

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
NEW DELHI.  
PRINCIPAL BENCH – COURT NO.III**

**Excise Appeal No.51213 of 2022 (SM)**

[Arising out of Order-in-Appeal No.332 (CRM)CE/JDR/2021 dated 21.10.2021 passed by the Commissioner (Appeals), Central Excise and Central Goods and Service Tax, Jodhpur]

**M/s. Shreeraj Panmasala Pvt. Ltd.**

Village-Banar, Jaipur Highway,  
Banar, Jodhpur,  
Rajasthan-342 027.

**Appellant**

Versus

**Commissioner of Central Goods &  
Service Tax and Central Excise,**

G-105, Road No.5, New Industrial Area, Basni,  
Opp. Diesel Shed, Behind AIIMS,  
Jodhpur,  
Rajasthan-3.

**Respondent**

**APPEARANCE:**

Shri Stebin Mathew, Advocate for the appellant.  
Shri Gopi Raman, Authorised Representative for the respondent.

**CORAM:**

**HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)**

**FINAL ORDER No. 51639/2023**

**DATE OF HEARING:03.11.2023  
DATE OF DECISION:13.12.2023**

**BINU TAMTA:**

1. The appellants, Shree Raj Pan Masala are engaged in the manufacture of Pan Masala containing Tobacco i.e. Gutkha falling under C.T.H. No. 24039990 of the Schedule to the Central Excise Tariff Act, 1985 at their factory at Banar, Jaipur- Jodhpur Highway, Jodhpur, Rajasthan. That the officers of Central Excise, Division Jodhpur, searched 4 godown premises located at Banar Chouraha, Banar, Jodhpur; godown opposite Veer Tejaji Hostel, Near tempo stand Nandari, godown at Raneja

Bhavan, Defence Colony, Main Nanderi Road, Jodhpur and godown at Plot No. 273, Tirupati Nagar, Nandari, Jodhpur on 10.08.2008 and 12.08.2008. The search of the said 4 godown premises resulted in seizure of raw materials for manufacture of gutkha and some quantity of manufactured gutkha in loose condition. Notably, the search party also found an assortment of packing material bearing the name of the appellant and several other gutkha manufacturers such as Yogesh Associates, Silvassa, Anand Tobacco Products, Thane, Sunrise Food Products to name a few, which showed that the raw material etc. which were not being used were stored in the godown. A show Cause Notice dated 04.08.2009 was issued demanding Central Excise duty to the tune of Rs. 21,48,30/- and resultant penalties on the appellant and several others. The Adjudicating Authority's order dated 18.04.2011 and the Appellate Authority's order dated 19.02.2013 being against the appellant, the matter travelled in appeal upto CESTAT in the first round and vide order dated 20.05.2015 was remanded to the Original Authority for compliance of natural justice. In the second round, the matter travelled upto the Commissioner (Appeals) and vide order dated 20.11.2019 was again remanded on account of non-compliance of natural justice. In the third round, the Order-in-Original dated 26.03.2021 was passed against the appellant and thereafter the impugned order in appeal dated 21.10.2021 has been passed. The appellant has now challenged this order before this Tribunal.

2. I have heard both sides and perused the records.

3. The main contention of the learned counsel for the appellant is violation of the provisions of section 9D of the Central Excise Act, 1944,

leading to non-compliance of the principles of natural justice. He relied on the Circular No. 1053/2/2017 – CX, dated 10.3.2017 to say that where a statement is relied upon in the adjudication proceedings, it would be required to be established through the process of cross examination, if the noticee makes a request for cross examination of the person whose statement is relied upon in the show cause notice. On this principal, he referred to various decisions. The Revenue on the other hand has supported the findings arrived at by the authorities below and relied on several judgements to say that if the party alleges absence of cross examination of the statements, they need to show what prejudice has been caused and there is no absolute right of cross examination, **M/s. Mittal Impex Vs. Pr. Commissioner, Customs, ICD, TKD, New Delhi – 2022 (4) TMI 143, M/s. Fortune Impex Vs. Commissioner of Customs, Calcutta - 2001 (7) TMI 209, M/s. Divine Impex, Yagnesh Trada Vs. Commissioner of Customs (E), NS - 2019 (369) ELT 858 and Surjeet Singh Chhabra Vs. Union of India [1996 (10) TMI 106 – Supreme Court.**

4. The very first contention raised by the learned counsel for the appellant relates to the provisions of section 9D of the Act, which reads as under : -

**“Section 9D in the Central Excise Act, 1944**

9D. Relevancy of statements under certain circumstances.—

(1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any

prosecution for an offence under this Act, the truth of the facts which it contains,—

[\(a\)](#) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

[\(b\)](#) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

[\(2\)](#) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceedings under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court.]”

