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

% *Date of Decision: 15th May, 2023*

+ **SERTA 3/2023**

THE COMMISSIONER OF CENTRAL TAX,
DELHI NORTH

..... Appellant

Through: Mr. Atul Tripathi, SSC with Mr. R.
K. Shah, Adv.

Versus

M/S OM FRAGRANCES & ANR.

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J. (ORAL)

CM No.24622/2023 (for exemption)

1. Exemption is allowed, subject to all just exceptions.
2. The application is disposed of.

CM No.24623/2023 (for condonation of delay)

3. For the reasons stated in the application, delay in filing the present appeal is condoned.
4. The application is disposed of.

SERTA 3/2023

5. The Revenue has filed the present appeal under Section 35G of the Central Excise Act, 1944 impugning the final order dated 29.09.2022 (hereafter '**the impugned order**') passed by the Customs,

Excise & Service Tax Appellate Tribunal (hereafter '**the Tribunal**').

6. The controversy in the present appeal relates to the quantum of duty payable by the respondents. The Tribunal upheld the Order-in-Original dated 30.11.2017 passed by the Principal Commissioner Central Tax (Goods & Services), Delhi (hereafter '**the Adjudicating Authority**') insofar as the computation of duty is concerned. According to the Adjudicating Authority as well as the Tribunal, the duty payable by the respondents, in the facts of the present case, for the months of July and August, 2008 was required to be computed on the basis of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 (hereafter '**the PMPM Rules**') as in force, prior to the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Second Amendment Rules, 2008 (hereafter '**the Second Amendment Rules**') coming into force. The Adjudicating Authority as well as the Tribunal had reasoned that the premises of respondent no.1 was searched on 04.08.2008, and the Second Amendment Rules came into force on 20.10.2008.

Factual Context

7. Respondent no. 1 (M/s OM Fragrances) is a firm engaged in the business of manufacturing and clearing of *gutkha* under the brand name "India Gold", for sale in the domestic market. Respondent no. 2 is one of its constituent partners.

8. Upon receiving information that the respondents were clandestinely removing goods without obtaining the requisite Central

Excise Registration; without accounting for the goods manufactured; and without paying the appropriate Central Excise Duty, a search was conducted at the premises of respondent no.1 – House No. 786, opposite Kalandeshwar Shiv Temple, Village Burari on 04.08.2008. During the search, the following items were found:

(a) Five pouch packing machines found in working condition. Besides the same, two more dismantled pouch packing machines were found and one mixer machine was also found.

(b) The finished goods seized from the factory were valued at ₹3,85,000/- (which also includes the *gutkha* pouches having a maximum retail price (MRP) of ₹1/- manufactured by the respondents).

9. The machinery available at the premises were valued at ₹3,75,000/-. The same were seized and handed over to respondent no.2 on *superdignama* dated 04.08.2008. The factory premises was sealed thereafter.

10. Statements of respondent no.2 and one Sh. Rajeev Gupta (Supervisor with respondent no.1) were recorded on 04.08.2008 and 05.08.2008 under Section 14 of the Central Excise Act, 1944. According to the appellant, they admitted the facts as mentioned in the *panchnama* dated 04.08.2008. They also admitted that the respondents were running the factory at Burari in night shifts for two-three days in a week since December, 2007.

11. Thereafter, under cover of a letter dated 03.09.2008, respondent no.2 forwarded two demand drafts aggregating a sum of ₹55,00,000/- pending quantification of the dues. These were deposited on 05.09.2008. Thereafter, respondent no.2 also made a payment of ₹20,00,000/-. Thus, in aggregate the respondents paid a sum of ₹75,00,000/-.

