

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH- COURT NO. I

EXCISE APPEAL NO. 51464 OF 2022

(Arising out of Order-in-Original No. 31/2022-CE dated 31.01.2022 passed by the Additional Director General (Adjudication), New Delhi)

M/s. Rajan Jhiriwal

Opposite LCR Public School,
1-Sikaribas, Near Shivaji Park,
Behror Road, Alwar,
Rajasthan - 301001

.....Appellant

versus

Additional Director General (Adjudication)

Directorate General of GST Intelligence (Additional Cell),
West Block - VIII, Wing - 6,
2nd Floor, RK Puram,
New Delhi - 110066

.....Respondent

WITH

E/52254/2024

E/52255/2024

E/52256/2024

APPEARANCE:

Shri Gaurav Gupta and Shri Saurabh Dahiya, Advocates for the Appellant

Shri S.K. Ray, Authorized Representative for the Department

CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 08.04.2026
DATE OF DECISION: 02.06.2026

FINAL ORDER NO's. 51011-51014/2026

JUSTICE DILIP GUPTA:

Excise Appeal No. 51464 of 2022 has been filed by M/s. Rajan Jhiriwal¹ to assail that portion of the order dated 31.01.2022 passed by the Additional Director General (Adjudication), New Delhi² that confirms the demand of central excise duty under section 11A(10) of the Central Excise Act, 1944³ for the reason that product manufactured and cleared

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1. the appellant
 2. the Additional Director General
 3. the Central Excise Act

by the appellant is classifiable as "zarda scented tobacco" under Central Excise Tariff Item⁴ 2403 99 30 and not CETI 2403 99 10 as "chewing tobacco" with interest under section 11AA and penalty under section 11AC of the Central Excise Act.

2. **Excise Appeal No. 52254 of 2024** has been filed by M/s. R. R. Jhiriwal to assail that portion of the order dated 31.01.2022 passed by the Additional Director General that imposes a penalty upon him under rule 26 of the Central Excise Rules, 2002⁵.

3. **Excise Appeal No. 52255 of 2024** has been filed by Robin Jhiriwal, Partner of the appellant, to assail that portion of the order dated 31.01.2022 passed by the Additional Director General that imposes a penalty upon him under rule 26 of the Central Excise Rules.

4. **Excise Appeal No. 52256 of 2024** has been filed by Rajan Jhiriwal, Partner of the appellant, to assail that portion of the order dated 31.01.2022 passed by the Additional Director General that imposes a penalty upon him under rule 26 of the Central Excise Rules.

5. The appellant had started manufacturing two products, namely, zarda and supari with brand name "MAMA" at two separate units, namely, M/s. Rajan Jhiriwal and M/s. R.R. Jhiriwal.

6. The issue that arises for consideration in these appeals is whether the goods manufactured by the appellant deserves classification under CETI 2403 99 10 as "chewing tobacco" as claimed by the appellant or CETI 2403 99 30 as "zarda scented tobacco" as claimed by the department.

7. The records indicates that the appellant, by a letter dated 02.08.2012, intimated the Superintendent about its intention to start manufacturing MAMA zarda under the category of "chewing tobacco

4. **CETI**

5. **the Central Excise Rules**

(powder form)” and filed Form-1 declaration under rule 6 of the Chewing Tobacco and in the Manufactured Tobacco Packaging Machine (Capacity Determination and Collection of Duty) Rules, 2010⁶.

8. The Assistant Commissioner of Central Excise⁷ passed an order dated 02.08.2012 in terms of rule 6(2) of the Capacity Determination Rules classifying the final products manufactured by the appellant under CETI 2403 99 10 of the Excise Tariff Act as “chewing tobacco”.

9. Subsequent to the issuance of Notification No. 05/2015-CE dated 01.03.2015, the appellant intimated the Deputy Commissioner of Central Excise⁸ of its decision to amend the classification of the final product from CETI 2403 99 10 (chewing tobacco) to CETI 2403 99 30 (zarda scented tobacco) and, accordingly, filed a declaration under rule 6 of the Capacity Determination Rules on 02.03.2015.

10. On 03.03.2015, the appellant had submitted process flow chart of final products to the jurisdictional Superintendent of Central Excise, Range-III, Alwar⁹.

11. In connection with the Form-1 declaration submitted by the appellant, an order dated 04.03.2015 was passed by the Deputy Commissioner under rule 6(3) of the Capacity Determination Rules classifying the final product under CETI 2403 99 10 as chewing tobacco.

