

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH**

REGIONAL BENCH – COURT NO. 1

Excise Appeal No. 61061 of 2019

[Arising out of OIO No. 18/2019-20/Commr./PP/FBD. dated 30.08.2019 passed by Commissioner of Customs, Central Excise & Service Tax-Faridabad]

Ms. Shree FlavourLlp

11/7 Mathura Road
Faridabad
Haryana-121003

.....Appellant

VERSUS

C.C.E. & S.T., FARIDABAD-I

Block-D, New CGO Complex, NH-IV, NIT
Faridabad (Haryana)-121001

.....Respondent

WITH

- **Excise Appeal No. 61281 of 2019 (S K Aggarwal)**
- **Excise Appeal No. 61282 of 2019(P V Subramanian)**
- **Excise Appeal No. 61283 of 2019(Yogesh Arora)**
- **Excise Appeal No. 61284 of 2019(Sharad Chaudhary)**
- **Excise Appeal No. 61285 of 2019(Vipin Kumar Aggarwal)**
- **Excise Appeal No. 61286 of 2019(Shri Gopal Gupta)**
- **Excise Appeal No. 61287 of 2019(Manoj Gupta)**

APPEARANCE:

Shri VivekKohli (Sr. Adv.), Shri Ashwini Sharma, Shri Anurag Mishra & Mrs. Nisha Bineesh Advocates for the Appellant

Shri Rajeev Gupta, Principal Commissioner, Shri Munish Kumar, Authorized Representative & Shri SaurabhGoel , Special Counsel for the Respondent

**CORAM: HON'BLE MEMBER (TECHNICAL), MR. RAJU
HON'BLE MEMBER (JUDICIAL), MR. AJAY SHARMA**

FINAL ORDER NO. A/60127-60134/2022

DATE OF HEARING: 03.03.2022
DATE OF DECISION: 24.08.2022

RAJU

These appeals are filed by

1. Shree Flavour LLP
2. S K Aggarwal
3. P V Subramanian
4. Yogesh Arora
5. Sharad Chaudhary
6. Vipin Kumar Aggarwal
7. Shri Gopal Gupta
8. Manoj Gupta

against demand of Central Excise Duty and imposition of penalties.

2 The facts of the case are that the appellants were engaged in the manufacture and packing of chewing tobacco in pouches and tins falling within tariff item 2403 99 10 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (for brevity 'the Tariff Act'). The dispute relates to levy of Central Excise Duty on Compounded basis, under section 3A of Central Excise Act 1944, on certain 'Packing Machines' used for manufacture of chewing tobacco. The appellants were using these machines in their Unit which according to them do not qualify as 'Packing Machines' in terms of the notification No.10/2010-CE (N.T.) dated 27.02.2010, whereas the revenue in the impugned order held that the said machines are 'Packing Machines'.

2.1 The Central Excise duty is normally levied on the goods manufactured. The actual quantity of goods is measured and duty is charged on actual manufacture of goods under Section 3 of the Central Excise Act. The Central Government is empowered by virtue of Section 3A of the Central Excise Act 1944 (CEA) to levy duty on the 'Deemed Production' where ever it considers it necessary in the interest of revenue. The said section 3A empowers the Government to notify the goods on which the Central Excise Levy will be made on the basis of Deemed Production. The product manufactured by the appellants was notified under Section 3A of the Central Excise Act, 1944 vide Notification No.10/2010-CE (N.T.) dated 27.02.2010. To determine what constitutes a 'Packing Machine' and what shall be the capacity of such 'Packing Machine' the government notified Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 (for brevity 'Capacity Determination Rules') as amended effective from 08.03.2010. The rule 2(d) of the said rules described the "packing machine" as follows:-

2(d) "packing machine" includes all types of Form, Fill and Seal (FFS) Machines and Profile Pouch Making Machines, by whatever name called, whether vertical or , with or without collar, single track or multi-track and any other type of packing machine used for packing of pouches of notified goods;

Rule 5 of the said rules prescribed the deemed production, based on number of machines and the MRP of the pouches packed. It is seen that the capacity of production is also determined by the MRP of the product manufactured. After determination of Deemed Production the duty liability was determined vide notification 16/2010-CE dated 27.2.2010

2.2 In short the scheme of the compounded levy is such that for each packing machine the deemed production is determined in terms of the Capacity Determination Rules. The total deemed production of each machine is measured in terms of 'Capacity Determination Rules'. For an assessee

total duty amount is based on the number of machines installed/used in the factory and also the MRP of the pouches manufactured on such machines. Duty is levied on the number of machines installed/used. The sole criterion for the determination of total duty payable is the number of "Packing machines" installed/used and the MRP of the pouches manufactured on respective machines.

