Stenter Machine employed by the independent textile processors covered under section 3A, was issued. The Board had clarified that the processors if otherwise eligible should be granted abatement without asking them to pay the duty first. The said circular although issued for textiles but clearly reveals the intension of the Government. It is submitted that the similar Circular No. 331/47/97-CX, dated 30.08.1997 was issued by the Board for allowing abatement.

(xxv) They submitted that proviso to section 3A (3) of the Central Excise Act, 1944, provides that where a factory producing notified goods did not produce the notified goods during any continuous period of 15 days or more, the duty calculated on a proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfils such conditions as may be prescribed. The said proviso came up for interpretation before the Hon'ble Tribunal in the case of Unicorn Packers Ltd and others. The Hon'ble Tribunal vide Order No. A/11068-11072/2015, dated 22.07.2015, held that on a close reading of the provisions of Rule 10 read with proviso 2 section 3A (3), it was clear that the duty calculated by the manufacturer as per Rule 7 of the said rules shall be abated on proportionate basis in case of non production of goods for the period as specified therein. Applying the binding ratio of the said decision, they are not required to pay any duty for the period from 01.04.2017 to 16.04.2017, when no Pouch Packing Machine was operational. The duty for the period when the Pouch Packing Machines were operational i.e. for the period from 17.04.2017 to 30.04.2017 having been paid by them, no further duty is required to be paid. The proceedings initiated vide the subject notice are required to be withdrawn in the interest of justice.

(xxvi) They also submitted that they had filed the declaration as required under Rule 6 of the said Rules, declaring the information and details required under the said Form 1. The said Form 1 was approved by the Jurisdictional Officer. Rule 6 (2) provides for determining and passing order concerning the annual capacity of production of the factory. In the present case no such practice of passing an order was prevalent and therefore the declaration filed by them was deemed have been accepted. Therefore any demand of duty contradictory to the declaration is legally not sustainable.

(xxvii) They submitted that the similar issue came up before the Hon'ble Tribunal against the OIO Nos. AHM-EXCUS-002-COMMR-026 to 029-1314 all dated 26.09.2013, AHM-EXCUS-002-COMMR-032-13-14 all dated 03.10.2013, and AHM-EXCUS-002-COMMR-036-13-14 all dated 25.10.2013 in the case of Vishnu Pouch Packaging Pvt. Ltd., Ahmedabad. The Hon'ble Tribunal in a bunch of appeals decided in our favour vide order reported at 2015-T1OL-690-CESTAT - AHM. The appeals of the department against the above order of the Hon'ble Tribunal was dismissed by the Hon'ble High Court vide judgment reported at 2016 (332) ELT 785 (Guj.) In view of above order of the Hon'ble Tribunal the present proceedings are required to be dropped in the interest of justice.

(xxviii) The assessee requested that the proceedings initiated vide Show Cause bearing No. C No. V.24/15-69/OA/2018 ,dated 13.02.2019; may be dropped.

PERSONAL HEARING:

11. During the course of the personal hearing held on 11.9.2020, Shri N.K. Tiwari, Consultant appeared on behalf of the assessee and reiterated the submissions made by them vide their written submission dated 8.7.2019 and sought one week's time to file further submissions, which was subsequently filed on 15.9.2020.

DISCUSSION AND FINDINGS:

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



13. From the records of the case I find that the said assessee had paid the duty on the proportionate basis for the month of April 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.

14. The issue to be decided is whether the assessee, who is a manufacturer of "Jarda Scented 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 i.e. whether that they were entitled for suo moto abatement under Rule 10 of the said Rules, or otherwise.

15. 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:

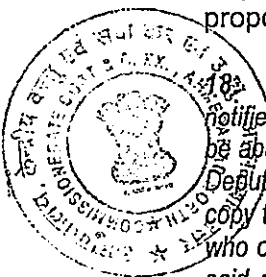
Provided further that in case of non-working of any installed packing machine during the month, for any reason whatsoever, the same shall be deemed to be operating packing machine for the month.

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. Attention is drawn to 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. 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 it has been alleged that the assessee did not fully discharge the duty payable for the month of April 2017. Instead the assessee had paid duty proportionately on the number of days its machine operated in that month.

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.

19. The provisions of Rule 10 of the said Rules, which provides that in case



the factory did not produce the notified goods during any continuous period of 15 days or more, the duty calculated on proportionate basis shall be abated in respect of such period. Therefore, on joint reading of Rule 7 and 10 of the said Rules, the duty on proportionate basis shall be abated when the pouch packing machines were not in operational and required to be paid only for the days for which pouch packing machines were operational.

