

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

+ **W.P.(C) No.2196/2008**

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Reserved on: 14th February, 2012

Date of Decision: 13th April, 2012

LOK NATH PRASAD GUPTA

.....Petitioner

Through: Mr. S.K. Bagaria, Sr. Adv. with Mr. Kavim Gulati, Praveen Kumar, Mr. Sanjay K. Shandilya, Mr. Gopal Das, Mr. Saurabh Bagaria and Ms. Poonam Singh Advocates.

Versus

UOI & ORS.

....Respondents

Through: Mr. Mohan Parasaran, ASG with Mr. Satish Aggarwala and Mr. N. Heyappan, Advs.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not ? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

R.V. EASWAR, J.:

This is a petition filed by Loknath Prasad Gupta under article 226 of the Constitution of India praying for the issue of an appropriate writ, order or direction to the Customs and Central Excise Settlement

Commission (hereinafter referred to as ‘CCESC’) quashing their order passed on 29.02.2008 in so far as it relates to the duty/ liability of ₹ 38,82,97,992/- and in so far as it rejects the claim of the petitioner for (a) immunity from penalty of ₹ 40,00,00,000/- and (b) immunity from interest payable by the petitioner.

2. The petitioner is the proprietor of M/s. Loknath Prasad Gupta carrying on business in the manufacture of “*Khaini*” (chewing tobacco) under the brand name “Raja” and “Champion”. He owns two factories, one at Delhi and another at Kolkata. The business is being carried on by him since 1987. The factories are registered under the relevant provisions of the Central Excise Act, 1944 (hereinafter referred to as ‘Act’).

3. The branded chewing tobacco which is also known colloquially as “*Khaini*” is exigible to central excise duty under the Act read with Chapter 24 of the first schedule to the Central Excise Tariff Act, 1985. In the present writ petition, the dispute centres around the manufacture of “Raja” brand *Khaini* and there is no dispute regarding “Champion” brand. In order to manufacture *Khaini*, the following raw materials are required: -

1.	Raw Tobacco	900.0 kgs.
2.	Snuff Powder	137.5 Kgs.
3.	Refined Groundnut Oil	125.0 Kgs.

4.	Lime	75.0 Kgs.
5.	Other Chemicals	
	(a) Kewra Water	1.5 Kgs.
	(b) Menthol	2.0 Kgs.
	(c) Black Pepper	9.0 Kgs.

Grand Total 1250.0 Kgs.

4. In addition to the above, packing materials are also required which are called “laminates”. The *Khaini* is packed in pouches of 5 gm. and 9 gm. each.

5. The officers of the Directorate General of Central Excise Intelligence searched the factories of the petitioner located both in Delhi and Kolkata on 31.05.2005. Searches were also conducted at the residence of the petitioner. On the basis of the materials collected during the search, several queries were raised and put to the petitioner. After examining the explanation and replies of the petitioner, and after considering the material gathered during the search, the Additional Director General of the Directorate of Central Excise Intelligence, who is respondent No.2 in the petition, issued a showcause notice seeking the explanation of the petitioner regarding the clandestine clearance of “Raja” brand *Khaini* amounting to ₹ 105,37,71,452/- for the period from 01.05.2001 to 31.03.2006. The petitioner was called upon to show-cause why excise duty should not be paid by him on the

above and also why no penal action shall be taken against him. The petitioner was also asked to showcause why the seized *Khaini* should not be confiscated. There were two parts to the show-cause notice which were as under: -

“(a) It was alleged that 13,51,057 Kg and 35,31,150 Kg of raw tobacco was received by the Petitioner’s Delhi and Kolkata factories but it was not accounted for in the records. On this count, the amount of duty evaded was alleged to be ₹ 51,78,65,995/-

“(b) It was alleged that weight of water was not taken into consideration and this resulted in suppression of production involving duty evasion of ₹ 53,57,18,425/-”

6. It was the petitioner’s stand that there was evidence to show evasion of excise duty/ liability only to the extent of ₹ 18,26,81,905/- from both the factories and that the excess of duty liability over and above the said amount was not supported by any evidence and, therefore, the petitioner was not liable to pay any duty over and above the aforesaid amount.