12. A show cause notice dated 29.01.2009 was issued proposing confiscation of the seized goods and payment of central excise duty of ₹96,47,361/- under the Central Excise Act, 1944. In addition, the respondents and Sh. Rajeev Gupta were called upon to show cause as to why a penalty under Rule 26 of the Central Excise Rules, 2002 should not be imposed on them. Thereafter, the show cause notice was adjudicated by the Adjudicating Authority by an Order-in-Original dated 23.04.2010 affirming the demand of ₹96,47,361/- and in addition imposing a personal penalty of ₹25,00,000/- and ₹10,00,000/- on respondent no.2 and Sh. Rajeev Gupta respectively.

13. The respondents filed an appeal against the Order-in-Original dated 23.04.2010 before the Tribunal, which was disposed of by an order dated 03.02.2017. The Tribunal remanded the matter to the Adjudicating Authority to decide the matter afresh after affording the respondents an opportunity to be heard.

14. The show cause notice was adjudicated afresh by the Adjudicating Authority by an Order-in-Original dated 30.11.2017. In terms of the said order, the Adjudicating Authority determined the

central excise duty at ₹26,29,439/- under Section 11A of the Central Excise Act, 1944 and directed recovery of the same. In addition, the Adjudicating Authority ordered confiscation of the seized finished goods valued at ₹3,85,000/- with an option to the respondents to redeem the goods on payment of redemption fine of ₹1,00,000/-. Additionally, the Adjudicating Authority imposed a penalty of ₹26,29,439/- on respondent no.1 and ₹1,00,000/- on Sh. Rajeev Gupta.

15. The Order-in-Original dated 30.11.2017 was reviewed by the Chief Commissioner of Central Goods & Services Tax, Delhi Zone and he directed filing of an appeal before the Tribunal. The appeal indicates that he had found the Order-in-Original to be not legal and proper on the following grounds:

- “I. The AA erred in dropping the quantum of demand amounting to Rs.70,17,912/- raised vide SCN dated 29.01.2009 without appreciating the provisions brought in vide Notification No.45/2008-CE(N.T.) dated 20.10.2008.
- II. The AA also erred by not imposing any penalty on Sh. Sumit Aggarwal (Partner) by relying upon the Hon’ble High Court order in the case of Vinod Kumar Gupta, reported as 2013 (287) E.L.T. (54) which is further appealed and pending with Honble Supreme Court.”

16. The appeal preferred by the Revenue was rejected by the impugned order.

17. As is apparent from the above, the controversy before the Tribunal was two-fold. First, whether the Adjudicating Authority had

erred in determining the quantum of duty at ₹26,29,439/-, which was less than the duty determined under the Order-in-Original dated 23.04.2010 by an amount of ₹70,17,912/-. And second, whether the Adjudicating Authority had erred in not imposing a penalty on respondent no.2 on the ground that respondent no.1, being a firm, had no independent identity.

The Controversy

18. Insofar as the question regarding imposition of penalty on respondent no.2 is concerned, the impugned order indicates that no submissions were advanced on behalf of the Revenue to assail the Order-in-Original. Accordingly, the Tribunal did not consider the same. Insofar as computation of duty is concerned, the Tribunal found no error with the Order-in-Original dated 30.11.2017.

19. The Revenue has accepted the impugned order insofar as it does not interfere with the decision of the Adjudicating Authority to not impose any penalty on respondent no.2. However, the Revenue has called into question the legality of the impugned order to the extent that it upholds the decision of Adjudicating Authority to compute the excise duty in accordance with the PMPM Rules as in force prior to 20.10.2008. Thus, the controversy in the present appeal is confined to the question of determination of the quantum of excise duty.

20. The Revenue has projected the following questions for consideration of this Court:

- “a. Whether observation of the Ld. Tribunal that amended Rule 17(2) of PMPMR-2008 shall not apply retrospectively is justified and valid.
- b. Whether the Ld. Tribunal failed to consider the actual intent of the legislation as mentioned in Rule 17(2) of PMPMR-2008.”

21. Mr. Atul Tripathi, learned counsel appearing for the Revenue contended that the quantum of duty was required to be determined on the basis of Rule 17(2) of the PMPM Rules as substituted by the Second Amendment Rules.