20. 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, the duty calculated on proportionate basis shall be abated in respect of such period. I find that it is not the case that their factory did not remain closed continuously for a period of 15 days or more and that they were not entitled for abatement under Rule 10 of the said Rules and this fact is brought out in the Show Cause Notice itself.

21. I also find that Rule 9 of Tobacco Packing Machines Rules, 2010 provides the manner of payment of duty and interest of the notified goods, shall be paid by the 5th of the month and an intimation shall be filed with the jurisdictional Superintendent by 10th of the same month. Further, 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 shall be paid by the 5th of the following month. Further, Rule 10 provides for abatement - in case of non-production of goods, where a factory did not produce the notified goods during any continuous period of 15 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 Central Excise Officers as the case may be, at least three working days prior to the commencement of such period.

22. The 3rd proviso to Rule 9 gives an exception that in case of increase in the number of operating 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. It is an admitted fact that during the period from 1.4.2017 to 16.4.2017, no machine was operating in the factory of the assessee. In other words, during the period in which the due date falls, there was no manufacturing activity by the assessee. Therefore, no duty could not have been determined and paid by them by 5th of the same month.

23. I hereby rely on the following decisions, passed by CESTAT, Principal Bench, New Delhi, in the case of M/s. Taste Well Product, reported in 2016 (335) E.L.T. 55 (Tri. - Del.), wherein, it has been held as under:

Interest - Delayed payment of duty - Compounded Levy Scheme - Chewing Tobacco - Closure of factory during period of due date - Since during period in which due date of payment of duty fell, there was no manufacturing operation, no duty could have been determined and paid by 5th of same month - In such cases due date of payment of duty becoming 5th of next month in terms of 3rd proviso to Rule 9 of Chewing Tobacco and Unmanufactured Tobacco Packing Machine (Capacity Determination and Collection of Duty) Rules, 2010 - Assessee having paid duty accordingly, there is no delay in duty payment and no interest chargeable from him - Rule 9 of Chewing Tobacco and Unmanufactured Tobacco Packing Machine (Capacity Determination and Collection of Duty) Rules, 2010. [para 5]

24. I rely on the decision of CESTAT, Regional Bench, Allahabad, in the case of M/s. Satyaprakash & Co., wherein it was held as under:

Interest on delayed payment of duty - Tobacco making factory closed from 1-4-2012 to 15-4-2012 - Neither production nor any addition in machines during April, 2012 - Assessee required to deposit duty and duty have been rightly paid before 5th of next month - Confirmation of interest on duty payable for the proportionate number of days - Set aside - Rule 9 of Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010. [paras 3, 3.1]

Production capacity based duty - Suo motu Abatement - Tobacco making factory closed from 1-4-2012 to 15-4-2012 - Closer of factory for a continuous 15 days in knowledge of Department as evident from Panchnama dated 16-4-2012 - Suo motu abatement proper and not in violation of provisions of Rule 10 of Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010. [paras 3, 3.1]

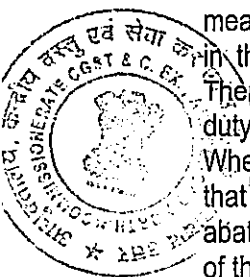
25. I rely upon judgment of the Gujarat High Court in the case of M/s. Thakur Tobacco Products Pvt. Ltd reported in 2016 (332) E.L.T. 785 (Gujarat), wherein the issue was decided in favour of the assessee. Relevant paragraph Nos. 12, 13, 14 and 15 of the said judgment are as under:

"12. In the above backdrop, the merits of the impugned order may be examined. The Tribunal, in the impugned order, has recorded that in none of the orders impugned before it, it is in dispute that there was a closure of the factory for more than fifteen days and the required procedure of due intimation of closure, sealing and due intimation or reopening was followed. Thus, there was no dispute that the requirements of Rule 10 of the PMPM Rules had been fulfilled. There was also no dispute that the amount adjusted was not more than the amount of duty mandated to be abated in terms of Rule 10 of the PMPM Rules. The Tribunal has taken note of the fact that Rule 10 of the PMPM Rules does not make any stipulation about abatement having to be claimed by filing an application, though it also does not imply to the contrary. Referring to Rule 9 of the PMPM Rules, it was observed that when the intention of the Government is that the amount is to be refunded and an express provision is provided thereof, whereas rule 10 does not make any such provision. It may be noted that insofar as Rule 96ZO of the Central Excise Rules is concerned, sub-rule (2) thereof expressly provides for claim of abatement being made under sub-section (3) of Section 3A of the Act, which would be allowed by an order passed by the Commissioner of Central Excise of such amount as may be specified in such order. Similarly, sub-rule (7) of Rule 96ZQ provides for abatement being allowed by an order passed by the Commissioner of Central Excise of such amount as may be specified in such order, subject to the conditions enumerated thereunder. Similarly, sub-rule (2) of Rule 96ZP provides for abatement being allowed by an order passed by a Commissioner of Central Excise of such amount as may be specified in such order subject to the fulfillment of the conditions laid down thereunder. Thus, in relation to independent processors of textile fabrics, manufacturers of non-alloy steel hot re-rolled products and manufacturers of non-alloy steel ingots, who were also assessed on the basis of annual production capacity under Section 3A of the Act, there was an express provision for making an order of abatement whereas the PMPM Rules are totally silent in that regard. There is no provision for making an order of abatement under Rule 10 of the PMPM Rules.

13. As noticed earlier, Rule 10 of the PMPM Rules provides for abatement of duty calculated on proportionate basis in case where the factory does not produce notified goods during any continuous period of fifteen days or more. However, such abatement is subject to the conditions stipulated thereunder as referred to hereinabove. Once such conditions are satisfied, the assessee becomes entitled to abatement of duty to the extent of the days the factory did not produce the notified goods.

14. On a plain reading of Rule 10 of the PMPM Rules, it is apparent that while the same provides that duty calculated on a proportionate basis shall be abated, it does not provide for any procedure for doing so. Thus, whereas Rules 96ZQ, 96ZO and 96ZP of the Central Excise Rules, 1944, which also are schemes under the compounded levy scheme, there were express provisions for making an order of abatement by the Commissioner, Rule 10 of the PMPM Rules is wholly silent in that regard. Under the circumstances, having regard to the fact that Rules 96ZQ, 96ZP and 96ZO provided for making an order of abatement, however, there is no corresponding provision in the PMPM Rules, it can be inferred that the rule making authority has consciously omitted making such provision. Therefore, in the absence of any specific provision for making an order of abatement, it cannot be said that the action of the assessee in calculating the duty on a proportionate basis and setting off the same against the duty payable in the succeeding month is, in any manner, violative of the rules or the statutory scheme.

15. Besides, in the light of the findings recorded by the Tribunal to the effect that it is not disputed that the adjustments made were not more than the amounts of duties mandated to be abated as per Rule 10 of the PMPM Rules, the action of the respondent assessee in computing the proportionate amount of duty towards the abatement and setting it off against the duty payable in the next month does not adversely affect the revenue in any manner. The abatement, in the opinion of this court, is not akin to refund and means reduction or diminution of the duty. Therefore, when the duty stands reduced to the extent provided in the rule, there is no liability to pay the same, inasmuch as, to that extent the duty stands abated. Therefore, if the assessee has correctly calculated the proportion of duty and set off the same against the duty payable for the next month, it cannot be said that the said action is contrary to the statutory scheme. When the rules do not provide for the manner in which duty is required to be abated, nor do they provide that abatement shall be by an order of the Commissioner or any authority, but nonetheless provide for abatement of duty and the extent of entitlement to such abatement, no fault can be found in the approach of the assessee in *suo motu* taking the benefit of such abatement."



26. I rely on the judgment passed by Hon'ble High Court of Allahabad, in the case of M/s. Trimurti Fragrances P. Ltd., reported in 2019 (370) E.L.T. 257 (All.), wherein it has been held as under:

Production capacity based duty - Abatement for non-production - Department relying upon Rule 9 of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 for claiming that monthly duty on notified goods to be paid by 5th day of month and assessee cannot simpliciter claim set off without first depositing same - HELD : Assessee having complied with statutory requirement, entitled to benefit claimed - Judgment in case of Thakkar Tobacco [2016 (332) E.L.T. 785 (Guj.)] accepted by C.B.D.T. in C.B.E. & C. Circular No. 1063/2/2018-CX., dated 16-2-2018 - Matter not res integra any more - Assessee entitled to abatement of duty, in event of closure of factory for continuous period of 15 days or more, without first depositing duty in terms of Rule 10 ibid - Question of law answered in favour of assessee and against revenue - Rule 10 of Pan Masala Packing Machines (Capacity Determination and Collection of Duty), Rules, 2008. [paras 21, 22, 23, 24, 25, 26]
Appeals dismissed