2.3 In the instant case the dispute relates to rate of duty applicable to certain machines used by the appellants. Based on the investigations conducted, a Show Cause Notice dated 21.07.2011 was issued to the appellants, Directors and employees of the appellants proposing a demand of Rs.250.12 Crores under Rule 19 of the Capacity Determination Rules read with Section 11A(1) of the Act along with interest under Section 11AB of the Act, besides proposing penalty under Section 11AC of the Act read with Rule 18 of the Capacity Determination Rules and Rule 25 of the Central Excise Rules, 2002. SCN also proposed confiscation of three machines and the goods seized valued at Rs.2.31 Cr. Besides, penalty under Rule 26 of the Rules read with Rule 19 of the Capacity Determination Rules, was also proposed on Sh. Manoj Gupta, Director, Sh. Sharad Chaudhary, Director, Sh. Vipin Kumar Aggarwal, Director, Sh. S.K. Aggarwal, Director, Shri Shri Gopal Gupta, Chairman of Copal Corporation Ltd. and Gopal Group of Companies, Sh. Yogesh Arora, General Manager (Purchase) and Sh. P.V. Subramaniam, Manager (Purchase).

3. Learned Counsel for the appellant submitted that there are 2 main issues to be decided by Tribunal:

- (i) Whether the 3 machines under reference qualify to be "packing machine" as envisaged under the Chewing Tobacco and Unmanufactured Tobacco packing Machines (Capacity Determination and Collection of Duty) Rules, 2010?
- (ii) Whether there was any suppression of facts on the part of the Appellant to evade duty so as to invoke extended period of limitation?

3.1 Learned Counsel argued that the appellants are engaged in manufacture of Flavored Chewing Tobacco falling under Chapter 24 of the First Schedule to the Central Excise Tariff Act, 1985. The products are cleared in Pouches, P.P. Jars and Tins, in various pack sizes. Ld counsel pointed out that they possess fully automated Form, Fill and Seal (FFS) machines where the speed of the machine vary from 300 plus pouches per minute and goes above 450 pouches packed in one minute. They also possess manually operated machines, which work on electricity or pneumatic power and wherein:

- (i) Pre-formed pouches are obtained from the outside the Unit;
- (ii) Pre-formed Pouch is hand held by the worker below the nozzle of the machine;
- (iii) Upon pressing of the pedal by the worker manually, an estimated quantity of the product is dropped in the pouch hand held by the first worker;
- (iv) The filled pouch is handed over to the second worker;
- (v) The second worker then weighs the pouch on a weighing scale and corrects the weight of the pouch either by taking out or putting in the product in / from the pouch by the aid of a spoon by hand;
- (vi) The weighed pouch is handed over to the third worker who uses a heat sealer (which uses electricity for generating heat) to enable hot sealing or by guiding the pouch on a band sealer (which again uses electricity to generate heat) to enable sealing, and the pouch is sealed.

Learned counsel argued that by the above process the pouch is manually packed. Therefore, from the above discussion and description, we can easily observe the difference between the automatic FFS machine and Manual Machines.

3.2 Learned Counsel pointed out that Notification No.10/2010-CE (N.T.) dated 27.02.2010, notified following goods under Section 3A

(i) unmanufactured tobacco, bearing a brand name, falling under tariff heading 2401 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986); and

(ii) chewing tobacco falling under tariff item 2403 99 10 of the said Tariff Act,

manufactured with the aid of packing machine and packed in pouches as notified goods, on which there shall be levied and collected duty of excise in accordance with the provisions of the said section 3A.

He argued that there are three essential ingredients for a product to qualify as the notified/specified goods:

- (i) it must be "Chewing Tobacco" falling under the prescribed Item number;
- (ii) it must be "Manufactured with the aid of packing machine"; and
- (iii) it must be "Packed in pouches".

Learned Counsel pointed out that these three conditions must be collectively satisfied for the product to qualify as a "specified goods" for the Compound Levy Scheme to be applicable. Learned Counsel pointed out that the product of the Appellant is "Flavored Chewing Tobacco" and packed in pouches.

3.3 Learned Counsel pointed out that the Notification explain the meaning of 'Packing Machines' as under:

"Packing Machine" includes all types of Form, Fill and Seal (FFS) machines and Profile Pouch Making Machine, by whatever names called, whether vertical or horizontal, with or without collar, single-track or multi-track and any other type of packing machine used for packing of pouches of notified goods"

Learned Counsel pointed out that the packing machines contemplated, for the purposes of such levy under section 3A, are:

- (a) Form, Fill and Seal machines; AND
- (b) Profile Pouch making machines;

by whatever name they are called and in whatever form they may be - whether vertical or horizontal or any other type - used for the packing of the pouches. Learned Counsel argued that for a machine to qualify as 'Packing Machine' the entire process of packing - i.e., from forming the pouch to its filling and then sealing - has to be performed in an integrated sequential manner by the said packing machine.

