



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 22 August 2023**
Judgment pronounced on: 06 September 2023

+ CEAC 5/2019

GOPAL CORPORATES LLP Appellant
Through: Mr. Vivek Kohli, Sr. Adv. with
Mr. Ashwani Sharma, Mr.
Juvas Rawal, Ms. Bhavya
Bhatia, Advs.

versus

COMMISSIONER DELHII-EAST, GST-CENTRAL TAX
..... Respondent
Through: Mr. Ajit Kalia, Sr. SC with Mr.
Abhinav Kalia, Advs.

AND

+ W.P.(C) 6017/2022

GOPAL CORPORATES LLP Petitioner
Through: Mr. Vivek Kohli, Sr. Adv. with
Mr. Ashwani Sharma, Mr.
Juvas Rawal, Ms. Bhavya
Bhatia, Advs.

versus

UNION OF INDIA & ANR. Respondents
Through: Mr. Kirtiman Singh, CGSC
with Mr. Waize Ali Noor, Ms.
Shreya Mehra, Mr. Varun
Rajawat, Mr. Kholi R., Advs
with Ms. Archana Surve, G.P.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE DHARMESH SHARMA



J U D G M E N T

YASHWANT VARMA, J.

1. Since the appeal and the writ petition emanate out of common proceedings drawn by the respondents against the appellant / petitioner, they were with the consent of parties heard together and are proposed to be disposed of by this common judgment. The appeal is preferred under Section 35G of the **Central Excise Act, 1944**¹ challenging an order dated 02 November 2017 passed by the **Central Excise and Service Tax Appellate Tribunal**² and which has in essence affirmed the Order in Original as well as the view as taken by the appellate authority. The issue arises out of the quantum of duty which the appellant / petitioner was liable to pay in terms of the provisions contained in the **Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules 2010**³.

2. The writ petition in addition seeks a declaration to the effect that Rule 8 of the CTUT Rules 2010 be declared ultra vires to Section 3A of the Act and additionally being violative of Article 14 of the Constitution. Mr. Kohli, learned senior counsel appearing for the appellant / petitioner fairly submitted that the challenge to Rule 8 would assume significance only if the Court were to not accede to the interpretation which is advocated for consideration and acceptance by the appellant / petitioner insofar as the provisions of the CTUT Rules

¹ the Act

² Tribunal

³ CTUT Rules 2010



2010 are concerned. The principal question which arises is the duty liability to be borne by the appellant / petitioner for the months of June 2012, July 2012 and February 2013 when certain new packing machines were added to the production line and were worked for a couple of days during the entire month.

3. The appellant / petitioner contends that additional duty is liable to be levied on a proportionate basis and in conjunction with the days when the additional packing machines had actually been operated. They assail the stand of the respondents that in terms of the CTUT Rules 2010, duty liability is to be ascertained and calculated based on the maximum numbers of packing machines that may have operated during any day of a particular month. For the purposes of examining the challenge which stands raised, we deem it apposite to notice the following essential facts.

4. The appellant / petitioner is a manufacturer of Flavoured Chewing Tobacco sold in packets / pouches. The retail pouches manufactured by it are chargeable to Central Excise Duty under Sub Heading 2403 99 10. The dispute in the present matters pertains to the months of June 2012, July 2012 as well as February 2013. The appellant / petitioner was discharging its duty liability on chewing tobacco pouches carrying different Retail Sale Prices in accordance with the provisions of the CTUT Rules 2010. In order to appreciate the issue which arises, it would be apposite to firstly notice the provisions of Section 3A of the Act and to which the CTUT Rules 2010 owe their existence. Section 3A of the Act reads as follows: -



“Section 3A of Central Excise Act, 1944-

“Notwithstanding anything contained in Section 3, where the Central Government, having regard to the nature of the process of manufacture or production of 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, 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 this section.”

(2) Where a notification is issued under sub-section (1), the Central Government may, by rules,

(a) provide the manner for determination of the annual capacity of production of the factory, in which such goods are produced, by an officer not below the rank of Assistant Commissioner of Central Excise and such annual capacity shall be deemed to be the annual production of such goods by such factory; or

(b) (i) specify the factor relevant to the production of such goods and the quantity that is deemed to be produced by use of a unit of such factor; and

(ii) provide for the determination of the annual capacity of production of the factory in which such goods are produced on the basis of such factor by an officer not below the rank of Assistant Commissioner of Central Excise and such annual capacity of production shall be deemed to be the annual production of such goods by such factory:

Provided that where a factory producing notified goods is in operation during a part of the year only, the annual production thereof shall be calculated on proportionate basis of the annual capacity of production:

Provided further that in a case where the factor relevant to the production is altered or modified at any time during the year, the annual production shall be re-determined on a proportionate basis having regard to such alteration or modification.”