7. While matters rested as above, the petitioner filed an application u/s 32E of the Act on 06.11.2006 before the CCESC, which is respondent No.5 in the present petition, seeking settlement of its case arising out of the show-cause notice. In the application, the petitioner

admitted additional excise duty liability of ₹ 18,26,81,905/- towards settlement of the dispute involving alleged duty evasion of ₹ 105,37,71,452/- for the period 01.05.2001 to 31.03.2006. In the application for settlement, he explained that the admitted duty liability related to *Khaini* cleared from his factory without payment of duty and that the duty to this extent (i.e., ₹18,26,81,905/-) was supported by documents, evidence and statements collected by the central excise authorities. As regards the balance of duty alleged to have been evaded by the petitioner as per the show-cause notice, the petitioner sought to explain what he considered to be the correct position before the CCESC. It was *inter alia* explained that the excise duty demand over and above the aforesaid amount of ₹ 18,26,81,905/- was based on certain allegations regarding receipt of raw tobacco and non-addition of water in the weight of the final product and it was submitted that these allegations were based purely on suspicion and surmise and were not true. It was pointed out that the allegation of duty evasion over and above the aforesaid amount by the central excise authorities was on theoretical assumptions and calculations without any evidence to show purchase of raw material that would be required for the manufacture of the *Khaini*. The petitioner stated further that out of the additional duty liability admitted in the

application for settlement, duty of ₹ 10,00,00,000/- had already been paid.

8. It appears that the petitioner was asked by the CCESC to file a separate application under Section 32E in respect of the Kolkata factory in Calcutta Bench and seek transfer of the same to the Principal Bench of the CCESC at New Delhi. This direction was complied with by the petitioner. By order dated 06.03.2007 the CCESC admitted the settlement application in accordance with Section 32F(1) of the Act subject to the petitioner depositing the balance amount of the admitted liability. In pursuance of this direction the petitioner deposited the balance duty of ₹8,26,81,905/- on three dates namely 15th, 16th and 21st March, 2007. Thus, the duty of ₹ 18,26,81,905/- admitted by the petitioner before the CCESC was paid.

9. The CCESC, after hearing the parties and after taking into account all the material/ evidence, passed its final order on 27.02.2008 under Section 32F(7) of the Act. In this order, which is under challenge before us, it was held by the CCESC as under: -

(a) The petitioner is liable to pay excise duty of ₹ 58,09,79,897/-. Since the petitioner had paid ₹ 18,26,81,905/-,

the balance duty of ₹ 38,82,97,992/- was directed to be paid by the petitioner within 15 days of the receipt of the order.

(b) The petitioner was not given full waiver from penalty. He was directed to pay ₹ 40,00,00,000/- by way of penalty and the amount of penalty in excess of the aforesaid amount was waived. The penalty amount of ₹ 40,00,00,000/- was also directed to be paid within 15 days of the receipt of the order.

(c) The petitioner was directed to pay interest at the rates applicable during the relevant period. No immunity was granted.

(d) The seized goods were directed to be released on payment of fine in lieu of confiscation. Payment of redemption fine was also ordered.

(e) Immunity was granted to the petitioner from prosecution under the Act, subject to payment of duty, interest, fine and penalty as directed by the order.

10. It is the aforesaid order of the CCESC passed on 29.02.2008 that is under challenge before us in the present writ petition.

11. The learned counsel for the petitioner even at the outset fairly stated that he would not press the challenge to the duty liability before

this Court and that he would confine the claim only to the penalty and interest directed to be paid by the petitioner by the order of the CCESC dated 29.02.2008. In its order under challenge, so far as the interest and penalty are concerned, the CCESC directed as under: -

“Interest: - Since the main applicants did not pay the duty when due, they have taken financial accommodation at the cost of exchequer. Having regard to facts and circumstances of this case, Bench is not inclined to give waiver from interest. Bench orders payment of interest at the rate(s) applicable during relevant period. Duty evaded has been calculated financial yearwise in the Show Cause Notice. Hence interest for the duty evaded in a financial year may be calculated with effect from 1st April of the financial year following that financial year. Revenue is directed to calculate the interest as per this order and inform the main applicant about the same within 15 days of receipt this order, where upon the main applicant shall pay the amount of interest within 15 days of the receipt of such intimation.

