HIGH COURT OF TRIPURA
AGARTALA

Central Excise Appeal No.01/2018

M/S DHARAMPAL SATYAPAL LTD (Unit-2), Plot No.3450-3453, Arundhutinagar, Industrial Estate, Agartala, Tripura - 799003, A company incorporated under the provisions of the Companies Act, 1956 and having its registered office at 98, Okhla Industrial Estate, Phase - III, New Delhi - 110020 and in the present appeal represented by Mr. Pramod Sharma, the Deputy General Manager of the Appellant Company.

…….. *Appellant(s).*

Vs.

COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, AGARTALA, Kiran Medical Halls Building, Old RMS Choumohani, Agartala Tripura, 799 001.

…….. *Respondent(s).*

Central Excise Appeal No.02/2018

M/S DHARAMPAL SATYAPAL LTD (Unit-2), Plot No.3450-3453, Arundhutinagar, Industrial Estate, Agartala, Tripura – 799 003. A company incorporated under the provisions of the Companies Act, 1956 and having its registered office at 98, Okhla Industrial Estate, Phase - III, New Delhi - 110020 and in the present appeal represented by Mr. Pramod Sharma, the Deputy General Manager of the Appellant Company.

…….. *Appellant(s).*

Vs.

COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, AGARTALA, Kiran Medical Halls Building, Old RMS Choumohani, Agartala Tripura, 799001

…….. *Respondent(s).*

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HON'BLE THE CHIEF JUSTICE MR. AKIL KURESHI
HON'BLE JUSTICE MR. S G CHATTOPADHYAY

For Appellant(s)	:	Mr. A K Sharaf, Sr. Advocate, Mr. K Roy, Advocate.
For Respondent(s)	:	Mr. Paramartha Datta, Advocate.
Date of hearing	:	4th May, 2021.
Date of Judgment	:	17th May, 2021.
Whether fit for reporting	:	Yes.

J U D G M E N T

(Akil Kureshi, CJ).

These appeals are filed by the assessee to challenge a common judgment dated 14th September, 2017 passed by the Central Excise & Service Tax Appellate Tribunal, Kolkata *(hereinafter to be referred to as "the Tribunal").*

[2] The appeals were admitted on the following substantial question of law:

> "Whether in the facts and circumstances of the case, the respondent was justified in denying claim of the appellant under *Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010* merely for the reason that the officer of the department has failed to mention about the machine which was made un-operational why could not be removed for certain reasons, although the same machine was made un-operational, at a later stage with a report of the officer of the

department that 'looking to the heaviness of the machine, not possible to remove', could be considered to be a substantial compliance of sub-rule (5) of R.6 of Rules, 2010"

[3] This question arises in following background facts which are recorded from Central Excise Appeal No.1/2018. Since facts are similar in both the appeals, they are not separately recorded as arising in Ce. Excise Appeal No 2/2018 :

The appellant assessee is a manufacturer of Jarda Scented Tobacco falling under Chapter 24 of the Central Excise Tariff Act, 1985. In terms of Section 3A of the Central Excise Act, 1944 read with Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 *(hereinafter to be referred to as "the Rules of 2010")* the assessee was liable to pay excise duty on the installed capacity of manufacture instead of actual manufacture and clearance of goods.

[4] The appellant had installed one machine in its factory which was sealed and de-sealed at its request by the Excise authorities during the period between 31st August 2015 to 6th November 2015. According to the appellant, such machine was operated/not-operated during the said period as under :

"

Period	Status	No of days the machine operated
31/08/2015 to 07/10/2015	Not operated	Nil

08/10/2015 to 19/10/2015	Operated	12
20/10/2015 to 06/11/2015	Not operated	Nil

,,

Since there was closure of production at the unit for continuous period on more occasions than one, the appellant filed a single abatement claim for the periods between 1st October 2015 to 7th October 2015 and 20th October 2015 to 31st October, 2015 under Rule 10 of the said Rules of 2010 and claimed that a total of Rs.50,32,548/- was admissible. The Assistant Commissioner of Central Excise rejected the application by an order dated 1st January 2016 on two grounds namely, the closure of the production activity at the unit was not for a continuous period exceeding 15 days and that provisions of Rule 6(5) of the said Rules of 2010 were also not satisfied since the machine was not removed from the factory.