5. Undisputedly, chewing tobacco falling under tariff item 2403 99 10 of the Central Excise Tariff Act, 1985 is notified as one of the goods in respect of which the Union Government had formed the requisite opinion that a duty of excise would be levied and collected in



accordance with the provisions made in Section 3A of the Act. Section 3A(2)(a) enables the Union Government to frame rules providing for the manner for determination of the annual capacity of production of a factory in which notified goods are produced and further postulates that the capacity as determined in accordance with those rules shall be deemed to be the annual production of goods by such a factory. In addition to the above, the rules that may be framed by the Union Government are also envisaged to provide for the factor on the basis of which annual capacity of production would be determined. The Second Proviso to Section 3A(2)(b) further stipulates that where the factor relevant to assessing production is altered or modified at any time during the year, the annual production shall be re-determined on a proportionate basis having regard to such alteration or modification.

6. Insofar as the CTUT Rules 2010 are concerned, the factor relevant for assessing production has been defined in terms of Rule 4, which reads as follows:-

“4. **Factor relevant to production.** - The factor relevant to the production of notified goods shall be the number of packing machines in the factory of the manufacturer.”

7. Rule 5 then makes provisions to estimate the quantity which will be deemed to have been produced in a factory. The said Rule is framed in the following terms:-

“5. **Quantity deemed to be produced.** - The quantity of notified goods, having retail sale price as specified in column (2) of the Table below, deemed to be produced by use of one operating packing machine per month, shall be as is equal to the corresponding entry specified in column(3) and column (4) of the said Table, as the case may be:-



Table

| S. No. | Retail sale price (per pouch) | Number of pouches per operating packing machine per month | |
|--------|-------------------------------|---|------------------------------|
| | | Pouches not containing lime tube | Pouches containing lime tube |
| (1) | (2) | (3) | (4) |
| 1. | Upto Rs. 1.50 | 22,46,400 | 21,46,560 |
| 2. | From Rs. 1.51 to Rs. 2.00 | 20,21,760 | 19,21,920 |
| 3. | From Rs. 2.01 to Rs. 3.00 | 20,21,760 | 19,21,920 |
| 4. | From Rs. 3.01 to Rs. 4.00 | 18,96,960 | 17,72,160 |
| 5. | From Rs. 4.01 to Rs. 5.00 | 18,96,960 | 17,72,160 |
| 6. | From Rs. 5.01 to Rs. 6.00 | 18,96,960 | 17,72,160 |
| 7. | Above Rs.6.00 | 17,97,120 | 16,97,280 |

Explanation. - For the purposes of this rule, if there are multiple track or multiple line packing machines, one such track or line shall be deemed to be one individual packing machine for the purposes of calculation of the number of pouches per operating packing machine per month.”

8. Rule 6 obliges a manufacturer of notified goods to make various declarations with respect to the number of packing machines that may be installed in a factory. The aforesaid declaration assumes significance since it correlates with Rule 5 and which lays down the principle for assessing the quantity deemed to be produced. Rule 6 reads as follows:-

“6. Declaration to be filed by the manufacturer. - (1) A manufacturer of notified goods shall, immediately on coming into force of these rules, and not later than 8th March, 2010, declare in Form 1 annexed to these rules, -
(i) the number of single track packing machines available in his factory;



- (ii) the number of packing machines out of (i), which are installed in his factory;
 - (iii) the number of packing machines out of (i), which he intends to operate in his factory for production of pouches of notified goods with lime tube and without lime tube, respectively, with effect from the 8th day of March, 2010;
 - (iv) the number of multiple track or multiple line packing machine available in his factory;
 - (v) the number of multiple track or multiple line packing machines out of (iv), which are installed in his factory;
 - (vi) the number of multiple track or multiple line packing machines out of (iv), which he intends to operate in his factory for production of pouches of notified goods without lime tube and with lime tube, respectively, with effect from the 8th day of March, 2010;
 - (vii) the name of the manufacturer of each of the packing machine, its identification number, date of its purchase and the maximum packing speed at which they can be operated for packing of pouches of notified goods, with lime tube and without lime tube, of various retail sale prices;
 - (viii) description of goods to be manufactured including whether unmanufactured tobacco or chewing tobacco or both, their brand names, whether pouches shall contain lime tube or not;
 - (ix) denomination of retail sale prices of the pouches to be manufactured during the financial year;
 - (x) the plan and details of the part or section of the factory premises intended to be used by him for the manufacture of notified goods of different denomination of retail sale prices and the number of machines intended to be used by him in each such part or section,
- to the jurisdictional Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, with a copy to the jurisdictional Superintendent of Central Excise:

Provided that a new manufacturer shall file such declaration at least seven days prior to the commencement of commercial production of notified goods in his factory.

