**(2011) 06 BOM CK 0026**

**In the Bombay High Court**

**Case No :** Writ Petition No. 894 of 2011 with W.P. No. 967 of 2011

Godfrey Philips India Ltd. APPELLANT

Vs

Union of India RESPONDENT

**Date of Decision :** 20-06-2011

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 3A
Constitution of India, 1950 — Article 226
Pan Masala Packing Machine (Capacity Determination and Collection of Duty) Rules, 2008 — Rule 6, 6(2), 7(2), 8, 9

**Citation :** (2012) 275 ELT 384

**Hon'ble Judges :** D.Y. Chandrachud, J;Anoop V. Mohta, J

**Bench :** Division Bench

**Advocate :** Navroz Seervai, with Firdosh Pooniwala and Rahul P. Jain, instructed by RES Legal, for the Appellant; R. Ashokan with S.D. Bhosale, for the Respondent

## Judgement

1. Rule, by consent returnable forthwith. With the consent of the learned counsel appearing for the contesting parties, Writ Petition 967 of 2011 is taken up on Board. Both these Petitions are taken up for hearing and final disposal by consent.

2. The Petitioners have impugned the validity of an order dated 4 January 2011 passed by the Deputy Commissioner of Central Excise, Pune, the Third Respondent in suo moto revision of determination orders passed on 26 October 2009 and 18 December 2009. The challenge before the Court is on the ground that (i) The order has been passed in violation of the principles of natural justice; (ii) There was an inherent lack of jurisdiction on the part of the Deputy Commissioner to pass a revised order; (iii) The order is contrary to binding orders passed by the Commissioner (Appeals) on 28 September 2010 and 3 November 2010; and (iv) The order is an attempt to over reach an interim order passed by this Court initially on 6 December 2010 and continued thereafter in Writ Petition 894 of 2011.

3. The Petitioner is engaged in the manufacture of pan masala covered by Chapter Heading No. 2106.90.20 of the First Schedule to the Central Excise Tariff Act, 1985, at a factory situated at Baramati. The Petitioner installed four Form, Fill and Seal machines in its factory for the packing of pan masala into pouches bearing different retail sale prices. Pan masala manufactured by the Petitioner is subject to the levy of central excise duty u/s 3A of the Central Excise Act, 1944. The Central Government has notified the Pan Masala Packing Machine (Capacity Determination and Collection of Duty) Rules, 2008 on 1 July 2008, Under Rule 6 a manufacturer of notified goods has to furnish in Form-I information pertaining to the packing machines to be used by him before the commencement of commercial production. Under sub-rule (2) of Rule 6, on the receipt of a declaration referred to in sub-rule (1), the Deputy Commissioner of Central Excise or, as the case may be, the Assistant Commissioner is required after making such enquiry as may be necessary including physical verification, to approve the declaration and to determine and pass an order concerning the annual capacity production of the factory. The declaration in Form-1 which precedes the order of the Deputy Commissioner requires the manufacturer to inter alia furnish information about the number of single track packing machines available in the factory, the number of packing machines out of that which are installed and the number of packing machines therefrom which he intends to operate for the production of notified goods. Sub-rule (6) of Rule 6 stipulates that in case the manufacturer wishes to make any subsequent changes with respect to any of the parameters declared by him and approved by the Deputy Commissioner or the Assistant Commissioner such as inter alia changes relating to the addition or removal of packing machines in the factory or in the number of machines to be used or commencing manufacture of goods of a new retail sale price or discontinuation of the manufacturing of goods of an existing retail sale price, he shall file a fresh declaration in advance to the Deputy Commissioner who shall approve such fresh declaration and redetermine the annual capacity of production following the procedure specified in sub-rule (2). Under Rule 7 the duty payable for a particular month is to be calculated by the application of the appropriate rate of duty specified in the notification of the Government of India dated 1 July 2008 to the number of operating packing machines during the month. Under Rule 8 in case of addition or installation or removal or uninstallation of packing machines during the month, the number of operating packing machines for the month shall be taken as the maximum number of packing machines installed on any day during the month.

4. Under Rule 9 the monthly duty payable has to be paid on the fifth day of the same month and an intimation has to be filed with the Superintendent of Central Excise in Form-2. Failure to pay duty attracts a liability to pay interest. In the event of an addition in packing machines during the month, differential duty is payable by the fifth of the following month. Moreover, in the case of discontinuation of manufacturing or the commencing of manufacturing goods of a new retail sale price during the month, the duty is recalculated and the

 

differential duty is payable by the fifth of the following month.

5. In the present case, the Petitioner initially submitted Form-1 on 21 October 2009 prior to the commencement of commercial production using two machines. By an order dated 26 October 2009 the Assistant Commissioner of Sales Tax determined the monthly duty liability of the Petitioner at Rs. 77 lacs. In terms of Rule 6 the Petitioner by a letter dated 18 December 2009 submitted Form-1 to the Assistant Commissioner. By that letter the Petitioner requested the Deputy Commissioner inter alia to fix the duty liability in respect of the third machine. The Commissioner passed an order on 18 December 2009 by which he assessed the annual production capacity of the Petitioner in respect of all the three machines as well as the monthly duty liability of Rs. 95 lacs.