Paras 22 to 26 of the order reads as under:

22. The sole issue under consideration is as to giving benefit of abatement for non-production, whether the assessee could on their own calculate Excise duty and set off the same against the duty payable in the next month. The argument of the Department relying upon Rule 9 of the PMPM Rules, 2008 claiming that the monthly duty on notified goods is to be paid by 5th day of the month and the assessee cannot simpliciter claim set off without first depositing the same had been repelled by the Gujarat High Court in the case of *Thakker Tobacco* (supra) holding that Rule 10 of the PMPM Rules, 2008 envisages a situation and provides for abatement of excise duty calculated on proportionate basis, in case where factory does not produce notified goods during continuous period of 15 days or more.

23. Moreover, the statute, that is proviso to sub-section (2) of Section 3A itself provides for abatement where a factory producing notified goods did not produce the same during any continuous period of 15 days or more, the duty calculated on the proportionate basis shall be abated in respect of such period, if the manufacturer of such goods fulfills such condition as may be prescribed. In the present case as the assessee having complied the statutory requirement, is entitled to the benefit claimed by him.

24. The judgment in case of *Thakker Tobacco* (supra) having been accepted by the C.B.D.T. in its circular dated 16-2-2018, the controversy does not remain any longer as the matter is not *res integra* any more.

25. In view of the above, we are of the considered opinion that once the Department has accepted the judgment in case of *Thakker Tobacco* (supra) and has issued circular holding that assessee is entitled to abatement of duty, in the event of closure of factory for continuous period of 15 days or more, without first depositing the duty in terms of Rule 10 of PMPM Rules, 2008, the appeal of the revenue has no force and is hereby dismissed.

26. The question of law is, therefore, answered in favour of the assessee and against the revenue.

27. I also rely on the judgment passed by the Hon'ble High Court of Delhi, in the case of M/s. Shakti Fragrances P. Ltd., reported in 2015 (324) E.L.T. 390 (Del.), wherein it was held as under:

Production capacity based duty - Pan Masala - Abatement of duty - Closure of factory for part of a month - Failure to pay duty by 5th day of month - Nothing in Pan Masala Packing Machine (Capacity Determination and Collection of Duty) Rules, 2008 to disentitle assessee pro rata abatement on his failure to pay duty by 5th day of month - In instant case undisputed fact of closure of factory from 14th to 31st August, 2012 - No interference in abatement order passed on 28th August, 2012 - However, interest for late deposit of duty liable to be paid - No interference in Tribunal's order - Revenue's appeal dismissed - Rules 9 and 10 ibid. [paras

11-12-13]
Appeal dismissed

9. The aforementioned decision in *Shree Flavours Pvt. Ltd. v. CCE, Delhi-IV* (supra) was challenged by the Revenue before the High Court of Punjab & Haryana by way of CEA No. 4 of 2015 (O&M) in the High Court of Punjab & Haryana. By an order dated 7th May, 2015 [2015 (321) E.L.T. A152 (P&H)], the Division Bench of the Punjab & Haryana High Court dismissed the said appeal following its earlier decision dated 4th October, 2007 in *Commissioner of Central Excise, Rohtak v. Kay Fragrance (P) Ltd.* (CEA 52 of 2013) [2014 (305) E.L.T. 109 (P&H)].

10. The Court has been shown the judgment of the High Court of Punjab & Haryana in *Kay Fragrance (P) Ltd.* The question addressed there was whether the duty liable was to be determined under the PMPM Rules for each month separately. The case of the Revenue was that the closure of a factory for less than 15 days in a month would not entitle the assessee to claim abatement of duty *pro rata*. The High Court held that Rules 7 and 9 could not be pressed into service by the Revenue to contend that the abatement cannot be made for a fraction of month. In other words, abatement of duty could not be denied to the party if in a particular month the closure was for less than 15 days.

11. In the present case, the appellant had pressed into service Rule 10 of the PMPM Rules requires the duty calculated on a proportional basis to be abated in case the factory does not produce the notified goods during any continuous period of 15 days in a month. Rule 10 further requires the intimation to that effect to be given to the authorities at least three working days prior to the commencement of the period of closure. Rule 9 requires the monthly duty payable to the authorities to be paid by the fifth day of the same month. There is nothing in Rule 9 to suggest that the failure to pay the duty payable on all the machines upfront by the 5th day of a month would disentitle the assessee to claim *pro rata* abatement of duty. The requirement under Rule 10 of giving intimation three days prior to the closure has been complied with by the assessee.