5. The Appellant has been raising the aforementioned contention repeatedly on the earlier round of litigation also and as a result, the matter was remanded by the Tribunal as well as by the Commissioner (Appeals). Therefore, in the third round of litigation, I find that the Adjudicating Authority has very cautiously examined the compliance of the principles of natural justice. Firstly, enough opportunities were granted to the appellant for personal hearing on 30.06.2020, 22.07.2020, 18.08.2020, 08.09.2020, 06.10.2020, 20.10.2020, 09.12.2020, 28.12.2020 and 10.02.2021. The authorised person of the appellant, Shri Ajay Singh, Advocate, appeared, and made elaborate submissions and on his request the hearing as well as the cross examination of the witnesses

was completed. Thus, in compliance of the order dated 20.11.2019 passed by the Commissioner (Appeals), reasonable opportunity of personal hearing was granted and principle of natural justice has been complied with. I also find that the Adjudicating Authority has specifically noted that the personal hearing was fixed, but Shri Manoj Kumar, Shri Sunil Gehlot, Shri Gaurav Sankey and Shri Dinesh Kumar Sen, noticees neither appeared nor defended their case and, therefore, he had no option but to decide the case on the basis of the available evidence.

6. I now come to the issue of granting opportunity to cross examine the witnesses. The Adjudicating Authority has specifically noted that during the proceedings of cross examination, out of the six witnesses, four witnesses, namely, Shri Kailash Joshi, Shri Ram Bhadu, Shri Manoj Sen and Shri Sunil Gehlot were cross examined by Shri Ajay Singh Advocate, and since the others had not availed the opportunity, he proceeded to consider the case on the basis of the available record. The cross examination of the said four witnesses as quoted in the order-in- original reads as under : -

**"Shri Kailash**

**"Question** - Please see your statement dated 23.04.2008, 26.04.2008, 27.04.2008, 28.04.2008, 29.04.2008, 30.04.2008, 02.05.2009, 15.05.2009, 30.06.2009 and 28.07.2009 and told that these statement tendered by you are willingly, freely and voluntarily.

**Answer** - All these statements get in written by forcefully.

**Question 2:** Please peruse your statement dated 30.06.2009 and 28.07.2009 wherein you stated that goods which were lying in godowns having no of the same and the said goods were manufactured in Shree Raj Pan Masala,

Banar Jodhpur and made clearance without proper documents.

: The fact is clearly wrong and he did not know that goods were come and stored in godowns.

## 2. **Shri Sunil**

**Question :** Please see your statements dated 7.4.2008, 8.4.2008, 12.04.2008, 16.04.2008 and 28.04.2008 and told that these statement tendered by you are willingly and voluntarily.

**Answer.:-** The statements get in written by forcefully and unwillingly.

**Question 2:** Please tell material goods in 4 godown (1) Plot No.273,Tirupati Nagar, Jodhpur (2), Banar Chouraha, Jodhpur (3), Near Tempo Stand, Nandari Jodhpur (4) Bhawan Jodhpur whether you know that goods belongs Shree Pan Masala, Banar Jodhpur and stored made clearance without proper documents.

**Answer.:-** I was not aware about the goods material stored in godowns.

## 3. **Shri Sen:**

**Question 1** – Please see your statement dated 23.d04.2008 and told that these statements tendered by you are willingly, freely and voluntarily.

**Ans.:-** The statements get in written under pressure.

**Question 2** - Please tell material goods lying in 4 godowns (1) Plot No.273, Tirupati Nagar, Jodhpur 92), Banar Chouraha, Jodhpur (3) Near Tempo Stand, nandari Jodhpur (4) Bhawan Jodhpur whether you know that goods belongs Shree Pan Masala, Banar Jodhpur and stored made clearance without proper documents bills.

■ My work was limited to factory. I am not aware about godowns. I was not aware about the goods and did not know that from where the goods come and stored in godowns.