(2) On receipt of the declaration referred to in sub-rule (1), the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, shall, after making such inquiry as may be necessary including physical verification, approve the declaration and determine and pass order concerning the annual capacity of production of the factory within three working days in accordance with the provisions of these rules:



Provided that the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, may direct for modifications in the plan or details of the part or section of the factory premises intended to be used by the manufacturer for manufacture of notified goods of different retail sale prices, as he thinks proper, for effective segregation of the parts or sections of the premises and the machines to be used in: such parts or sections before granting the approval :

Provided further that if the manufacturer does not receive the approval in respect of his declaration within the said period of three working days, the approval shall be deemed to have been granted subject to the modifications, if any, which the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, may communicate later on but not later than thirty days of filing of the declaration.

(3) The annual capacity of production shall be calculated by application of the appropriate quantity that is deemed to be produced by use of one operating packing machine as specified in rule 5 to the number of operating packing machines in the factory during the month beginning which the capacity is being determined:

Provided that annual capacity of production 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 8th day of March, 2010:

Provided further that in case a new manufacturer commences production of notified goods, his annual capacity of production shall be calculated on the pro-rata basis of the total number of days in that year and the number of days remaining in that year starting from the date of commencement of the production of such notified goods.

(4) The number of operating packing machines during any month shall be equal to the number of packing machines installed in the factory during that month.

(5) 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.

(6) In case a manufacturer wishes to make any subsequent changes with respect to any of the parameters which has been declared by him and approved by the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may



be, in terms of sub-rule (2), such as changes relating to addition or removal of packing machines in the factory or making alterations in any part or section of the approved premises or in the number of machines to be used in such part or section or commencing manufacture of goods of a new retail sale price or discontinuation of manufacturing of goods of existing retail sale price, and similar other details, he shall file a fresh declaration to this effect at least three working days prior to such subsequent changes to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, who shall approve such fresh declaration and re-determine the annual capacity of production following the procedure specified in sub-rule (2).”

9. As would be evident from Rule 6(2), upon a declaration being made by the manufacturer, the competent officer of Central Excise is to conduct an enquiry and if deemed necessary also undertake a physical verification of the factory premises. It is only when the declarations made are approved that the proper officer of Central Excise determines the annual capacity of production of a factory. Of significance are sub rules (4) and (5) of Rule 6 and which provisions have been placed in order to identify the number of operating packing machines and also lay down the procedure to be followed in case an installed machinery is not intended to be operated. The said Rule further stipulates that every addition or deduction of packing machines from the production line would oblige the manufacturer to make identical declarations and for the annual capacity of production being reassessed accordingly.

10. The duty which is liable to be paid by a manufacturer is envisaged to be levied at a rate specified in a notification to be issued by the Union Government and be leviable on the number of operating



packing machines in the factory. This is evident from the provisions contained in Rule 7 which reads thus:-

“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.”

11. The subject of alteration in the number of operating packing machines is dealt with in Rule 8 which is extracted hereinbelow:-

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

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

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

12. Rule 9 stipulates the manner of payment of duty and reads as under: -

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

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

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



machines operated by him for the period during which such manufacturing took place :

Provided also that in case a 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.”

13. Rule 10 deals with the contingency where a factory does not produce notified goods during any continuous period of 15 days or more and speaks of a proportionate abatement of duty liability. The said provision is reproduced hereinbelow: -

“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.”

14. It appears from the disclosures made by the appellant / petitioner with respect to additional packing machines that these machines were received on 28 June 2012, 30 July 2012 and 26 February 2013 and sealed on the said dates. It is stated to have thereafter communicated to the respondents of the installation dates of the three machines on 26 June 2012, 27 July 2012 and 21 February 2013. The machines are stated to have been after due inspection duly approved by the respondents and thus deemed to have been added to the production line on 29 June 2012, 31 July 2012 and 27 February 2013. The additional machines are thereafter stated to have been deleted from the production line and sealed on 30 June 2012, 31 July 2012 and 28 February 2013. The case of the appellant / petitioner was that since the additional machine had been worked for only two days in June 2012, one day in July 2012, and two days in February 2013, additional duty was liable to be paid only for the days when the additional machinery was actually utilized and operated and that the addition of those machines to the production facility could not have been taken into account for the purposes of assessing its duty liability for the entire month.