28. Attention is also drawn to Circular No. 485/51/99-CX, dated 15.09.1999, wherein the Board had clarified that the processors, if otherwise eligible should be granted abatement without asking them to pay the duty first. Similar Circular No. 331/47/97-CX, dated 30.08.1997 was also issued by the Board for allowing abatement. Further, Section 3A (3) of the Central Excise Act, 1944, provides that where a factory producing notified goods did not produce the notified goods during any continuous period of 15 days or more, the duty calculated on a proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfils such conditions as may be prescribed.

29. Vide CBEC Circular No. 1063/2/2018-CX., dated 16-2-2018, the department has accepted the decision of the Hon'ble High Court of Gujarat dated 01.10.2015 in the case of M/s Thakkar Tobacco Products Pvt. Ltd in Tax Appeal No. 619 of 2015, as under:

7.1 Department has accepted the aforementioned order of the Hon'ble High Court of Gujarat where the Hon'ble Court dismissed the departmental appeal on the question of law, whether manufacturer has the option of suo-moto abatement of duty in the event of closure of factory for a continuous period of 15 days or more without first depositing the duty in terms of rule 10 of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008, on the following grounds,

a) As per provisions of the Central Excise Act, 1944 and the PMPM Rules abatement is to be granted and the statute does not prescribe any order of abatement to be passed by the any authority such as DC/AC. Page 7 of 29

b) In the erstwhile Central Excise Rules, 1944, there was an express provision which provides for claim of abatement would be allowed by an order passed by the Commissioner of Central Excise. When the intention of the government is that amount is to be refunded in as specific manner, then an express provision is provided. However the impugned rule does not make any such provision.

c) The Board Instruction from F.No.267/16/2009-CX-8 dated 12.03.2009 is not applicable in the present case as Rule of PMPM rules does not speak of any order of abatement.

30. The issue of suo moto abatement has been taken up by various Tribunals and High Courts and it has been repeatedly held that availing suo moto abatement is proper and not in violation of the provisions of Rule 10 of the said Rules. Further the said interpretation has been accepted by the Department vide Circular No. 1063/2/2018-CX., dated 16-2-2018. Therefore, I hold the duty in the present case is not required to be paid by fifth day of the month; and that it is only in case where the manufacturer had installed the machines prior to fifth day of the month for which declaration has been filed, that he is required to pay duty by fifth day of the month. The amount payable during the month is dependent on the number of machines installed and the MRP for which they are used. In the instant case, no machines were installed on or before 5th day of month, therefore, the amount of duty payable could not have been ascertained and deposited by the assessee. Therefore, I conclude that the assessee is entitled for abatement for the relevant month and the proportionate duty has been abated appropriately from the duty determined under Rule 7 of the said rules.



31. Applying the above ratios, I find that the assessee is not required to pay any duty for the period from 01.04.2017 to 16.04.2017, when no Pouch Packing Machine was operational. Further, the duty for the period when the Pouch Packing Machines were operational i.e. for the period from 17.04.2017 to 30.04.2017, having been already paid by the assessee, no further duty is required to be paid.

32. Therefore, I drop the entire demand raised in the present SCN, as such, I do not find it necessary to discuss the other aspects of confiscation of goods, demand of interest and imposition of penalty, which become null and void, when the demand of duty itself is not sustained. I, hereby, vacate the proceedings initiated against the assessee, vide the SCN no.V.24/15-69/OA/2018,dated 13.02.2019.

33. In view of the above discussion, I pass the following order:

ORDER

(i) I drop the proceedings initiated against the assessee, vide SCN no.V.24/15-69/OA/2018,dated 13.02.2019.



F.No.V.24/15-69/OA/2018

(Signature)
(Dr. Balbir Singh)
Principal Commissioner
CGST & Central Excise,
Ahmedababd-North.

Dated:29.9.2020

BY REGD. POST/HAND DELIVERY

To,
M/s. Vishnu Tobacco Product, Unit-III,
36, Changodar Industrial Estate,
Sarkhej-Bavlva Highway, Changodar,
Ahmedabad-382213

Copy to:

1. The Principal Chief Commissioner, C.G.S.T, Ahmedabad Zone, Ahmedabad.
2. The Dy Commissioner of CGST & Central Excise, Division-IV, Ahmedababd-North.
3. The Supdt. Of CGST & Central Excise, AR-II, Division-IV, Ahmedababd-North.
4. Guard file

