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

+ CEAC 9/2017

COMMISSIONER OF CENTRAL EXCISE, DELHI-II ..... Appellant
Through: Mr. Harpreet Singh, Senior Standing Counsel with Ms. Namrata Bharti, Advocate.

versus

M/s. BALAJEE PERFUMES ..... Respondent
Through:

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE CHANDER SHEKHAR

O R D E R

% 24.05.2017

CM No.20015/2017 (for condonation of 66 days' delay in filing the appeal)

1. For the reasons stated in the application, the delay in filing the appeal is condoned and the application is allowed.

CEAC No.9/2017

2. This is an appeal by the Commissioner of Central Excise, Delhi-II under Section 35 G of the Central Excise Act, 1944 (CE Act) against the final order dated 5th August, 2008 by the Customs, Excise and Service Tax Appellate Tribunal ('CESTAT') in Excise Appeal Nos. 2017-2018 of 2008. By the said impugned order, the CESTAT set aside the order dated 20th June, 2008 passed by the Commissioner of

Central Excise (Appeals) (CCE (A) , Delhi-II.

3. The facts in brief are that a show cause notice ('SCN') dated 21st March 2005, was issued to the Respondent and seven other entities/persons. In this it was stated therein that the Respondent was having its factory in Jhilmil Industrial Area in Delhi (East) and were engaged in the business of manufacture of 'Maruti', 'Kaveri' and 'Ajeet' brands of pan masala containing tobacco commonly known as 'Gutkha' falling under Chapter Sub-heading 2404.49 of the Central Excise Tariff Act, 1985 ('CETA'). The Respondent was registered with the Central Excise Department under the jurisdiction of Central Excise VII Division of Delhi-II Commissionerate. The Respondent was a partnership firm. Its partners were Shri Varun Gupta and Smt. Deepa Gupta.

4. It was stated in the SCN that the Directorate General of Central Excise Intelligence ('DGCEI') had gathered intelligence that the Respondent was indulging in clandestine clearance of 'Maruti', 'Kaveri' and 'Ajeet' brands of Gutkha to their dealers. On this basis the factory premises and other related premises of the Respondent were searched on 7th October, 2004 and certain goods/records/documents were seized. 65,940 pouches of 'Maruti' brand Gutkha (1.25 grams each) with Maximum Retail Price ('MRP') of Rs. 0.50 per pouch valued at Rs. 32,970; 2,760 pouches of 'Kaveri' brand Gutkha (1.25 grams each) with MRP of Re. 1 per pouch valued at Rs. 2,760, both totally valued at Rs. 35,730. These were found in excess of the stock recorded in the RG-1 Register/Daily Stock Account. Seizures were also

made from the premises of the main dealers of the Appellant.

5. During the course of investigation statements were recorded of Mr. Pawan Prabhu, Proprietor of M/s. Devakikrishna Traders, Hubli; Mr. Varun Gupta, partner of the Appellant; Mr. Avinash Baliga, Proprietor of Damodar Traders, Belgaum; Mr. Bharat Porwal, partner of M/s. Super Traders, Belgaum; Mr. Shashikant J. Porwal of M/s. Super Stores, Belgaum and Mr. Abdul Rashid, Proprietor of M/s. RK Zarda Stores, Belgaum. On the basis of the investigations, the SCN was issued to the Appellant and others *inter alia* to show cause as to why the Central Excise duty amounting to Rs. 4,25,266 should not be demanded and the seized material not confiscated. Penalties under Section 11 AC of the CE Act and Rule 25 of the Central Excise Rules, 2002 ('CE Rules') were also proposed.

6. The SCN made it clear that it was "being issued only in respect of goods seized in the premises of Balajee, Residence of Shri. Varun Gupta, Partner of Balajee, M/s. Devakikrishna Traders Hubli, M/s. Damodar Traders, Belgaum, M/s Super Traders Belgaum, M/s Super Stores Belgaum, M/s RK Zarda Stores Belgaum and M/s. Lovely Sweets (LVT) Hubli and is without prejudice to any other notices/action that has been or may be initiated against them or their personnel under the said Act and Rules or any other law for the time being in force in India." This was because on the issue of clandestine removal of goods a separate SCN was issued on the same date followed by a further SCN on 26th October 2006. The said SCNs were adjudicated by the CCE who passed an adjudication Order-in-Original

dated 25th March 2008. A demand of Rs. 3,73,39,131 and penalty of equal amount was confirmed against the Appellant and a personal penalty of Rs. 5 lakhs each against certain dealers. The appeals against the said order were allowed by the CESTAT by an order dated 15th January 2016. The Department's appeal against that order (CEAC 11 of 2016) was dismissed by this Court on 11th April 2017. IN of the On Appeal by the Appellant herein was passed.

7. Reverting to the SCN in the present case which was regarding the goods seized of the value of Rs. 35,730 from the premises of the Appellant, on 22nd March, 2007, the Assistant Commissioner passed the adjudication order, ordering *inter alia* for the confiscation of the goods seized and for penalties of Rs. 3,89,034 on the Appellant under Section 11 AC of the CE Act read with Rule 25 of the CE Rules. A penalty was also imposed on Mr. Pawan Prabhu.

8. Mr. Pawan Prabhu and the Appellant filed an appeal before the CCE(A) who by the order dated 20th June 2008, dismissed it.

9. Against the dismissal of the above appeal, both the Appellants approached the CESTAT, which by the impugned order allowed the appeals. In the impugned order dated 5th August 2016, it was noted by the CESTAT that in respect of the SCN dated 21st March, 2005 regarding clandestine removal of goods by the Appellant a separate adjudication order had been passed on 25th March 2008, which in appeal was set aside by the CESTAT by a separate order dated 15th January 2016.

10. In the impugned order dated 5th August 2016 it was held by the CESTAT that since in the proceedings initiated by the Revenue separately to establish clandestine clearance and demand of duty stood set aside already by the CESTAT, the seizure of the goods which lead to the SCN in the present case was also held to be not sustainable and set aside. The proceedings for imposition of personal penalties on the concerned persons and various traders was also set aside.

11. The CESTAT in the impugned order relied on its earlier decision dated 15th January, 2016 which dealt with the question of clandestine removal and the consequential demand. Since that was invalidated, the CESTAT in the impugned order considered it appropriate to hold that the impugned order of the Assistant Commissioner as confirmed by the CCE (A) were also unsustainable in law.

12. It requires to be noted that by an order dated 11th April, 2017 in CEAC 11/2016, this Court has dismissed the appeal of the CCE against the said order dated 15th January, 2016 of the CESTAT. The Court held that no substantial question of law arose from the said order which set aside the order confirming the demand on the allegation of clandestine removal.

13. Consequently the Court is of the view that the impugned order of the CESTAT in the present case also does not give rise to any substantial question of law.

14. The appeal is accordingly dismissed but in the circumstances with

no orders as to costs.

<u>CM No.20014/2017 (Stay)</u>

15. In view of the dismissal of the appeal, this application does not survive and is disposed of as such.

S.MURALIDHAR, J

CHANDER SHEKHAR, J

MAY 24, 2017
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