

2013 (2) ECS (26)(Del-HC)

IN THE HIGH COURT OF DELHI AT NEW DELHI

WRIT PETITION CIVIL NO. 1255 OF 2013

IN THE MATTER OF :-

M/S K.K. SALES

....PETITIONER

VERSUS

UNION OF INDIA & ORS.

...RESPONDENTS

CORAM

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MR. JUSTICE R.V. EASWAR

ORDER

We have heard the learned counsel for the parties at length. The order in original dated 31.12.2012 which is impugned before us has been passed by the Commissioner Central Excise, Delhi – II. An appeal lies from this order before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) under section 35 B of the Central Excise Act, 1944. The issue that is involved in this petition is with regard to the content of betel nut in the final product manufactured by the petitioner. The said product is a mouth freshener which is marketed under the brand name of “Chutki”

According to the learned counsel for the petitioner, the petitioner has availed of the concessional rate of duty on the final product on the ground that it does not contain more than 15 % of betel nut by weight. On the other hand the decision of the Commissioner of Central Excise which is impugned indicates that one of the samples taken from the petitioner and which was tested at the Central Revenue's Control Lab indicated the content of betel nut to be in excess of 15% by weight and therefore, the demands have been raised and penalties have been imposed.

The learned counsel for the petitioner has placed before us tests done by the Delhi Test House in respect of two samples S – IV and S – 4 which were taken on 10.02.2011 by the respondent and handed over the petitioner after the same were sealed by the respondent in terms of paragraph 8.11 of Chapter 11 of the Central Excise Manual. The said Chapter 11 deals with samples. As per paragraph 8.11 four samples are to be taken and one of them has to be handed over, after sealing by the proper officers, to the manufacturer so that he may independently have the samples tested subject to the conditions mentioned therein. As per the tests carried out at the instance of the petitioner, the content of betel nut has been shown to be 10.20% in the sample marked S – 4 and 9.8% in the sample marked S – IV. It is, however, pertinent to note that test report is subsequent to the order – in – original passed by the Commissioner of Central Excise which is impugned herein. The learned counsel for the respondent points out that the samples had been sent for testing by the petitioner subsequent to the said order – in – original.

We have only indicated the controversy that requires to be adjudicated upon. However, we have refrained from expressing any opinion on the same inasmuch as the order – in – original is appealable under section 35 B of the Central Excise Act, 1944. The petitioner has also indicated that it would be filing an appeal before the CESTAT within three weeks. Consequently, we dispose of this writ petition by directing that in case the petitioner files the appeal within three weeks before the CESTAT along with an application for waiver of pre – deposit under section 35 F of the Central Excise Act, 1944, the demands and penalties raised in the order in original shall remain stayed till the disposal of the said application under section 35 F by the Tribunal.

It is also the contention of the learned counsel for the petitioner that initially the sample taken on 10.02.2011 were sent for testing to Sri Ram Institute of Industrial Research and the said Institute has submitted a report . the details of which are given on page 249 of the paper – book. That report has, however, not been made available to the petitioner and the petitioner verily believes that the said report is in favour of the petitioner. Any how, such a request for supply of copies of the said report could be made by the petitioner before the Tribunal when such an appeal is filed.

The writ petition is disposed of with the aforesaid directions.