15. Mr. Kohli, learned senior counsel appearing for the appellant / petitioner had contended that the Second Proviso to Section 3A(2)(b) is a clear indicator of duty being levied on a proportionate basis. It was submitted that the said Proviso is an unequivocal embodiment of the intent of the Act for duty being levied on a pro rata basis. It was his submission that if Rule 8 was to be understood in the manner as suggested by the respondents, the same would clearly be rendered ultra vires the aforesaid Proviso.

16. According to Mr. Kohli, notwithstanding Rule 8 prescribing the addition of a packing machine being taken into consideration for the purposes of ascertaining the maximum number of packing machines installed on any date during the month, the same cannot be understood as detracting from the right of the manufacturer to pay duty on a pro rata basis only. It was submitted that the proportionate levy of duty is a concept which stands duly enumerated and adopted in Rule 9 and more particularly, the Third Proviso thereto and the duty liability must consequently be ascertained and answered on a conjoint reading of Section 3A and Rules 8 and 9. According to learned senior counsel, if the machine which stood installed only for a particular number of days in a month were to be taken into consideration for adjudging the duty liability for the entire month, the same would not only be ultra vires to the Proviso to Section 3A but also clearly be arbitrary. Mr. Kohli submitted that the appellant / petitioner has assailed the validity of Rule 8 as a matter of abundant caution and solely in response to the stand as struck by the respondents in these matters.



17. Mr. Ajit Kalia, learned Standing Counsel and Mr. Abhinav Kalia, learned counsels appearing for the respondents on the other hand submitted that Rule 8 in unequivocal terms prescribes that the moment a packing machine is added to the production facility during the month, the number of operating packing machines would have to be calculated accordingly and be recognized as representing the maximum number of packing machines installed for the month. The Tribunal while upholding the view taken by the original authority as well as the appellate forum has essentially found that the challenge laid to the demand as raised by the respondents would not sustain bearing in mind the plain language of Rule 8. It has accordingly come to conclude that Rule 8 mandates that if any new machine is installed on any date during the month, it is to be considered as having operated for the entire month. It accordingly held that while the number of machines which would be deemed to have operated during the concerned months would have to be computed in accordance with the above, the appellant / petitioner would be liable to pay duty accordingly.

18. Having evaluated the rival submissions which were addressed, we deem it appropriate to note at the outset that the challenge to Rule 8 of the CTUT Rules 2010 was founded solely upon the Second Proviso to Section 3A(2)(b). The appellant / petitioner does not question the authority of the Union Government to either prescribe the manner in which the the annual capacity of production may be



determined nor does it question its right to formulate a factor relevant for the purposes of estimating production in a factory.

19. As would be evident from the submission which was addressed by Mr. Kohli, the solitary ground of challenge was that if the maximum number of packing machines were to be calculated on the basis as suggested by the respondents, the same would clearly fall foul of the proportionate payment of duty principles which find resonance not just in the Proviso appended to Section 3A(2)(b) but also in light of the various provisions of the CTUT Rules 2010 which have been referred to hereinabove.

20. Having conferred our thoughtful consideration on the grounds on which Rule 8 is essentially challenged, we find ourselves unable to accede to the submissions as addressed by and on behalf of the appellant / petitioner for the following reasons. As is manifest from a reading of Section 3A(2)(a), the Union Government is empowered not only to prescribe the manner for determination of annual capacity of production of a factory, the said provision by way of a legal fiction stipulates that the capacity of production as determined in accordance with the Rules shall be “*deemed*” to be the annual production of goods in that factory. The computation of annual production and the same being computed by virtue of a statutory deemed fiction does not owe its genesis to Rule 8. The said legal fiction stands incorporated in Section 3A(2)(a) itself.

21. Section 3A(2)(b)(ii) further enables the Union Government to prescribe a factor on the basis of which the production capacity of a



factory may be determined. It is in furtherance of the aforesaid provision that Rule 4 constructs the number of packing machines to be the “*factor relevant*”.

22. Rule 8 deals with a situation where a packing machine may either be added / installed or removed or uninstalled in a factory during a month. While dealing with such a contingency, however, it stipulates that the number of operating packing machines in a month shall be taken to be maximum number of packing machines which were installed on any day during the month. It becomes significant to note that Rule 8 speaks of both operating packing machines as well as packing machines installed. The said Rule too incorporates a deeming fiction as would be evident from the usage of the phrase “*shall be taken as*”. As we read Rule 8, it is manifest that in case a machine is added to the production capabilities existing in a factory, the number of operating packing machines of the month shall be deemed to be the maximum number of packing machines installed and existing on any day during that month. The fact that a particular packing machine is operated only for a few days during the month does not result in the duty liability being proportionately reduced or enhanced.