Reasons and Conclusion

22. In exercise of the powers conferred under Sub-sections (i) and (iii) of Section 3 of the Central Excise Act, 1944, the Central Government has framed the PMPM Rules, which were notified under Notification No.30/2008 – Central Excise (N.T.) dated 01.07.2008. The PMPM Rules came into force on 01.07.2008 as expressly provided under Rule 1(ii) of the PMPM Rules.

23. Rule 17 of the PMPM Rules, as notified, is relevant. The same reads as under:

“17. Penalty for contraventions, etc. (1) Subject to the provisions of section 11AC of the Act, if any manufacturer produces or removes notified goods in contravention of any provision of these rules, then all such goods shall be liable to confiscation, and the manufacturer shall be liable to a penalty not exceeding the duty leviable on the notified goods in respect of which aforesaid contravention has been committed.

(2) If it is found that goods have been cleared from a

unit which is not registered with the jurisdiction of Central Excise Office, then its duty liability for the period till it was not registered, shall be determined as if the goods manufactured by the unit were not eligible for levy and assessment under notification of the Government of India in the Ministry of Finance (Department of Revenue), No.29/2008-C.E.(N.T.), dated the 1st July, 2008 and dealt with accordingly.”

24. It is material to note that the premises of respondent no.1 was searched on 04.08.2008. As on the date of the said search, Rule 17 as set out above was applicable. Respondent no.1 is not registered with the Excise Department and there is no dispute that the Adjudicating Authority has determined the duty payable in terms of Rule 17(2) of the PMPM Rules as in force on the date of the search.

25. The Central Government notified the Second Amendment Rules by Notification No.45/2008– Central Excise (N.T.) dated 20.10.2008. By virtue of Rule 2(v) of the Second Amendment Rules, Sub-rule (2) of Rule 17 was substituted with the following Sub-Rule:

“2. In the said rules,-

(v) in rule 17, for sub-rule (2), the following sub-rule shall be substituted, namely:-

“(2). If it is found that goods have been manufactured in or cleared from a unit which is not registered with the jurisdictional Central Excise Office, then the duty liability of such unit shall be determined on the basis of number of packing machines found available in the premises of the unit and the retail sale price of the pouches manufactured with the aid of such packing machines and unless

evidence to the contrary is provided to the satisfaction of the Central Excise Officer, such machines shall be deemed to have been in operation since the 1st July, 2008 and shall be construed as operating packing machines for the purposes of rule 7 and dealt with accordingly.””

26. Thus, according to the Revenue, the duty for the period of 01.07.2008 to 04.08.2008 was required to be computed on the basis of the machines found at the premises of respondent no.1 that had been in operation since 01.07.2008. And, the duty payable is required to be calculated by applying the appropriate rate of duty as specified in the Notification dated 01.07.2008 (as amended on 20.10.2008) to the number of operating packing machines found at the factory.

27. The Tribunal rejected the said contention in the following manner:

“18. It is not in dispute that the search was conducted on 04.08.2008. At that time the unamended rule 17(2), which had come into force on 01.07.2008, was operating. The amended rule 17(2) came into force on 20.10.2008 and there is nothing in the amended Rules that may show that they shall apply retrospectively w.e.f. 01.07.2008. The contention of the learned authorised representative appearing for the department that merely because the amended rule 17(2) states that such machine shall be deemed to have been in operation since 01.07.2008, it would mean that the amended rule 17(2) shall apply retrospectively from 01.07.2008 cannot be accepted. The amended rule 17(2) would apply to any search conducted after 20.08.2008 and it would only be in such a situation that the consequence would flow from 01.07.2008. At the time when the search was conducted on 04.08.2008, rule 17(2) had not been amended and the amended rule 17(2)

cannot impose duty at a higher rate with retrospective effect.”