3.4 Learned Counsel pointed out that in case of FFS machines, all activities from formation of pouch from the paper roll in the machine, filling of the pouches with the product, sealing of the open end of the pouch after it is formed and filled is done in continuous process. Ld. Counsel argued that the machine should have all the three functions as a continuous and synchronized process i.e. forming the pouch, filling the pouch and thereafter sealing the pouch, so as to qualify as packing machine under the Compound Levy Scheme. Ld. Counsel argued that whenever the machine did not perform all these three functions, it cannot be considered as Packing Machine, under the Compound Levy Scheme. Learned Counsel pointed out that out of three machines in dispute, two machines only perform the function of Filling and nothing else. The said two machines neither form the pouch, pack the pouch or seal the pouch.

3.5 Learned Counsel argued that the Department's contention that because the devices installed by the Noticee uses electricity hence they are packing machines, is completely baseless. Learned Counsel pointed out that Board vide File No. 341/24/2010-TRU, dated 05.03.2010, clarified that the Compound Levy Scheme covers notified goods manufactured with the aid of packing machines and packed in pouches. Further, there was no intention to levy duty on compounding basis on pouches which had not been packed with the aid of packing machines but are packed manually with the help of hand operated fillers or spoons or a similar manually operated device and sealed with heat sealers / band sealers / candles / hot iron and the like. Learned Counsel pointed out that nothing in the above clarification specifies anything about electricity. The Central Government in its clarification has

specifically excluded “pouches packed manually with the help of hand operated fillers or spoons or a similar manually operated device and sealed 5 with heat sealers / band sealers / candles / hot iron and the like” knowing well, that the heat sealers/band sealers itself uses electricity for their operation and still have been specifically excluded from the said the Compounded Levy Scheme.

3.6 Learned Counsel pointed out that the term “packing” or “packed” has not been defined under the Notification or the Capacity Determination Rules. Learned Counsel argued that “Packing” or “packed” in common parlance would mean something which is presented in a manner where it is ready for delivery to its target audience. With respect to the product in question, it would mean being secured in a manner such as would preserve the product in its present form during transportation, storage, distribution and finally sale to its consumer. In effect, a containment that would preserve or enhance the shelf life of the product. Ld Counsel argued that a pouch will be a “packed pouch”, if, and only if, it is sealed and secured from all sides. A pouch, filled with the product, but not sealed and having an open end will not qualify to be a “packed pouch”. Sealing, so as to secure and protect the product from spilling, contaminating, preserving its quantity and quality, is an intrinsic part of the process of packing. He argued that merely filling the pouch with the aid of a machine will not suffice. Ld Counsel pointed out that the entire packing process indicated above would amply demonstrate that the sole purpose of all the three Impugned Machines is only, and only, filling of the product in the pouches. None of the three Impugned Machines seals the pack and therefore, concludes the process of packaging. Open ended, filled pouches are not packaged pouches.

3.7 Learned Counsel argued that Condition Nos. 2 and 3 of the Notification are not satisfied by the product being manufactured by the Appellant and hence, the product of the Appellant is not “specified goods” under and in terms of the Notification. As such, the product of the Appellant does not qualify for assessment under the Compound Levy Scheme.

3.8 Learned Counsel pointed out that the three machines of the Appellant that are under dispute are as below:-

1. Filler machine (1 Kg)
2. Filler machine (500 gms)
3. Pedal Filler and Heat Sealer machine (10 gms)

Learned Counsel argued that the first two machines, are only filler machines (1 kg and 500 gms) on which the following 3 steps are performed –

1. Pre-formed pouches are procured from external sources and are not produced in the factory.
2. These procured pre-formed pouches are held below the hopper by the first worker.
3. On pressing the pedal by the worker, the electricity is triggered which rotates the disc on the hopper from which tobacco is dropped in the pouch due to pneumatic pressure.

The role of these 2 machines ends over here. It has no provision to perform any function like weighment or sealing/packing of pouches. Learned Counsel pointed out that the third machine which is the pedal and heat sealer machine is used for filling of 10 gm of Flavored Chewing Tobacco. The machine has a frame with hoppers attached on its sides. Learned Counsel pointed out that following 6 steps are to be performed before sealing the pouches –

1. Pre-formed pouches are procured from external sources and are not produced in the factory.
2. These procured pre-formed pouches are manually held below the hopper by 1st worker. (There are total 4 hoppers in the said machine).
3. On pressing the pedal by the worker, the electricity is triggered which rotates the disc on the hopper from which tobacco is dropped in the pouch due to pneumatic pressure.
4. The filled pouch is passed onto 2nd worker which weighs the pouch by putting it manually on a weighing scale.
5. Weight of the pouch is manually adjusted by the 2nd worker as per the required quantity, either by putting in or by taking out tobacco out of the pouch manually.
6. Once the weight is checked, the filled pouch is manually passed onto the 3rd worker for sealing.