Penalty: - Keeping in view of the scale of evasion and other circumstances of the case, the Bench is not inclined to grant full waiver from penalty. However, keeping in view the co-operation extended by all the applicants during the settlement proceedings, the Bench grants immunity from penalty to M/s Loknath Parsad Gupta Unit No.I and II in excess of ₹ 40,00,00,000/- (Rs.Forty Crores only) under the provisions invoked in the SCN. They are directed to deposit the amount of penalty of Rs.Forty Crores within 15 days of receipt of this order. Full waiver from penalty is granted to the co-applicants.”

12. It is submitted on behalf of the petitioner that a sum of ₹ 13,00,00,000/- amounting to 50% of the interest of ₹ 25.87 crores, which is amount of interest calculated as per the orders of the CCESC, has been paid by the petitioner. The penalty of ₹40,00,00,000/- has also been paid in four equal installments as per the directions of the Supreme Court in SLP No.19974/2008 dated 16.09.2008.

13. The arguments of Mr. Bagaria, learned counsel for the petitioner, so far as the interest directed to be paid by the CCESC is concerned, may be summarized as under: -

(a) The petitioner had fully co-operated in the proceedings before the CCESC as required by Section 32K of the Act and this has been recognised even by the CCESC. In the last page of their order they have observed that the petitioner may be granted immunity from penalty in excess of ₹ 40,00,00,000/- “keeping in view the co-operation extended by all the applicants during the settlement proceedings”.

(b) In several orders passed by the CCESC in the case of *Khaini* manufacturers, the CCESC has directed the manufacturers to pay simple interest at only 10% per annum, that too in cases where the show-cause notice was issued

alleging higher duty evasion than in the petitioner's case, which was reduced by the CCESC to almost 50% thereof. As an example the order of the CCESC dated 15.02.2007 in the case of M/s. Murari Lal Harish Chandra Jaiswal (P) Ltd. was cited. In this case though the show-cause notice alleged excise duty evasion of ₹ 34.50 crores, the CCESC had reduced the same to ₹ 16.70 crores and even in such a case the interest was directed to be paid only at 10% per annum.

(c) The CCESC has in several cases passed orders directing the levy of token amount of interest and consistent therewith, should have also reduced the interest to be paid by the petitioner to 10% per annum.

(d) Full and true disclosure in the settlement application does not necessarily mean that the applicant before the CCESC should declare the entire duty mentioned in the show-cause notice. Though the petitioner is not challenging the duty liability determined payable by the petitioner, that is only because the petitioner is desirous of putting a quietus to the matter.

(e) There are contradictions and weaknesses in the order of the CCESC determining the duty/ liability at ₹ 58,09,79,897/- as against the admitted liability of ₹ 18,26,81,905/-.

(f) As per Section 32K of the Act as it existed during the relevant time, the CCESC had the power to grant immunity from interest either fully or partly. It was the consistent practice to grant immunity from interest in full or in excess of 10% per annum. In the petitioner's case the CCESC has directed payment of interest at the applicable rates and on this basis the central excise authorities have quantified the interest by applying the rates of 24%, 18% and 13% for different periods. The CCESC has thus discriminated between persons similarly situated which is in violation of article 14 of the Constitution of India.

14. The arguments of Mr. Bagaria, learned counsel for the petitioner with regard to the penalty of ₹ 40,00,00,000/- imposed by the CCESC are that the CCESC has taken into account only the co-operation extended by the petitioner in proceedings before it and that it has omitted to take into consideration the fact that the petitioner has made a full and true disclosure of the duty liability. He submitted that the full and true disclosure contemplated by Section 32K(1) of the Act

does not mean disclosure of the duty liability demanded in the show-cause notice and that it means what the petitioner has in truth and reality evaded by way of non-payment of the duty. He pointed out that the entire addition by the CCESC was based only on assumptions, conjectures or possibilities and that certainly two or more views were possible, but this debatable addition cannot by itself lead to the conclusion that the petitioner has not made a full or true disclosure of its duty liability. It is highlighted that the case of the Revenue and computation made by them was rejected as illogical. In particular it was pointed out that with regard to the water consumption addition of ₹ 17,00,00,000/- made by the CCESC the calculations are made on probabilities and possibilities. It was further pointed out that while calculating the moisture content in the tobacco, it is to be noted that once the inherent moisture in the tobacco is admitted, the question as to how much moisture was present in the tobacco would also be a matter of estimate which cannot affect the truth and fullness of the disclosure. The sole basis for fastening the excise duty/ liability over a period of 5 years upon the petitioner was only an estimate of the inherent moisture in the tobacco. When there is no clinching factual or expert evidence regarding the water consumption and for the further addition of ₹ 17,00,00,000/- made by the CCESC it cannot be said that there was no full and true disclosure by the petitioner.