#### 4. Shree Ram

**Question 1** : Please see your statement dated 15.09.2008 and told that these statements rendered by you are willingly, freely and voluntarily.

**Answer :-** The statements get in written by forcefully and unwillingly.

**Question 2 -** Please tell material goods in 4 godowns (1) Plot No.273 Tirupati Nagar, Jodhpur (2) Banar Chouraha, Jodhpur (3) near Tempor Stand, Nandari, Jodhpur (4) Bhawan, Jodhpur whether you know that the goods belong Shree Pan Masala, Banar Jodhpur and stored made clearance without proper documents bills.

- No, these goods were not pertains to factory. I was not aware about the goods materials. "

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7. The appellant has been given sufficient opportunity in terms of Section 9D of the Act and that is how, Sh. Ajay Singh, Advocate cross examined four witnesses and though opportunity was granted for cross examination of other witnesses but they did not avail the same. Thus no fault can be found with the order of the Adjudicating Authority on this ground. The learned Counsel for the appellant has pointed to decision in our **Arya Fibers Pvt. Ltd versus commissioner of CEX, Ahmedabad – 2014 (311) ELT 529**, where the Tribunal held that rejection of request for cross examination of witnesses, whose statements were relied upon, amounts to violation of principles of natural justice. The said decision is clearly distinguishable as in that case the request for cross examination was rejected by the Adjudicating Authority on the reasoning that no justifiable and tangible reasons have been furnished for cross examination whereas in the present case on the request for cross examination of the witnesses on behalf of the appellant, the same was allowed, and the four

witnesses, who appeared were cross examined. There is no doubt about the principle that when any statement is used against a party, and opportunity of cross examining the person who made those statements have to be given, however, the necessity of cross examination depends upon the facts and circumstances of each case and is required to be given wherever it is considered to be relevant and genuine and is not with intent to delay the proceedings. Reliance is placed on the decision of the Bombay High Court in **Patel Engineering Ltd. Vs. Union of India – 2014 (307) ELT 862 (Bombay)** affirmed by the Supreme Court in **2015 (323) ELT A-73 (SC)**, that right of cross examination cannot be asserted in all inquiries and by denial of cross examination alone, it cannot be concluded that principles of natural justice has been violated. Further, relying in **M/s. Mittal Impex (supra)**, no prejudice has been shown by the appellant to support his contention. The appellant in the present case has already delayed the proceedings on this ground and though opportunity was granted by the Adjudicating Authority but the same was not fully availed.

8. I agree with the findings recorded on the basis of the above cross examination of the witnesses. The statements recorded on several dates could not have been taken forcefully and though the statements were recorded in 2008 and 2009, however, no evidence has been produced to show that the witnesses were in any manner harassed or provoked to give statement against the appellant. The adjudicating authority has further analysed the cross examination of these witnesses to record the finding that they being the active directors could not have been unaware of the duty liability and removal of goods or unaccounted material kept in the



godown. He also evaluated that in the case of Shri Ram Bhadu, the statement made was contradictory in as much as he said that, "the goods do not pertain to their factory", but on the other hand, he said, "he is not aware about the goods and the material stored in godowns".

9. The learned Counsel for the appellant in terms of the liberty sought, as per order dated 03.11.23, has placed on record the order of this Tribunal in the case of the appellant himself, being Final Order No.54125-54130/2017 dated 22.06.2017, which pertained to search conducted in August, 2007, however, the said decision is distinguishable, particularly for the reason that in that case, request for cross examination was rejected on the plea that there is no fundamental right of cross examination in the adjudicating proceedings, there is no link that the goods seized were cleared by the appellant without payment of duty and also that seizure of gutkha in other places by itself will not establish unaccounted clearance. In view of my discussion above, with reference to the present case, no reliance can be placed on the said order.

10. The appellant themselves are not certain about the goods seized from the four godowns and has therefore taken different and contradictory stand. The other limb of submissions is that the goods were seized earlier during the search in the month of April 2008 and were provisionally released on 4.6.2008, which were stored in the four godowns, which has now become the subject matter of the show cause notice. In other words, the goods now seized from these four godowns were actually the goods which were provisionally released by the department earlier. If the contention of the appellant is taken to be true then in that event the burden was on the appellant to produce satisfactory

evidence to co-relate the goods now seized with the goods provisionally released but no document was produced at any stage. In the absence of any evidence the said contention is unacceptable and therefore the identity of the goods remain doubtful. Moreover, as recorded by the adjudicating authority that when the details of the seized goods with the details of the goods seized from various godowns of the appellant in the month of April 2008, were tallied, it was found that not a single entry was common in both the cases and the goods seized from the above mentioned four godowns were different from the goods that were seized from various godowns of the appellant in the month of April 2008 which were provisionally released by the department.