12. On 04.03.2015, the appellant had filed online application for amendment in central excise registration.

13. On 04.03.2015, the Superintendent Central Excise forwarded the manufacturing process of the appellant to the Deputy Commissioner and reported in connection with the letter dated 02.03.2015 submitted by the

6. the Capacity Determination Rules
7. the Assistant Commissioner
8. the Deputy Commissioner
9. the Superintendent Central Excise

appellant for change in classification that the final product of the appellant is classified under CETI 2403 99 10 and does not merit classification under CETI 2403 99 30.

14. For the subsequent periods, the Jurisdictional Assistant Commissioner also passed orders under rule 6(2) of the Capacity Determination Rules classifying MAMA zarda brand manufactured by the appellant under CETI 2403 99 10 as chewing tobacco.

15. On 04.03.2015, the Superintendent Central Excise sent a report to the Deputy Commissioner regarding the visit to the factory premises of the appellant for verification of the declaration dated 02.03.2015 submitted by the appellant in Form I and again clarified that the final product of the appellant is correctly classified under CETI 2403 99 10 and does not merit classification under CETI 2403 99 30 as claimed by the appellant.

16. On 04.03.2015, the Superintendent Central Excise also directed the Regional Officer to collect sample of raw material and send it to CRCL for correct nomenclature of the product.

17. On 16.03.2015, the Superintendent Central Excise forwarded the samples of the product drawn from the factory of the appellant under a Panchnama dated 16.03.2015 to the Deputy Commissioner and also stated that the final product of the appellant is in powder form and till then the tobacco preparation of the appellant manufactured in powder form should be classified as chewing tobacco under CETI 2403 99 10.

18. On 17.03.2015, the Deputy Commissioner forwarded the sample to CRCL, New Delhi along with the test memo dated 16.03.2015 for determination of nomenclature of such samples.

19. On 23.04.2015, the chemical examiner gave the following opinion on the test report:

“the sample is in the form of brown coloured powder. It is a preparation containing tobacco, lime and flavouring compound”

20. On 07.07.2015, the appellant under a bona fide belief that it had wrongly applied for amendment in the central excise registration, filed an application for withdrawal of amendment. The same was accepted by the department by e-mail dated 01.09.2016.

21. Based on an intelligence regarding evasion of central excise duty on finished products, a search was conducted on 21.01.2016 at the factory premises of the appellant and certain documents were resumed as well as representative samples of finished “MAMA” zarda brand under a Panchnama dated 21.01.2016. Statements of the appellant, Robin Jhiriwal, Partner of the appellant, were also recorded under section 14 of the Central Excise Act. Statement of Rajan Jhiriwal was also recorded under section 14 of the Central Excise Act. Statements of various other persons were also recorded.

22. A show cause notice dated 23.02.2017 was issued to the appellant, calling upon the appellant to show cause why central excise duty short paid by the appellant during the period March, 2015 to February, 2016 should not be demanded and recovered in terms of section 11A(4) of the Central Excise Act for the reason that the product manufactured and cleared by the appellant is classifiable as “zarda scented tobacco” under CETI 2403 99 30 and not CETI 2403 99 10 as “chewing tobacco”. Interest and penalty was also proposed to be imposed on the appellant. The show cause notice also called upon M/s. R.R. Jhiriwal, Robin Jhiriwal and M/s.

Rajan Jhiriwal to show cause why penalty under rule 26 of the Central Excise Rules should not be imposed upon each of them.

23. A detailed reply to the show cause notice was filed by all the noticees and the allegations made therein were denied.

24. The Additional Director General, however, by order dated 31.01.2022 confirmed the demands proposed in the show cause notice and the relevant portion of the order is reproduced below:

"22.2. I find that the whole dispute is regarding the classification of the finished goods manufactured and sold by the Noticee i.e. whether it is Zarda Scented Tobacco falling under CETH 24039930 or Chewing tobacco falling under CETH 24039910.*** I find that the CRCL report clearly mentions that the finished mixture 'is composed of Tobacco, slaked lime & odoriferous substances (flavorant/scented compound). I find that the Noticee had admitted during investigations that they were using ingredients like clove, cardamom, Kulanjan, Menthol, Perfume and other flavours. The CRCL report establishes that the finished mixture contains flavor and scent. ***** Thus as per CRCL report there is presence of both flavor and scent in the finished mixture which confirms that perfume/scent was added to the product.**