This pouch is manually placed by the 3rd worker between the band sealer on the side of the filling unit (which is run on electricity) to seal the pouch. The band/heat sealer had been welded on the same machine by the Appellant for the convenience and efficiency of the workers only. On the said band sealer, the worker guides the open end of the pouch between the band sealer to seal the same, as an independent and separate process manually. The band/heat sealer can be used for sealing the pouches even without

using the filler machine. Learned Counsel pointed out that the above-described process, stands verified and validated by:

- (a) visits by the Department Officers;
- (b) the YMCA Report
- (c) the IIT Delhi Report and
- (d) the Technical Report submitted by the Appellants before the Department

Learned Counsel pointed out that this is the broad description provided in the Show Cause Notice too.

3.9 Learned Counsel argued that the activity of filling of pre-formed pouches, its weightment and sealing are mutually exclusive and independent. Both the processes of filling and sealing on this machine are independent of each other and happen as two separate processes. Even an individual single process out of the two can also be done on the said machine as both the said processes are not continuous, synchronized and inline, but are separate and independent of each other. The third machine cannot under any circumstance be described as an automatic machine as the pouch cannot go to the band sealer for sealing of its own. Further, this band sealer has been exempted from Compound Levy Scheme vide Board clarification dated 05.03.2010.

3.10 Learned Counsel argued that the goods are not packed with the aid of any packing machine as envisaged in the Notification or the Circular. The two machines used in the factory is only for filling (Filler Machine) the procured pre-formed pouches. In the above given process, all the 6 steps are done manually by the worker and only in 2 steps i.e. during rotation of the disc in Step 1 and sealing of the pouch by heat sealer in Step 6, electricity is used. So, the ratio of manual working viz-z-viz electricity used is 6: 2. Hence, in no way can above machine be said to be an automatic machine which had been brought under Compounded Levy Scheme by the Department with an intention to levy duty on deemed production. He argued that the Department has erred in arriving at a conclusion that since the machines under reference uses electricity or pneumatic pressure, so they are packing machines, without appreciating its actual working. Further the clarification issued by the Board dated 05.03.2010 does not say that to be out of the purview of Compound Levy Scheme, the machine should not be using electricity. He argued that these devices do not perform the three functions of forming, filling and packing the pouches. They perform only one of the three mandatory functions - namely, filling. They do not form the

pouch - which are externally purchased. They do not weigh the quantity of the product - which is again performed on a separate device. And, they do not seal or complete the packing process - which is again performed on a separate device. Thus, while these devices under consideration are used in one of the steps in the entire process of packing, they do not initiate the process of packing nor do they conclude the process of packing. They only perform one of the steps in the process of packing.

3.11 Learned Counsel argued that Under Rule 6, Declaration as prescribed in Form-1 is to be filed. The said Declaration inter alia requires the manufacturer to declare 'the name of the manufacturer of each of the packing machine, its identification number, date of its purchase and the maximum packing speed at which they can be operated for packing of pouches of notified goods, with lime tube and without lime tube, of various retail sale prices'. The Form 1, inter alia, requires declaration of maximum speed of packing pouches at which it can be operated, again which can only be in case of fully automated FFS machine and not in case of machines which are run by human intervention. Learned Counsel argued that the machines under reference cannot run without human intervention and the output of the same depends on the efficiency of the individual worker. The rules also fix the number of pouches of respective Retail Sale Price, deemed to have been packed during the month on the packing machines covered under the Compound Levy Scheme, which can only be packed using FFS machines, which works with no human intervention. This deemed production mentioned in notification is impossible to be achieved on machines which work with human intervention, where the output is dependent on the efficiency of worker and not of the machine. This fact is substantiated by the fact that Union Government have further incorporated slabs with machines having various speed, like Packing Machine having speed up to 300 pouches per minutes, Packing Machines having speed from 301 to 450 pouches per minutes and Packing Machines having speed above 450 pouches per minute. The duty slabs for the respective speed slabs and its deemed production have also been fixed accordingly. As is evident from the above paras, the machines contemplated under Chewing Tobacco Rules are the machines which has definite speed and capacity to pack pouches numbering as high as 300 pouches or even more in a minute. Such a capacity is possible only in a machine which is fully automated and perform all three functions i.e. Form, Fill and Seal of the pouches and not by the Filler & Sealing Machines under reference, which are run by human intervention at all the levels and output of which is dependent on the efficiency of the workers. The capacity is totally dependent on the efficiency of the individual worker in

question and is nowhere near the deemed production fixed under the Compound Levy Scheme. Learned Counsel argued that these cannot be machines intended to be covered under the Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010, as the Capacity of the machines under reference cannot be determined. It is further evident that the legislation has no intention to cover these impugned machines, which don't have any definite output or speed to fix the deemed production of the same and its duty payable thereof. In this regard Learned Counsel relied on the following decisions:-