15. As against the above arguments of the learned counsel for the petitioner, Mr. Mohan Parasaran, the learned Additional Solicitor General of India, submitted that the CCESC has not acted arbitrarily but has applied its mind to each and every aspect of the case as required by Section 32F (7) of the Act. According to him, even in the matter of determining the amount of excise duty evaded by the petitioner, the CCESC has supported its conclusion with reference to incontrovertible figures and percentage and calculations as is evident from paragraphs 26 to 30 and 41 to 44 of its order. He contended that the claim of the learned counsel for the petitioner that there were several contradictions and weaknesses in the method adopted by the CCESC in arriving at the excise duty evaded by the petitioner is untenable. The non-waiver of any part of the penalty ₹ 40,00,00,000/- or the interest liable to be paid by the petitioner was a well-considered decision taking into account all aspects of the case and it cannot be said that the CCESC has exercised its discretion improperly or non-judicially.

16. We have carefully considered the rival contentions. Judicial review of the order of the CCESC has its own parameters and limitations. We can only examine the decision-making process but not the actual decision arrived at by the CCESC, unless the decision is irrational, illegal or perverse. This position is well settled and

reference may only be made to the judgment of S.B. Sinha, J. speaking for the Supreme Court in ***State of U.P. and Anr. Vs. Johrimal (2004) 4 SCC 714***. The following observations sum up the entire legal position:-

“It is well-settled that while exercising the power of judicial review the Court is more concerned with the decision making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the Court is not competent to exercise its power when there are serious disputed questions of facts; when the decision of the Tribunal or the decision of the fact finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision maker's opinion on facts is final. But while examining and scrutinizing the decision making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the court of judicial review can reappraise the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touchstone of the tests laid down by the Court with special reference to a given case. This position is well settled in Indian administrative law. Therefore, to a limited extent of scrutinizing the decision making process, it is always open

to the Court to review the evaluation of facts by the decision maker.”

17. The CCESC i.e. Customs and Central Excise Settlement Commission was established under Section 32 of the Central Excise Act. The settlement machinery is meant for providing a chance to the tax evader who wants to turn a new leaf as recommended by the Direct Taxes Enquiry Committee, popularly known as Wanchoo Committee. However, the CCESC has to settle cases only in accordance with law and the provisions of the Act and it has no power to go beyond those provisions. The power to grant immunity from penalty is conferred upon the CCESC by sub-section (1) of Section 32K of the Act. If it is satisfied that any person who made the settlement application “has co-operated with the settlement commission in the proceedings before it and has made full and true disclosure of his duty liability”, it may grant to such person, subject to conditions which it may think fit to impose, immunity from the imposition of any penalty, fine and interest under the Act with respect to the case covered by the settlement. Sub-section (2) provides for withdrawal of immunity if it turns out that the terms of the order of settlement regarding payment of the duty are not complied with. Sub-section (3) also provides for withdrawal of the immunity if the

CCESC is satisfied that it was obtained by concealment of material particulars or by giving false evidence.

18. In view of the settled legal position, we are to confine ourselves to examining the decision making process followed by the CCESC in the present case. As regards the penalty of ₹ 40,00,00,000/- imposed on the petitioner, we are unable to find fault with the decision-making process adopted by the CCESC. There may be some merit in the argument of the learned counsel for the petitioner that full and true disclosure may not necessarily mean extent of the excise duty liability as stated in the show-cause notice. However, one has to keep in mind the entire conspectus of facts. In the present case, the CCESC has observed in paragraph 48 of its order as under: -

“48. Before finally settling the case, Bench would like to observe that it is a case of clandestine manufacture and clearance of goods which continued for a very long time. Amount of evasion is huge. Applicants have admitted clandestine manufacture and removal of Khaini only in respect of the quantities of Raw material to the extent that had gone into the manufacture of Khaini on which duty liability of Rs.18,26,81,905/- was worked out. Beyond this, their disclosure cannot be taken as full and true. Hence they do not deserve full exemption from penalty and this aspect needs to be kept in view while deciding on the extent and conditions of immunities.”