22.5. I find that the samples of finished mixture manufactured by the Noticee were drawn on 21.01.2016 during search proceedings and therefore have a surprise element involved. Bottles of liquid perfume were recovered during search. The present proceedings under the impugned notice are on the basis of search conducted and samples drawn during search and test reports of the said samples. It would be illogical to rely on samples drawn ten months earlier. **In the present case evidence in the form of perfume bottles found during the search, confirms to the result of the test report. So I am**

not inclined to accept the contention of the Noticee that the Test result which is more favorable to them ought to be accepted. Therefore I do not find any merit in this submission of the Noticee and I reject this submission.

22.7. ***** I find that the Noticee had not raised this issue during the sampling of the product on 21.01.2016 and/or during the investigation. They have also not raised this issue at the time of drawing of sample. The Apex Court's decision in the case of Tata Chemicals Ltd. vs. CC (Preventive), Jamnagar, 2015 (320) ELT 45 (SC) cited by the Noticee is also of the same view. **Therefore I reject their submission and accept the findings of the report of CRCL for the samples drawn on 21.01.2016.**

25.6. Thus there is enough evidence to prove that the Noticee company was manufacturing zarda scented tobacco and the allegations in the impugned SCN are found to be correct. The Noticee filed wrong declarations before the department keeping in view the duty rate changes on Zarda scented tobacco effective from 01.05.2015, by declaring chewing tobacco of heading 24039910 (instead of the actual Jarde scented tobacco of heading 24039930). This resulted in an uncalled for benefit accrued to them of Rs. 43.47 Lakh per machine per month after the upgradation of four machines to higher speed of 301 and above for Re. 1 pouches per minute is taken into account."

(emphasis supplied)

25. It would be seen from the order that the Additional Director General held that the products manufactured and cleared as MAMA zarda by the appellant are classifiable as "zarda scented tobacco" under CTI 2403 99 30. The short paid duty was, therefore, directed to be recovered with interest and penalty. The Additional Director General also confirmed the

imposition of penalty upon M/s. R.R. Jhiriwal, M/s. Rajan Jhiriwal and Robin Jhiriwal under rule 26 of the Central Excise Rules.

26. The issue, therefore, that arises for consideration in these appeals is whether the goods manufactured by the appellant are "chewing tobacco" falling under CETI 2403 99 10 or "zarda scented tobacco" falling under CETI 2403 99 30.

27. It needs to be noted that chewing tobacco and zarda scented tobacco attracted different rates of duty at different times under Notifications and details are as follows:

Period	Chewing Tobacco	Zarda Scented Tobacco	Relevant Notification	Position in the present case (appellant is engaged in manufacturing of Chewing Tobacco)
Prior to 01.03.2015	Same	Same	Notification No. 16/2010-C.E., dated 27.02.2010	
With effect from 01.03.2015	24.15 lakhs per packing machine per month with speed up to 300 or 38.64 lakhs per packing machine per month with speed of 301 and above	27.05 lakhs per packing machine per month	Notification No. 5/2015-C.E., dated 01.03.2015	Up to March 2015, appellant had 8 machines up to the speed of 300 and thus paid duty on rate of 24.15
With effect from 30.04.2015	24.15 lakhs per packing machine per month with speed up to 300 or 38.64 lakhs per packing machine per month with speed of 301 and above	27.05 lakhs per packing machine per month with speed up to 300 or 82.11 lakhs per packing machine per month with speed of 301 and above	Notification No. 25/2015-C.E., dated 30.04.2015	For April 2015, appellant had 2 machines up to the speed of 300 and thus paid duty at the rate of 24.15 and appellant had 1 machine for speed of 301 and thus paid duty at the rate of 38.64. From May 2015 to February 2016, appellant had 4 machines of speed of 301 above and thus appellant had paid duty at the rate 38.64

With effect from 01.03.2016	30.51 lakhs per packing machine per month with speed up to 300 or 43.58 lakhs per packing machine per month with speed of 301 and above	30.51 lakhs per packing machine per month with speed up to 300 or 43.58 lakhs per packing machine per month with speed of 301 and above	Notification No. 16/2016-C.E., dated 01.03.2016	Rate of duty under both classification were made same by this Notification
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28. It also needs to be noted that the appellant had submitted ER-1 returns for different periods showing the classification of the product under CTI 2403 99 10:

CETI	Description of Goods	Form ER-1 Return filed for the period
24039910	Other manufactured tobacco and manufactured tobacco substitutes – Homogenised or reconstituted tobacco; tobacco extracts and essences – other: other: chewing tobacco	August 2012
24039910	Other manufactured tobacco and manufactured tobacco substitutes – Homogenised or reconstituted tobacco; tobacco extracts and essences – other: other: chewing tobacco	March 2013
24039910	Other manufactured tobacco and manufactured tobacco substitutes – Homogenised or reconstituted tobacco; tobacco extracts and essences – other: other: chewing tobacco	April 2013
24039910	Other manufactured tobacco and manufactured tobacco substitutes – Homogenised or reconstituted tobacco; tobacco extracts and essences – other: other: chewing tobacco	May 2014
24039910	Other manufactured tobacco and manufactured tobacco substitutes – Homogenised or reconstituted tobacco; tobacco extracts and essences – other: other: chewing tobacco	March 2014
24039910	Other manufactured tobacco and manufactured tobacco substitutes – Homogenised or reconstituted tobacco; tobacco extracts and essences – other: other: chewing tobacco	January 2015
24039910	Other manufactured tobacco and manufactured tobacco substitutes – Homogenised or reconstituted tobacco; tobacco extracts and essences – other: other: chewing tobacco	April 2015
24039910	Other manufactured tobacco and manufactured tobacco substitutes – Homogenised or reconstituted tobacco; tobacco extracts and essences – other: other: chewing tobacco	February 2016
24039910	Other manufactured tobacco and manufactured tobacco substitutes – Homogenised or reconstituted tobacco; tobacco extracts and essences – other: other: chewing tobacco	March 2016

29. It would also be relevant to refer to the determination of classification of the products by the department. In this connection, the following orders issued by the department would show that the department itself classified the product under CTI 2403 99 10:

S. No.	Particulars	Date	CETI
1.	Order No. 06/2012-13 effective from 01.08.2012	02.08.2012	24039910
2.	Order No. 8/2012-13 effective from 14.09.2012	14.09.2012	24039910
3.	Order No. 9/2012-13 effective from 01.10.2012	03.10.2012	24039910
4.	Order No. 10/2012-13 effective from 01.02.2012	03.12.2012	24039910
5.	Order No. 11/2012-13 effective from 01.04.2013	28.03.2013	24039910
6.	Order No. 02/2013-14 effective from 01.10.2013	27.09.2013	24039910
7.	Order No. 03/2013-14 effective from 01.12.2013	03.12.2013	24039910
8.	Order No. 04/2013-14	05.02.2014	24039910
9.	Order No. 06/2013-14 effective from 01.03.2014	25.02.2014	24039910
10.	Letter rejecting the amendment application filed by appellant	04.03.2015	24039910
11.	Order No. 04/2014-15	04.03.2015	24039910
12.	Order No. 01/2015-16	06.04.2015	24039910
13.	Order No. 06/2015-16	14.03.2016	24039910

30. Shri Gaurav Gupta, learned counsel for the appellant assisted by Shri Saurabh Dahiya submitted that the MAMA zarda manufactured by the appellant was correctly classified by the appellant under CETI 2403 99 10 as chewing tobacco and the Additional Director General committed an error in holding that it would fall under CETI 2403 99 30 as zarda scented tobacco. In this connection, learned counsel pointed out that the appellant had submitted ER-1 returns and in all the ten ER-1 returns, the classification shown by the appellant CETI 2403 99 10. Learned counsel pointed out that the department also issued orders classifying the products manufactured by the appellant under CETI 2403 99 10. It was, therefore, not open to the department to issue the show cause notice alleging that the product manufactured by the appellant would fall under CETI 2403 99 30. In support of this contention, learned counsel placed reliance upon the decision of the Supreme Court in **Commissioner of**

Central Excise and S.T., Alwar vs. Tara Chand Naresh Chand¹⁰.

Learned counsel also submitted that penalties under rule 26 of Central Excise Rules could not be imposed on M/s. R.R. Jhiriwal, Robin Jhiriwal and M/s. Rajan Jhiriwal.