(i) The Hon'ble CESTAT in case of COMMISSIONER OF CENTRAL EXCISE, UDAIPUR Vs. M/s MIRAJ PRODUCTS PVT LTD reported at 2018-TIOL-427-CESTAT-DEL has specifically held in Para 7 of the said Order-

"7. We have examined the provisions of Chewing Tobacco Rules, 2010. Rule 5 of the said rules 10 which determines the quantity of production based on the capacity of the machine as well as read with the Notification number 16/2010 makes it clear that the notified goods are goods which are for retail sale produced by using packing machines, as per the table mentioned therein. The explanation 5 in the notification makes it abundantly clear that for the purpose of said notification 'Filter Khaini means chewing tobacco which is packed in sachets of filter paper or fabric before being packed in pouches with the aid of packing machines'. The contention of the revenue is that the aid of packing machines should be for sachet and not for pouch. We are not able to appreciate such interpretation of the explanation. A plain reading of the explanation shows that packing in pouches should be with the aid of packing machines. In this contention, we also refer to clarification issued by the board vide letter dated 53/2010. It was categorically clarified that packing of pouches of notified goods and further filling with the help of manual process will not attract the Chewing Tobacco Rules and duty will be leviable in terms of Section 3 only."

(ii) The Hon'ble CESTAT in case of COMMISSIONER OF CENTRAL EXCISE, CHANDIGARH Vs. M/s TEJ RAM DHARAM PAUL reported at 2013-TIOL-1192-CESTAT-DEL (2013(297)ELT 0125 (Tri.- Del.)) has categorically held in Para 14 as under-

"14. After taking into consideration the entire facts he has held that in terms of Explanation 5 and the clarification given by the Board he came to conclusion that Section 3A covers only pouches packed with the aid of packing machine and not the pouches that are packed manually. Inasmuch as the plastic pouches, in the present case, are pre-sealed and zipped from one side and the sachets are put in manually and the pouch is sealed with the help of hot iron/band sealer, it cannot be said that the plastic pouches are packed with the help of packing machine."

From the above referred judgments, Learned Counsel argued that it is very clear that the Compounded duty can only be levied when 'Notified Goods' are packed in pouches with the help of 'Packing Machine'.

3.12 Learned Counsel argued that the reports of technical experts obtained by Department shows that they admitted that impugned machines are not automated machines. Further, two (2) of the said machines have no provision to seal the pouch at all and the third one has a band sealer as a separate process. Learned Counsel argued that the Technical experts were to study the working of the machines, but instead they gave their opinion on the legal point. It was for this reason that the Appellant sought the cross-examination of the experts, but the same was denied by the Department. Learned Counsel argued that the technical report calling the impugned machines as "Packing Machines" cannot be relied upon.

3.13 Learned Counsel argued that that the unit of the Appellant had been visited by the officials of the Department on numerous occasions' right from March, 2010 till July, 2010 and the officials carried out several rounds of inspection to study the nature and working of the machines under reference. Ld counsel explained in details the correspondence between them and the department. He also gave details of the visit made by various officers

3.14 Learned Counsel argued that the Appellant was using manually operated machines, using electricity at the time of notification of Rules. That the machines in questions, were acquired in July, 2009. Learned Counsel argued that an intimation had been duly given to the Department under Rule 31 of the Central Excise Rules, 2002 vide letter, dated 22.07.2009 and 23.07.2009. This intimation was given to the Department in terms of Circular No. 854/12/2007 dated 07.09.2007 wherein in Para 2.4 it is stated:

"In case, the unit brings any new filling and packing machine into the factory, the intimation should be filed before 24 hours of bringing in the said machine."

Even in the said letters the Appellant described the machines as manual machines. These machines were procured by the Appellant even before the Compound Levy Scheme was conceptualized.

3.15 Learned Counsel argued that the Adjudicating Authority, while rejecting the plea of the Appellant on invocation of extended period, has not referred to the various visits by the Official of the Department for physical verification of the impugned machines, more specifically the visit by the Preventive wing of the Department dated 21.05.2010 and also the various correspondence exchanged giving the nature and working of the impugned machines, more specifically the letter dated 25.05.2010 written by the Appellant, which was already there on record. The letter dated 2nd March, 2010 and filing of declaration dated 5th March, 2010 along with the covering letter, duly acknowledged by the department clearly shows that 2 of the