19. We cannot possibly say that while observing as above, the CCESC took into account any irrelevant material or ignored relevant material. The conduct of the petitioner was a relevant factor to be taken into account. The fact that the petitioner admitted clandestine manufacture and removal of *Khaini* is also a relevant factor to be taken into account. Moreover, the CCESC has noted that such clandestine manufacture had continued for quite a long period (almost 5 years). This is also a very important factor which the CCESC has rightly taken into consideration. The duty admitted by the petitioner before the CCESC was ₹ 18,26,81,905/- which was enhanced by the CCESC to ₹ 58,09,79,897/-. There is a difference of ₹ 40,00,00,000/- (approximately) which is quite a substantial difference. The CCESC has accepted that the petitioner had extended co-operation in the proceedings before them. However, section 32K(1) of the Act requires both co-operation and full and true disclosure of the duty liability. The huge difference between the duty liability admitted by the petitioner before the CCESC and the ultimate duty liability determined by the CCESC, was an important and relevant circumstance. The contention of Mr. Bagaria, learned counsel for the petitioner, to the effect that the calculations and working of the CCESC for arriving at the duty liability are based on surmises or conjectures or probabilities and, therefore, it cannot be said that the

petitioner did not make a full or true disclosure of the duty liability is only one facet of the case. In this connection, we have referred to paragraphs 41 to 44 of the impugned order. We have gone through the same and record our observations in the following paragraphs.

20. In paragraph 41 to 44 of the impugned order, the CCESC has referred to the fact that the dispute was not with regard to the total weight of inputs that are required to manufacture *Khaini* and the dispute was only about the weight of the water that was to be added. The central excise authorities had relied upon certain test reports to ascertain the water contained in the *Khaini*, but the CCESC rejected them as not reliable and this fact is recorded in paragraph 35 of the impugned order. The calculations made by the central excise authorities were commented upon and it was observed that the formula adopted by them did not account for any evaporation during manufacturing process. Having rejected the test reports relied upon by the central excise authorities and having disputed the accuracy of the calculations made by them, the CCESC proceeded to make its own calculations. It is this exercise which is reflected in paragraphs 41 to 44 of the impugned order. It is not necessary to examine in detail the calculations made by the CCESC in these paragraphs. Suffice to note that these calculations, as rightly pointed out by the learned Additional Solicitor General, show application of mind to the claims put forth by

the petitioner. The impugned order shows that the estimate and the calculations were based on strong probabilities and sound logic and they are not vulnerable to the criticism of being a mere *ipse dixit*. When clandestine removal was established, duty evasion has to be necessarily estimated in the absence of any direct evidence or material to show the exact quantum of duty-evasion. In paragraph 42 of the impugned order, the CCESC has rightly observed that proceedings for settlement cannot be circumscribed by strict rules of evidence and that any minor inconsistencies and inaccuracies in the calculations by the central excise authorities cannot justify rejection of the entire procedure adopted in reaching the estimate. The question of moisture content in the finished *Khaini* was taken up for detailed examination by the CCESC. It would be appropriate to re-produce paragraphs 42 to 44 of the impugned order in order to highlight the efforts taken by the CCESC to arrive at a reasonable estimate of the excise duty liability: -

“42 As mentioned earlier, settlement proceedings are different in nature from other proceedings such as adjudication proceedings or trial is a court of Law. Such proceedings cannot be bound down by strict rules of Evidence Act or the concept of total collaboration of Evidence. To reach a settlement, it may sometimes be appropriate to logically examine the evidence and if it contains some inconsistency, to remove the same rather