28. We find no infirmity with the aforesaid view.

29. It is material to note that Rule 1(2) of the Second Amendment Rules expressly provides that “*they shall come into force on 20.10.2008*”. Thus, the contention that Rule 17(2) as amended by Second Amendment Rules would also apply to searches conducted prior to 20.10.2008 militate against the express language of Rule 1(2) of the Second Amendment Rules. Further, the contention that the language of Rule 17(2) as amended by the Second Amendment Rules, makes it explicit that it would apply from 01.07.2008, is unpersuasive. A plain reading of Rule 17(2) as amended by the Second Amendment Rules indicates that it provides for the manner of computing the duty payable in respect of goods manufactured or cleared from the unit, which is not registered with the concerned Central Excise office. Undisputedly, the duty is liable to be computed on the presumption that the machines found at such premises are in operation since 01.07.2008. The duty is required to be calculated by applying the appropriate rate of duty, as specified in the Notification No.42/2008 – C.E. dated 01.07.2008, to the number of packing machines operating in the factory during that month. However, we are unable to accept that the machinery provision of Rule 17(2) as amended by Second Amendment Rules is operative for searches conducted during the period prior to the amended Rule 17(2) coming into force, that is, prior to 20.10.2008.

30. Mr. Atul Tripathi, the learned counsel appearing for the Revenue

submitted that it would be necessary to apply the amended Rule 17(2) retrospectively from 01.07.2008 as the same is in conformity with the legislative intent in framing the PMPM Rules.

31. We are unable to accept that it is implicit in the language of Rule 17(2), as amended, that it is applicable retrospectively. First of all, the language of Rule 1(2) of the Second Amendment Rules is unambiguous and expressly provides that the amended rules would come into effect from 20.10.2008. Secondly, it is trite law that laws affecting the rights of parties would apply prospectively unless it is expressly provided otherwise or is required by necessary implication.

32. In the case of *Assistant Excise Commissioner, Kottayam & Ors. v. Esthappan Cherian & Anr.: (2021) 10 SCC 210*, the Supreme Court held as under:

“17. Another equally important principle applies : in the absence of express statutory authorisation, delegated legislation in the form of rules or regulations, cannot operate retrospectively. In *CIT v. M.C. Ponnose* [*CIT v. M.C. Ponnose*, (1969) 2 SCC 351 : (1970) 1 SCR 678] this rule was spelt out in the following terms : (SCC p. 354, para 5)

“5. ... The courts will not, therefore, ascribe retrospectivity to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature. Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the courts that

the persons or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect.”

18. The principle has been affirmed in many decisions such as *Hukam Chand v. Union of India* [*Hukam Chand v. Union of India*, (1972) 2 SCC 601 : (1973) 1 SCR 896] , *RTO v. Associated Transport Madras (P) Ltd.* [*RTO v. Associated Transport Madras (P) Ltd.*, (1980) 4 SCC 597 : 1981 SCC (Tax) 9] ; *Federation of Indian Mineral Industries v. Union of India* [*Federation of Indian Mineral Industries v. Union of India*, (2017) 16 SCC 186] and recently, in *Union of India v. G.S. Chatha Rice Mills* [*Union of India v. G.S. Chatha Rice Mills*, (2021) 2 SCC 209] .”

33. In the present case, we are unable to accept that it is implicit in the provisions of the amended Rule 17(2), that it applies retrospectively for purposes for determination of duty in respect of searches conducted prior to 20.10.2008. Undisputedly, for searches conducted after the Second Amendment Rules came into force, the duty would be determined by assuming – unless established to the contrary – that the machines found were operative from 01.07.2008 and by applying the computational provisions of Rule 7 of the PMPM Rules.

34. We find no ground to interfere with the impugned order. The questions projected by the Revenue are answered against the Revenue.

35. The appeal is unmerited and accordingly dismissed.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

MAY 15, 2023/‘gsr’