[5] The appellant filed appeal against the said order. The Commissioner(Appeals) allowed the appeal in part by an order dated 2nd September, 2016 to the following extent :

> "6.3 On going through the observation the ld. adjudicating authority and the contention of the appellant I find that the FFS packing machine under question was sealed and un-installed for the period from 01/09/2015 to 07/10/2015 and 20/10/2015 to 06/11/2015. Accordingly, I am of the view that in both occasions/spells machine was not in operation or did not produce any notified goods for a

> period of 15 days or more though it was in fragmented period falls in two month."

However, with respect to the assessee's claim for abatement for the period between 1st October 2015 to 7th October 2015, he rejected the claim on the ground that *"the machine was not un-installed and sealed in such a manner that it cannot be operated as evident from the sealing order dated 31st August, 2015."*

[6] To the extent the appeal of the assessee was rejected by the Commissioner of Appeals, the assessee approached the Tribunal. Tribunal by the impugned judgment dismissed the appeal making following observations :

> "……On perusal of the above reports, it is clear that Superintendent while sealing the packing machines in one case, categorically mentioned that the machine is sealed in such a manner that it cannot be operated. But in the other report, it has not been mentioned categorically. Thus, there is a distinction between the two reports mentioned above. The ld. Counsel on behalf of the appellant argued that the sealing of the machines would show that it cannot be operated. Further, it is contended that there is no material on record that the sealed machine was operated. I am unable to accept the contention of the ld. Counsel for the appellant. I find that the report dated 19.10.2015 is inconsonance with the provisions of proviso to Rule 6(5) of the Rules, 2010. In the other report, there is no indication that it cannot be operated. Hence, I agree with the findings of the Commissioner(Appeals). The ld. Counsel referred to various

> case laws. None of the case laws are relevant in the facts and circumstances of the present case."

[7] Appearing for the appellant, learned senior counsel Mr. A K Sharaf took us to the provisions of the said Rules of 2010 and in particular, sub-rule (5) of Rule 6 thereof. He also drew our attention to the proceedings drawn by the Inspector of Central Excise on 19th October, 2015 while sealing the machine of the assessee which reads as under :

> "In pursuance of Order C.No.V(30)02/CL/CE/ACA/2015/4396 dated 14/10/15 of the Assistant Commissioner CE & ST Division, Agartala, the Sanko Rotary Type Single Track FFS Machine having identification No.120323479 has been Uninstalled and Sealed on 19.10.2015 at 23-50 hrs. under my supervision and assisted by Sri Gautam Das Choudhury, Inspector. **As the machine is heavy weight and removal of machine requires quite a large number of skilled labour and other tools which is not available at this dead hours of night, the machine is sealed in such as manner that it cannot be operated.** The entire uninstallation and sealing has been in presence of Sri Pramod Sharma, authorized signatory of Dharampal Satyapal Ltd.(Unit-2) after observing all necessary formalities."

However, for the period between 1st October, 2015 to 7th October, 2015 the sealing order did not specify that the machine was sealed in such a manner that it cannot be operated and that it was too heavy to be moved out. On these grounds, the claim of the assessee was rejected.

[8] Counsel contented that the Commissioner(Appeals) and the Tribunal had given the benefit to the assessee of abatement of duty for the period covered under the sealing order dated 19th October, 2015 whereas under substantially similar circumstances, for the sealing order dated 31st August 2015, such benefit was not granted. He submitted that the machinery remained the same. In what manner the Inspector of Central Excise should pass the order of sealing a machine was not within the control of the assessee. The authority had mentioned that the machine was uninstalled and sealed in terms of Rule 6(5) which was a substantial compliance of the statutory requirements. Subsequently, at the request of the assessee, the machine was de-sealed and there was no allegation by the department that the assessee had carried out the manufacturing activity despite sealing of the machine.

[9] On the other hand, learned counsel for the department opposed the appeal contending that the revenue authorities and the Tribunal have considered the question in light of relevant facts. There is no error in the view of the Tribunal. No question of law arises. Appeal may, therefore, be dismissed.

[10] Section 3A of the Central Excise Act, 1944 pertains to power of Central Government to charge excise duty on the basis of capacity of

production in respect of notified goods. Sub-section (1) of Section 3A provides that notwithstanding anything contained in Section 3 where the Central Government having regard to the nature of the process of manufacture or production on excisable goods of any specified description, the extent of evasion of duty in regard to such goods or such other factors as may be relevant, he is of the opinion that it is necessary to safeguard the interest of revenue, specify, by notification in the Official Gazette such goods as notified goods and there shall be levied and collected duty of excise on such goods in accordance with the provisions of the said Section, which essentially envisages collection of excise duty on annual capacity of production.