than reject the entire evidence. Bench is therefore, of the opinion that minor inconsistency should be removed and the final view should be tested with the help of the process Panchnama. It is a fact that %ages in which the ingredients were put as mentioned in para 21 above are not disputed by both the sides. What is disputed is the quantum of moisture content in the finished Khaini. The Bench has observed that if all the ingredients including moisture are added the resultant total comes to 121.8 whereas the weight of the ingredients is in percentage basis which is relatable to 100. Further, the Tobacco content has been shown on dry basis in the test reports whereas the weight percentage of other ingredients include moisture content and moisture has also been calculated separately. The Bench notes that the moisture cannot exist in vacuum and has to be contained in a substance. Further, in case the weight of the moisture is to be excluded, it is difficult to exclude weight of 1 ingredient individually. Either the moisture is extracted from all the products or none at all. Keeping in view the above, Bench finds that in order to arrive at actual weight of the Tobacco which has been shown on the dry basis in the test reports, the most appropriate method would be to segregate the percentage of moisture content altogether and then arrive at some conclusion. The Bench further notes that in addition to Tobacco Snuff being the products of the same agricultural product would also be forming part of the Tobacco percentage shown in the test reports. Thus, the weight of the Snuff in the ratio in which the same have been put, in needs to be subtracted from the quantity of Raw Tobacco as shown in the test reports. Further, in order to arrive at the total Tobacco content in its natural state in which the same

had been put in the manufactured Khaini, the same percentage that was inherent in the Raw Tobacco needs to be added. Keeping in view the above parameters, the Bench finds that simply to calculate the correct percentage of Tobacco in the finished Khaini on the basis of the total of the product being 100, would be the correct method.

43 In view of the above observations, the Bench proceeds to calculate the quantity of Raw Tobacco in its natural state contained in 100 Kgs of finished Khaini as under: -

The mean weight percentage of Tobacco on dry basis as per test report – 64.95. The ratio of Tobacco + Snuff is 72.11.

Thus, the total of Tobacco + Snuff = 72+11=83.

Accordingly, the ratio of Tobacco + Snuff on dry basis would be

For Tobacco - $72+83 \times 64.95 = 56.34$.

For Snuff - $11+83 \times 64.95 = 8.61$.

Total - $= 64.95$.

Thus content of Tobacco on dry basis is $= 56.34$

By adding 10% moisture in Tobacco comes to

(as per test report) $= 56.34 \times 10 \div 100 = 5.63$

The total quantity of Tobacco with inherent moisture would be $= 61.97$ (say 62)

Hence the ratio of Tobacco in finished Khaini $= 62:100$

Having come to the conclusion that a quantity of 62 Kgs of Raw Tobacco would make 100 Kgs of finished Khaini, the Bench, in order to test the veracity of the above calculations, undertook to check whether the above calculations confirm to other parameters as given in the test report.

44 Bench finds that total weight of all ingredients excluding water that had been put into the product as per a process panchnama was 100 Kgs of ingredients. 50 Kgs of water was added to it. The Bench is of the view that all the quantity of water put in as per the process panchnama cannot remain part of the total quantity of Khaini manufactured as claimed by the Revenue since there were various processes such as mixing, curing etc. involved during the manufacture and some part of the same would evaporate. The Bench is also not inclined to believe the version of the applicant that the whole quantity of water put in would evaporate during the process. It also defies logic. Considering that the total weight of all the ingredients that had been put in were 100 Kgs and a quantity of 50 Kgs of water had been added into it, some of which would evaporate during the process of manufacture and the total of all the ingredients including moisture would not be 150 Kgs. In this regard the Bench observes that the said ratio of Tobacco to Khaini which is 62:100 confirms to the observations made above. If the weight of other ingredients is added to quantity of Tobacco, the same comes as under: -

<i>Tobacco</i>	<i>62</i>
<i>Lime</i>	<i>06</i>

<i>Ground Nut Oil</i>	<i>10</i>
<i>Snuff</i>	<i>11</i>
<i>Other</i>	<i>01</i>
<i>Total</i>	<i>90</i>

Thus in a quantity of 100 Kgs, 10 Kgs is water. If inherent moisture of all the other ingredients, which comes to about 8% is added to it, the total water contents become 18 Kgs. It is seen that the Ground Nut Oil is also liquid which should also for part of the liquid content. That makes all the liquid contents to about 28% which is quite nearer to the figure of 33% moisture shown in the test report and appears to be very reasonable.

In view of above discussions, the Bench is of the view that in the circumstances of the case where there is controversies about test reports and the law sides did not agree to a fresh test, the finding duly verified from different angles would be the best possible and most accurate formula to reach the total amount of production of Khaini on the basis of the quantity of Raw Tobacco. Bench accordingly, determines that 62 Kgs of Raw Tobacco would result in the manufacture of 100 Kgs of Khaini in applicant's case. Final production figures of Khaini are therefore to be worked accordingly."