machines under reference were duly informed by the Appellant. The letter dated 5th March categorically says that these 2 machines are not covered under Compound Levy Scheme (CLS) and also the fact that the Appellant will be using these machines, being out of the purview of the Compound Levy Scheme (CLS). The 3rd machine was received by the Appellant later, for which due prior intimation vide letter dated 22nd March, 2010 was given by the Appellant in terms Clause 2.4 of the Board Circular No. 854/12/2007/CX dated 7th September, 2007. In the Intimation dated 22.03.2010 in one of the Invoices, the seller of the machine mentioned the machine as Packing Machine in the Head Note but the Head Note was further clarified and the machine was further described as Dosing Filling System. Therefore, even the Third Machine was not the Packing Machine and also been duly intimated to the Department in terms of Circular No. 854/12/2007 dated 07.09.2007. Further, it is not the case of the department, nor has it been alleged in the Show Cause notice that any of the 3 impugned machines was found to be illegal or unaccounted. Further, the letter dated 8th March, 2010 of the Deputy Commissioner, wherein he says that all machines including the Tin machines and the manual machines are covered under the Compound Levy Scheme (CLS), clearly shows that the department were aware of the impugned machine. Learned Counsel argued that the Appellant duly replied to the Deputy Commissioner's letter dated 8th March, 2010, informing that the impugned machines are not covered under the Compound Levy Scheme (CLS). The Appellant further vide its letter dated 15th March, 2010 duly informed the working of the machines under reference. It is submitted that on the letters of the Appellant dated 8th March & 15th March of 2010, the Deputy Commissioner wrote a letter dated 17th March, 2010 to the Appellant, wherein he informed that the department has re-examined the issue and that there is no levy of duty on compounded basis on Tin Packing machine and on pouches which have not been packed with the aid of packing machine, but are packed manually with the help of hand operated fillers or similar manually operated device and sealed with heat sealers/band sealers/candles/hot iron and the like. The Deputy Commissioner never disputed the averment of the Appellant given in its letter dated 10th March, 2010 that these machines are not covered under Compound Levy Scheme (CLS). Neither the Deputy Commissioner asked the Appellant to declare the said machines and/or pay duty on the same under Compound Levy Scheme (CLS).

3.16 Learned Counsel argued that another issue highlighted in the Show Cause Notice is about the change of the nomenclature of one machine from "Sealer (Pedal Operated)" to "Pedal Operated Filler". This was also duly

explained during investigation as is given at wherein the statement of the Purchase Manager Mr. P.V.Subramanian is given. In response to Question 1 therein, he has categorically stated that as the description on the bill was wrongly given as "Sealer (Pedal Operated)" instead of "Pedal Operated Filler", it was duly corrected. In fact, it was to done to make the description of the machines more clear and better, from a mere Sealer to Filler. It is also undisputed fact that the Appellant duly filed the requisite statutory declarations, forms, return on or before the due date and duly maintained the statutory records and kept the Department informed of all the facts. The Appellant was not required to give any declaration in the aforesaid Form-I as the Appellant from the Day 1 is of the view that the said machines are manually operated machines and the said Declaration was required to be filed only in respect of FFS machines.

3.17 Learned Counsel argued that the fact that there is no fraud, collusion, wilful misstatement of facts or suppression of facts on the part of Appellant or co-Appellant(s) with the intent to evade duty is substantiated by the observation of all the three members of the Hon'ble Settlement Commission, whom the Appellant approached to buy peace. All the three members of the Hon'ble Settlement Commission unanimously agreed and observed that there is no suppression of facts on the part of the Appellant at all so as to invoke the extended period. All the declarations were duly filed by the Appellant, informing about the machines under reference giving its working in detail, duly acknowledged by the department, a fact, which is undisputed. Learned Counsel argued that the Settlement Commission in their Final Order No. F-1111/CE/12-SC(PB) dated 03.09.2012, the majority opinion at the end of Para 34 have specifically held-

"Thus, there is no suppression of facts regarding nature and working of 3 machines on the applicant's part"

3.18 Learned Counsel argued that perusal of the above chronology of communications and visits by the Department clearly shows that the Department in this case had the knowledge from the very beginning about the machines under reference, therefore, the extended period cannot be invoked by the Department and the period beyond one year from the date of Show Cause Notice is barred by limitation. The only period which falls within limitation is the starting from the 1st of July, 2010 till 24th of July, 2010. The Appellant in support of the above view places reliance on the following judgments:

- BaidyanathAyurvedBhavan Ltd. Vs Collector of Central Excise, Allahabad [2004 (165)E.L.T. 494 (SC)],
- GopalZardaUdyog vs. Commissioner of Central Excise, New Delhi [2005 (188) E.L.T. 251 (S.C.)],
- Collector of Central Excise vs. H.M.M. Limited [1995 (76) E.L.T. 497 (S.C.)];
- Kaur & Singh vs. Collector of Central Excise, New Delhi [1997 (94) E.L.T. 289 (S.C.)];
- Commissioner of Central Excise vs. Tripura Containers Pvt. Ltd. [2011 (264) E.L.T. 339 (Guj.)];
- Union of India vs. Rajasthan Spinning & Weaving Mills [2009 (238) E.L.T. 3 (S.C.)];
- Pushpam Pharmaceuticals Company vs. Collector of C. Ex., Bombay [1995(78) E.L.T. 401 (S.C.)];

3.19 Learned Counsel argued that Rule 18 of Chewing Tobacco Rules and Rule 25 of the Central Excise Rules, 2002 is subject to Section 11AC of the Act. The said Section mandates mensrea on part of the person before any penalty can be imposed. In the instant case there is no mensrea.