[11] To operationalize this scheme, the Central Government has framed the said Rules of 2010. Rule 10 of the said Rule pertains to abatement in case of non-production of goods. Relevant portion of Rule 10 reads as under:

> "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."

[12] Rule 6 of the said Rules pertains to a declaration to be filed by the manufacturer. Sub-rule (5) of Rule 6 reads as under :

> "The machines which the manufacturer does not intend to operate shall be uninstalled and sealed by the Superintendent of Central Excise and removed from the factory premises under his physical supervision.
>
> **Provided that in case it is not feasible to remove such packing machine out of the factory premises, it shall be uninstalled and sealed by the Superintendent of Central Excise in such a manner that it cannot be operated."**

[13] In terms of sub-rule (5) of Rule 6 of the said Rules, the machines which the manufacturer does not intend to operate would be uninstalled and sealed by the Superintendent of Central Excise and removed from the factory premises under his physical supervision. For the period during which the machine is thus rendered incapacitated, the concerned manufacturer would be spared the burden of excise duty since the entire levy is based on installed production capacity and not on actual manufacture or clearance of goods. The provisio to the said sub-rule provides that in case it is not feasible to remove the machine, it shall be uninstalled and sealed in such a

manner that it cannot be operated. In case of the present assessee, as noted, under an order dated 19th October 2015, the Inspector of Central Excise recorded that the machine was uninstalled and sealed on the said date under his supervision. However, since the machine was heavy and removal would require large number of skilled labourers and the tools which were not available, the machine was sealed in such a manner that it cannot be operated. As noted, this order was found sufficient by the Commissioner(Appeals) to enable the assessee to claim abatement of duty. It appears that the department has also accepted this order of the Commissioner(Appeals).

[14] However, for the remaining period, the claim of the assessee is rejected on the ground that the sealing order did not specify that it was sealed in such a manner that the machinery cannot be operated. We may recall, sub-rule (5) of Rule 6 provides that the machine which the manufacturer does not intend to operate shall be uninstalled and sealed by the Superintendent of Central Excise and removed from the factory premises under his supervision. However, the proviso to sub-rule (5) envisages that in case it is not feasible to remove such machine out of the factory premises, it shall be uninstalled and sealed by the Superintendent of Central Excise in such a manner that it cannot be operated. The fact that the machine is too

heavy to be removed was recorded by the Superintendent of Central Excise in his order dated 19th October, 2015. Being the same machine, the situation for a different period, would not change.

[15] It is true that the proviso in such a case requires that the machine should be uninstalled and sealed by the Superintendent in such a manner that it cannot be operated. In the sealing order dated 31st August, 2015 that the Superintendent passed, he may not have used this expression that he had sealed the machine in such a manner that it cannot be operated. However, this would not be sufficient for the department to deny the benefit of abatement to the assessee in terms of Rule 10 of the said Rules. Firstly, it was the duty of the Excise Superintendent to seal the machine and record it in the order that it was so sealed that it cannot be operated. In what manner the Superintendent passing an order after sealing the machine was not within the control of the assessee. Further, this machine was subsequently de-sealed at the request of the assessee, at which point there was no allegation that the seal was broken or that despite the seal the manufacturing activity was continued. The very purpose of sealing a machine is to keep it out of use and to render it inoperative. When the Superintendent of Central Excise thus sealed the machine and also passed an order to this effect, the presumption would arise that such sealing was in such a manner as that the same cannot

be operated. In absence of any allegations by the department and any material on record suggesting that despite sealing the assessee operated the machine, it would not be permissible to withhold the abatement of duty only on the ground that the Superintendent of Central Excise did not draw proper proceedings and did not elaborately record that the sealing was done in such a manner that the machine could not be operated.

[16] In the result, the question of law is answered in favour of the assessee. Appeals are allowed by directing the department to give the benefit of abatement for the periods in question.

The judgment of the Tribunal is reversed. Both the appeals are disposed of accordingly. Pending application(s), if any, also stands disposed of.

(S G CHATTOPADHYAY, J) **(AKIL KURESHI, CJ)**

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