31. Shri S.K. Ray, learned authorized representative appearing for the department, however, supported the impugned order and submitted that the products manufactured by the appellant are correctly classifiable under CETI 2403 99 30. In this connection, learned authorized representative placed reliance upon the report submitted CRCL. Learned authorized representative also placed reliance upon the statements made under section 14 of the Central Excise Act. Learned authorized representative also submitted that penalties under rule 26 of Central Excise Rules have been correctly imposed on M/s. R.R. Jhiriwal, Robin Jhiriwal and M/s. Rajan Jhiriwal.

32. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

33. It seen that with effect from 30.04.2015, the excise duty on zarda scented tobacco had increased and that is why the show cause notice had called upon the appellant to pay the differential excise duty. The records indicates that in all the ten ER-1 returns that were filed by the appellant from August, 2012 upto March, 2016, the classification of the product manufactured by the appellant was shown under CETI 2403 99 10 as chewing tobacco. No objection was ever raised by the department from August, 2012 upto March, 2016. It is also seen that the department itself had issued various orders from 2012 upto 2016, in which the classification

10. Civil Appeal 959 of 2019 decided on 20.10.2023

of the product manufactured by the appellant, was shown under CETI 2403 99 10.

34. In **Tara Chand Naresh Chand**, the department had filed an appeal to assail the order dated 28.03.2018 passed by the Tribunal. The assessee had claimed that product manufactured by it was "zarda scented tobacco" classifiable under CETI 2403 99 30 but the department claimed that it was "chewing tobacco" falling under CETI 2403 99 10. The Supreme Court noticed that the stand of the assessee had been consistent that the product manufactured by it is classifiable as zarda scented tobacco and it is only at the instance of the jurisdictional Deputy Commissioner that the assessee classified the goods as chewing tobacco under CETI 2403 99 10. The Supreme Court noticed that as the assessee and the department were classifying the product as "chewing tobacco", there was no error in the order passed by the Tribunal.

35. In the instant case also, the appellant and the department have consistently classified the product as chewing tobacco falling under CETI 2403 99 10. The department cannot, therefore, contend that the product should be classified as zarda scented tobacco under CETI 2403 99 30.

36. It will, therefore, not be necessary to examine the other contentions raised by the appellant.

37. Penalty upon the appellant under section 11AC of the Central Excise Act cannot also be sustained. The demand of central excise duty and the differential duty against the appellant, therefore, deserves to be set aside.

38. Penalties upon M/s. R.R. Jhiriwal, Robin Jhiriwal and M/s. Rajan Jhiriwal under rule 26 of the Central Excise Rules cannot also be sustained for the reason that the order does not hold that the goods were liable to confiscation.

39. In this connection, it would be appropriate to reproduce rule 26 of the Central Excise Rules. They are as follows:

"26. Penalty for certain offences

(1) Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or rupees ten thousand, whichever is greater:

PROVIDED that where any proceeding for the person liable to pay duty have been concluded under clause (a) or clause (d) of sub-section (1) of section 11AC of the Act in respect of duty, interest and penalty, all proceedings in respect of penalty against other persons, if any, in the said proceedings shall also be deemed to be concluded."

40. It clearly transpires from the impugned order that there is no discussion in the order that the goods are liable to confiscation and it is only while imposing penalties under rule 26 of the Central Excise Rules that it has been observed that the goods are liable to confiscation. There has to be a discussion and a finding that the goods are liable to confiscation. In the absence of such a finding penalties under rule 26 of the Central Excise Rules could not have been imposed. This is clear from a bare perusal of rule 26(1) of the Central Excise Rules.

41. The view that has been taken finds support from the decision of the Tribunal in **Shri Ramesh Garg, Chairman of M/s K.S. Oil Ltd. vs. Commisioner, CGST, Customs & Central Excise¹¹** and the relevant portion of the order is reproduced below:

11. Excise Appeal No. 51760 of 2017 decided on 09.12.2024

"5. In the impugned order, goods have not been confiscated nor have any goods been held liable to be confiscated. We, therefore find, the essential ingredient to impose penalty under Rule 26, namely, confiscation of the goods or goods are liable for confiscation, has not been fulfilled in this case. Therefore, the penalty could not have been imposed under Rule 26."

42. In this view of the matter, penalties under rule 26 of the Central Excise Rules could not have been imposed.

43. Thus, for all the reasons stated above, the impugned order dated 30.01.2022 passed by the Additional Director General cannot be sustained and is set aside. All the four appeals are, accordingly, allowed.

(Order pronounced on **02.06.2026**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Shreya