23. This is further evident from the Second Proviso to Rule 8 which stipulates that in case an installed packing machine falls into a state of disuse for any reason whatsoever, notwithstanding the same, it shall be deemed to be an operating packing machine for the month. We are constrained to observe that the appellant / petitioner did not even question the validity of this Proviso.



24. The challenge to Rule 8 must also fail when tested on the anvil of the Second Proviso to Section 3A(2)(b). It becomes pertinent to note that the Second Proviso deals with a contingency where the “*factor relevant*” is altered or modified at any time during the year. It is in such a situation alone that the annual production is liable to be re-determined on a proportionate basis. However, and as is evident from the recital of facts in the preceding parts of this decision, the “*factor relevant*” as prescribed by Rule 4 remained unaltered. The quantification of duty liable to be paid by a manufacturer remained constantly during the period in question hinged upon the number of packing machines in the factory of a manufacturer. The “*factor relevant*” as prescribed by Rule 4 remained unchanged. The Second Proviso to Section 3A(2)(b) would stand confined to a situation where a factor relevant is altered or modified during the year. The said Proviso would thus come into play only if the basis for adjudging production comes to be altered or modified and the duty liability liable to be re-determined on a proportionate basis. In fact, we are of the firm opinion that the Proviso has no inhibiting effect on the deeming fiction which stands incorporated and embodied in Rule 8.

25. We further note that Mr. Kohli had placed reliance on a decision of the Tribunal rendered in **Shree Shyam Pan Products Pvt. Ltd. v. Delhi-I⁴**, and where the Tribunal had taken a view contrary to what has been expressed by us hereinabove. This would be evident from the following extracts of that decision: -

⁴ Final Order dated 03.11.2017 passed in Appeal No. E/51144/2017-EX [SM] by CESTAT, New Delhi



“7. On careful consideration of the submissions made, I find that the issue is whether the appellant is required to discharge differential duty on the products “Pan Masala” which were not produced during the period 1st to 10th June 2013 on the new machine which was installed.

8. The provisions of Rule 9 of the said Rule and more specifically the 3rd proviso needs to be reproduced which I do so.

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:

9. It can be seen from the above reproduced proviso, it enshrines the discharge of duty liability on account of addition and installation of packing machines. The differential duty amount, if any, should be paid by the 5th of the following month. From plain reading of above said proviso, it transpires that the demand of the duty on the products “Pan Masala” can be done so only from the date of production only, if any new machinery installation is done, which in the case is from 10th June, 2013. Since there is no dispute as to the fact that the third packing machine was installed on 10th June, 2013, any demands of the duty liability on an assumed production from the period 1st to 10th June 2013 does not arise, and Ld. Counsel was correct in pointing out that provisions of Section 3A (ii) 2nd proviso thereto of the Central Excise 1944, clearly enshrines that the duty liability has to be discharged on the production of the goods on proportionate basis when there is alteration or modification. The facts being not in dispute that the new machine was installed on 10th June, 2013, the demand for the differential duty from the period from 1st June, 2013 to 10th June 2013 is unsustainable and liable to be set aside and I do so.”

26. However, and significantly, we find that the Tribunal has abjectly failed to advert to the deeming fiction which stands introduced by Rule 8. We thus find ourselves unable to approve the view as taken in *Shree Shyam Pan Products*.

27. The submission advanced by Mr. Kohli and resting upon Rule 9 must also face a similar fate. All that Rule 9 prescribes is the date by



which differential duty may be paid by a manufacturer. The Third Proviso deals with a situation where the number of operating packing machines stand increased during a month. It is in that context that it stipulates that the additional duty which may thus become payable would have to be deposited by the fifth day of the following month. This would clearly appeal to reason since the principal part of Rule 9 requires that the monthly duty be deposited by the fifth day of the same month. If the Rule were to stop at this point, there would clearly be a vacuum in case an additional packing machine were to be added to the production line after the fifth day of the said month. The Third Proviso to Rule 9 consequently cannot possibly be read as diluted the deeming fiction which stands embodied in Rule 8.

28. Accordingly, and for all the aforesaid reasons, we find ourselves unable to hold Rule 8 as being ultra vires Section 3A nor do we find any error in the view as expressed by the Tribunal while passing the order impugned.

29. The appeal as well as the writ petition shall consequently stand dismissed.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

SEPTEMBER 06, 2023
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