4 Learned Counsel for revenue took us through the various provisions of law and the notifications issued.

4.1 Learned Counsel for revenue pointed out that after issuance of notification No.10/2010-CE (N.T.) dated 27.2.2010, the appellants vide letter dated 02.03.2010, submitted a list of 16 Form Fill and Seal (for brevity 'FFS') machines for pouch packing. In addition to 16 machines, the appellant declared that there are some machines are TOTALLY MANUAL MACHINES to be used in case of emergency. It was further submitted by the appellant that they would not be undertaking any manufacturing activity of the notified goods w.e.f. 08.03.2010 but would be packing pouches MANUALLY with machines which are manual operated and do not fall within the ambit of the Rules. Learned Counsel for revenue pointed out that the appellant had submitted declaration under Form-1 as required under Rule 6 of the rules only qua 16 FFS machines vide letter dated 5.3.2010. No declaration in form 1 was filed/submitted qua other machines for the reason that the same, being manually operated, did not qualify as "packing machine". Vide letter dated 15.03.2010, the appellant submitted a note qua 5 machines, which included 2 machines claimed to be manually operated namely:

- i. Dosing machine for manual pouch filling;
- ii. Manual filling and sealing device for Zipper Pouch;

4.2 Learned Counsel for revenue pointed out that the appellants unit was visited on 24.07.2010 by the anti-evasion unit of the Central Excise Commissionerate, Faridabad. During the visit, three machines were found being used for manufacturing of notified goods. Other than the three

machines, the appellant was also engaged in packing of chewing tobacco through manual filling process as depicted in the photographs taken at the time of search. Panchnama dated 24.7.2010 was drawn. Relevant contents on. The panchnama records that the machines were found to be pneumatically controlled and used the air compressor which was power operated. Statement dated 24.07.2010 of Sh. Manoj Gupta (Director) of the appellants who was present at the time of visit of the Officers, who had accepted that the three machines used for packing of notified goods were operational only with power.

4.3 Learned Counsel for revenue argued that Investigations were carried out to ascertain the correctness of the contents of the declaration given by the appellants in respect of the 16 FFS machines in Form 1 in terms of Rule 6 of the Capacity Determination Rules and also in respect of two machines (stated to be manually operated in letter dated 15.3.2010) and one machine which remained undeclared and in statement dated 24.7.2010 claimed to be manually operated. These 3 machines were found to be operated with aid of electricity and/or pneumatically with a electrically powered compressor connected.

4.4 Learned Counsel for revenue argued that during the investigation, it was revealed that out of the 16 FFS machines, declaration in respect of 14 machines as regards their manufacturer were found to be incorrect. It was revealed that the purported manufacturers were in fact dealers of scrap who had been contacted by the employees of the appellants, to issue invoices only i.e. only paper transactions were carried out to route the machines from Gopal Corporation Ltd. i.e. parent company of Gopal Group. The machines were in fact supplied on paper by the sister concerns of the appellants to the purported manufacturers who in turn had issued invoices in favour of the appellants without actually seeing or receiving the machines in their premises. He relied on the Statement of Sh. ManharBhalla, Sales Manager Cum Factory Manager of M/s Akash Pack Tech (P) Ltd, Faridabad, Statement of Sh. Pradeep Mendiratta, authorized Signatory and Sh. Harish ChanderMendiratta, Proprietor of M/s Prabhat Steels, Patparganj, New Delhi and Statement of Sh. Vishnu Aggarwal, Partner of M/s Tirupati Enterprises

4.5 It further revealed that in respect of one of the three machines claimed to be manually operated machine, the employees (Sh. Subramaniam) who contacted the purported suppliers, had asked the supplier (M/s Industrial Tapes & Packers, New Delhi) to change the description of the machine from 'Dosing Filling Machine" whereas the sale

invoice in showed the description as "Sealer (Paddle Operated)" and subsequently on the request of the appellants, the description was further changed to "Pedal Operated filler". A parallel invoice was issued while changing the description of the machine. Similarly, another machine which was also claimed to be manual was also routed through M/s Aggarwal Industrial Packers (P) Ltd who had in turn shown to have been purchased it from M/s Industrial Tapes and Packers, New Delhi. Sh. Karun Aggarwal, Authorized Signatory of the two units stated in his statement dated 02.08.2010 and 17.08.2010 divulged that the said machine was just having a square iron base and three feet high in which four hoppers were attached on all four sides and that except the frame and four hoppers there was no other attachment or accessory attached to the machine. The said machine was stated to be not working at that time of issuance of invoice by them. Learned Counsel for revenue argued that it was accepted by Shri Manoj Gupta, Director of the appellants in his statement dated 28.02.2011 that from the appearance of machines, it seems that the machines were fabricated and there is no model or name of the manufacturer on the machines. Learned Counsel for revenue relied on the Statement of Sh. Karun Aggarwal, authorized signatory of M/s Aggarwal Industrial Packers (P) Ltd and M/s Industrial Tapes & Packers, New Delhi, Statement of Sh. P.V. Subramaniam, Manager (Purchase) of the appellants. Learned Counsel for revenue argued that the entire manipulations were got carried out by the employees namely Sh. P.V. Subramaniam, Manager (Purchase), Sh. Yogesh Arora, G.M. Purchase and Shri Kapil Sharma of the appellant at the instance of the Directors.