11. Another line of argument taken by the learned Counsel for the appellant is that at the material time, the appellant was having manufacturing units at various places and the appellant purchases the raw material for all units and distribute it to them. Therefore, the raw material which was purchased from the open market to be utilised for trading or distribution to other units was kept in the said four godowns. In support of this contention also the appellant has not produced any evidence and therefore it was observed that the inputs or raw materials for further manufacture of finished goods were in fact procured without any bills and also they were not recorded in any statutory records under Rule 12(1) of Central Excise Rules, 2002, which provides :

**"Rule 12. Filing of Return:-**

**(1)** Every assessee shall submit to the Superintendent of Central Excise a monthly return in the form specified by notification by the Board, of production and removal

of goods and other relevant particulars, within ten days after the close of the month to which the return relates: [**Provided** that an assessee, manufacturing pan masala falling under tariff item 2106 90 20 or pan masala containing tobacco falling under tariff item 2403 99 90, shall also file, along with the return, for the month to which the said return relates, a statement summarizing,-

(i) the purchase invoices for the month with the names and addresses of the suppliers of betel nut, tobacco and packing material along with the quantity of the said goods purchased; and

(ii) the sales invoices for the month with the names and addresses of the buyers, description, quantity and value of goods sold by the assessee.

**Explanation:** When the goods are not sold from the factory, the address of the premises to which the goods are dispatched from the factory shall also be provided.]”

12. The appellant has not submitted any such returns along with a statement in terms of Rule 12(1) and hence the contention raised by the appellant cannot be accepted.

13. Having rejected the contentions of the appellant and considering the seizure in the present case of large quantity of raw material, packing material ready to pack Gutka, also finished Gutka showing the names of various brands of other units and other inputs like Zarda, Lime, Cardamom, Katha, Tobacco, Menthol, Perfume, Clove oil etc. and some other material worth Rs.1,17,04,930/-, and packed Gutka of various brands, having a total MRP of Rs.48,90,854/- along with 1600 kgs.

of loose Gutka having market value of Rs.12,00,000/-, I have no hesitation in upholding the findings that the appellant had indulged in clandestine manufacture and clearance of goods of various brands. The unaccounted gutka and stock of raw material was stored in these godowns without any documentation and any declaration in that regard, solely with intent to use the same for clandestine removal. The Adjudicating Authority rightly held that the goods so seized are liable for confiscation under Rule 25 of Central Excise Rules, 2002 and the excise duty was recoverable along with interest and penalty. This is a clear case of wilful suppression, mis-statement and fraud with intent to evade payment of duty and hence the penalty imposed is justified and does not call for any interference. It is a settled law that it is not necessary to establish mens-rea in tax matters as non compliance of statutory provisions is sufficient. The authorities below are justified in imposing penalty under the provisions of section 11 AC of the Act, relying on the decision of the Apex Court in the case of **Chairman, SEBI versus Shriram Mutual Fund, 2006 (5) SCC 361** that mens rea is not an essential element for imposing penalty. Further, in view of the law laid down in **Union of India versus Rajasthan Spinning and Weaving Mills, 2009 (238) ELT 3 (SC)**, once the ingredients to attract the provisions of section 11AC are attracted, the discretion to quantify the amount of penalty ends and in view thereof, the adjudicating authority has rightly imposed the penalty equal to the duty amount. Similarly, interest under section 11AA has also been rightly imposed as the appellant knowingly and deliberately evaded payment of excise duty.

14. In view of the discussion above, the impugned order holding that the excise duty amounting to Rs. 21,48,030/ is recoverable in terms of proviso to section 11A(1) along with interest under section 11AB and penalty under section 11AC of the Act and also the Gutkha seized from the four godowns is liable for confiscation needs to be affirmed. The appeal, is accordingly dismissed.

[Order pronounced on 13<sup>th</sup> December, 2023 ]

**(Binu Tamta)**  
**Member (Judicial)**

Ckp.