These observations of the CCESC more than adequately demonstrate the application of mind and the efforts of the CCESC to arrive at an estimate of the excise duty due from the petitioner which can be said

to be close to the actual duty payable by the petitioner. They also show that there is no flaw in the decision-making process in arriving at the excise duty liability of the petitioner.

21. If this much is granted, it should follow that the impugned order, in so far as the penalty is concerned, is beyond the bounds of judicial review. It must be recognised that in the very nature of things the real excise duty payable by the petitioner must be necessarily based on calculations and figures which must be derived from the material or evidence present before the CCESC. That such figures and calculations are not foolproof and could be less than 100% accurate cannot be an argument available to the petitioner in order to put forth its claim for immunity from penalty to the extent of ₹ 40,00,00,000/-. As already pointed out the petitioner had admittedly indulged in clandestine manufacture and removal of excisable goods without payment of excise duty. Obviously, there would be no record showing precisely the figure of excise duty sought to be evaded by the petitioner. But for that reason the central excise authorities or the CCESC cannot throw up their hands and plead helplessness; they have to perforce arrive at a reasonable estimate of the *Khaini* that has been cleared without payment of excise duty. Such an exercise has been carried out by the CCESC and the efforts taken by them in arriving at the excise duty sought to be evaded by the petitioner in such a manner

that it is as close as possible to the actual duty sought to be evaded is palpably and ably demonstrated in the order, if we may say so with respect.

22. We are unable to subscribe to the contention of the learned counsel for the petitioner that the scale of evasion of duty is a totally extraneous reason for not granting full immunity from penalty. The case before us is one where evasion of duty to the extent of ₹ 40,00,00,000/- (approximately) has been worked out. It is a substantial amount and in our opinion the CCESC has rightly kept it in mind while refusing to grant immunity. We are also unable to assent to the proposition that this is a case where only a token penalty ought to have been levied. We are satisfied that the CCESC has exercised its discretion properly, having due regard to all relevant factors.

23. So far as the interest is concerned, the case of the petitioner appears to us to stand on a better footing. It may be made clear at the outset that the learned counsel for the petitioner has agitated only the rate of interest. He has contended that in several other cases the CCESC has charged interest only at the rate of 10% whereas in the petitioner's case it has ordered payment of interest at the rates applicable during the relevant period. It is stated that for the relevant

period three different rates were applicable – 24%, 18% and 13%. It is submitted that despite different rates of interest prescribed by the statute for the relevant period, the CCESC in several cases has either granted full immunity from payment of interest or as restricted the rate of interest to 10% for the entire period. A list of such cases was given. The submission is that there is no ground made out for discriminating against the petitioner. It is pointed out further that the total interest liability has been calculated by the central excise department at ₹ 25.87 crores out of which the petitioner has paid ₹ 13,00,00,000/-. Reliance is placed on the judgment of the Bombay High Court in *West Coast Ingots Pvt. Ltd. v. UOI*, 2008 (232) ELT 21.

24. We find force in the submissions of the learned counsel for the petitioner so far as the waiver of interest is concerned. We may hasten to add that we are not inclined to grant full immunity from the interest. However, having regard to the fact that it has been the uniform practice of the CCESC to direct payment of interest @ 10% for the entire period, as seen from its orders filed before us, it seems to us that to direct the petitioner to pay interest at the different rates in force during the material period would be inconsistent and may even be discriminatory. This aspect has not been considered and noticed in the impugned order. Rather than remanding this old matter, we have

examined the issue. We are informed that interest @ 10% for the entire material period would amount to ₹ 19.56 crores as against ₹ 25.87 crores directed to be paid by the CCESC. The petitioner has already paid ₹ 13,00,00,000/-. He is directed to pay the balance of interest on the footing that interest payable would be at the rate of 10% for the entire relevant period. Immunity is allowed with regard to the balance of interest over and above the said percentage.

25. In the result the writ petition is partly allowed, the only relief being with reference to the rate of interest payable by the petitioner. All interim orders stand vacated. There shall be no order as to costs.

(R.V. EASWAR)
JUDGE

(SANJIV KHANNA)
JUDGE

APRIL 13, 2012
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