6. The grievance of the Petitioner arises out of the fact that the Commissioner passed a revised order on 30 November 2010 purporting to revise the production capacity and the monthly duty liability. The monthly duty liability was sought to be revised from Rs. 95 lacs to Rs. 285 lacs and the Petitioner was directed to pay the liability before commencing the production.

7. At that stage, the Petitioner filed Writ Petition 894 of 2011 inter alia seeking a direction against the Respondents to refrain from restricting the Petitioner from commencing production till the final disposal of an appeal which the Petitioner then intended to file against the order dated 30 November 2010. On 6 December 2010 the hearing of the Petition was adjourned on the request of Counsel appearing on behalf of the Respondents and a Division Bench directed that no coercive steps would be taken in pursuance of the impugned order dated 30 November 2010 until 16 December 2010. The interim protection was continued thereafter by subsequent orders passed by the Division Bench. On 28 December 2010 the Petitioner addressed a communication to the Deputy Commissioner of Central Excise by which intimation was furnished of the arrival of the fourth machine. The Deputy Commissioner was requested to make a duty determination in respect of the said machine in accordance with the provisions of Rule 6 and a determination in regard to the annual production capacity of the new machine. The Deputy Commissioner passed an order on 4 January 2011 by which he purported to revise the annual production capacity of the existing three machines in addition to making a determination in respect of the fourth machine. The monthly duty liability was revised to Rs. 380 lacs and the Petitioner was requested to pay the duty liability before commencing commercial production.

8. The order passed by the Deputy Commissioner on 4 January 2011 has been questioned on the ground that the Deputy Commissioner had an inherent lack of jurisdiction to pass an order revising even the production capacity of the existing three machines and the determination of duty made in respect of those three machines by the previous order dated 18 December 2009. It has been submitted that the order was also passed in violation of the principles of natural justice and contrary to the interim protection which was granted by this Court in the interim order of the Division Bench in the first petition. Finally, it has been submitted

 

that the order was contrary to the orders passed by the Commissioner (Appeals) on 28 September 2010 and 3 November 2010.

9. On the other hand, Counsel appearing on behalf of the Respondents submitted that an appeal against the impugned order of the Deputy Commissioner is available and therefore, this Court should not entertain the Petition under Article 226 of the Constitution.

10. Ordinarily where an appellate remedy is available, particularly in the context of revenue legislation, this Court would not be inclined to exercise its extra-ordinary jurisdiction under Article 226 of the Constitution. However, the facts of the present case disclosed that the Deputy Commissioner has exercised his powers in breach of the principles of natural justice. Originally as we have noted, the Deputy Commissioner had passed an order on 26 October 2009 assessing the annual production capacity and the monthly duty liability in respect of two machines at Rs. 77 lacs per month. On 18 December 2009 the Deputy Commissioner passed an order by which the annual production capacity was assessed in relation to three machines and the monthly liability was assessed at Rs. 95 lacs. The Deputy Commissioner proceeded to issue a revised order on 30 November 2010 by which he suo moto revised the monthly duty liability from Rs. 95 lacs to Rs. 285 lacs. No hearing was furnished to the Petitioner before the impugned order was passed. No material has been produced before this Court to indicate that the Deputy Commissioner had any fresh material before him before he proceeded to pass the order dated 30 November 2010 and in any event the revised order does not contain a reference to any fresh or new material. Therefore, even if the Deputy Commissioner were to have jurisdiction to issue a revised order, something which has been disputed by the Petitioner, he proceeded to do so plainly in breach of the principles of natural justice and without indicating any valid reasons or justification. The Petitioner had moved this Court in the first petition seeking some protection so as to enable the Petitioner to file an appeal against the order. An interim protection was granted by the Court by its order dated 6 December 2010 which was subsequently continued. On the induction of the fourth machine the Petitioner had moved the Deputy Commissioner seeking an assessment with reference to the production capacity and duty liability originating in the installation and use of that machine. The Deputy Commissioner passed an order dated 4 January 2011 revising the annual production capacity and the monthly duty liability in respect of all the four machines. No hearing was afforded to the Petitioner before the Deputy Commissioner did so. In this view of the matter, we set aside the impugned order of the Deputy Commissioner dated 4 January 2011 on the ground that there was a failure of the principles of natural justice. Since that is the only ground, on which we have interfered with the impugned order, we are of the view that it is not necessary at this stage to relegate the Petitioner to the remedy of an appeal. Accordingly, we quash and set aside the impugned order dated 4 January 2011 passed by the Deputy Commissioner of Central Excise. The Deputy Commissioner shall pass fresh orders in accordance with law after furnishing to the Petitioner

an opportunity of being heard.

11. Insofar as the first petition is concerned (Writ Petition 894 of 2011) the Petition, as noted earlier, was for a direction restraining the Respondents from refraining the Petitioner from commencing production till the final disposal of the appeal which the Petitioner intended to file against the order dated 30 November 2010. The order dated 30 November 2010 was superseded by the subsequent order dated 4 January 2011 which was a combined order passed by the Deputy Commissioner in respect of the four machines. The subsequent order dated 4 January 2011 has now been quashed and set aside on the ground of a breach of the principles of natural justice, in Writ Petition 967 of 2011.

12. All the rights and contentions of the parties are kept open on the merits to be urged before and decided by the Deputy Commissioner.

13. Both the Petitions would accordingly stand disposed of.

14. There shall be no order as to costs.

 