4.6 Learned Counsel for the Revenue also pointed out that technical opinion was also taken from 02 renowned Govt. Institutes in respect of the three machines as to whether the same were manually operated machines or not. One from YMCA University of Science & Technology, Faridabad and second from IIT New Delhi. In the said reports the expert observed that the three machines could not be equated to manual packing and neither could they be termed as 'hand operated fillers' or spoons or similar like manually operated device.

4.7 Learned Counsel for revenue found it pertinent to mention that consequent to issuance of SCN to the appellants, they went before the Settlement Commission in respect of part of the demand i.e in respect of the machine used for packing pouches of 10gms, therein admitting their duty liability of Rs.1.02 Cr along with interest which later was revised to Rs.4.09 Cr on the basis of notice issued by the Settlement Commission (since the

packing machine was having 4 hoppers) and the same accepted by the appellants and the amount was deposited. However, the Settlement Commission, ordered the case to be sent back to the adjudicating authority for disposal of SCN in accordance with the provisions of law. Learned Counsel for revenue argued that this machine has been admitted to duty under the Compounded Levy by the appellant before the Settlement Commission. Though the order of settlement commission is not a binding precedent once the matter was referred to the adjudication authority, however, the admission by the appellant cannot be ignored as the same shows willful misstatement by the appellant till the detection by the department on 24.7.2010.

4.8 Learned Counsel for revenue argued that the following questions are raised in this dispute:-

- 1) Whether three machines found to be operational at the time of visit at the factory premises of the appellant on 24.7.2010 are Packing Machines as per the notification dated 27.2.2010?
- 2) Whether the appellants had suppressed/ mis declared /wilfully misstated and contravened the provision of rules in use of Packing Machines for manufacturing of Chewing Tobacco?
- 3) Whether the extended period of limitation is invocable in the facts and circumstances of the present case?

4.9 Learned Counsel for revenue argued that definition of packing machine in the said notification is an inclusive definition and besides FFS machines also covers

'any other type of packing machine used for packing of pouches of notified goods.'

4.10 Learned Counsel for revenue argued that for the chewing tobacco to qualify as "notified goods" the same has simply to be packed in pouches with the "aid of packing machine". According to the Learned counsel the term with the "aid of" would also include filling of tobacco in pouch which is thereafter sealed with help of sealers. Learned Counsel for revenue argued that it is not the condition of the notification that there has to be a complete continuous process for packing of Chewing tobacco in pouches. The notification simply mentions that in case a packing machine is used in the entire process meaning thereby the packing machine is used to aid the packing process, then the goods in question would qualify as notified goods and would be liable to duty under Section 3A of the Act.

4.11 Learned Counsel for revenue pointed out that clarification was sought by the trade from the Board office and a clarification was issued by the Board vide F.No.341/24/2010-TRU dated 5.3.2010 in Para (3) of the said clarification reads as follows:-

"(3) Requests have also been received to clarify whether manual packing of pouches of notified goods and their further sealing with the help of heat sealing /hand sealers / candles/ hot iron would come within the purview of compounded levy scheme or not. THE SCHEME COVERS THE SAID NOTIFIED GOODS, MANUFACTURED WITH THE AID OF PACKING MACHINES. However, there is no intention to levy duty on compounding basis on pouches which have not been packed with the aid of packing machines but are packed with the help of hand operated fillers or spoons or a similar manually operated devices and sealed with heat sealers/band sealers/candles/hot iron and the like. These would be leviable to duty in terms of Section 3 of the Central Excise Act, 1944. It is also clarified that the manufacturer would also be allowed to keep packing material required for packing of such manually packed pouches in his factory premises."

4.12 Learned Counsel for revenue argued that from the reading of the Notification and the clarification given by the Board it is lucid that the process of sealing has not been embedded in the definition of packing machine. Even while clarifying the exclusion of hand operated fillers/spoons or a similar manually operated device the use of sealer has been excluded meaning thereby that the process of sealing is not linked to the definition of packing but is one of the process for packing of Chewing tobacco in pouches.

4.13 Learned Counsel for revenue pointed out that the filling of pouches with the help of the said machines which are pneumatically/compressor controller and run with the aid of electricity has not been disputed by the appellant. The fact that the pouches filled by the aid of packing machines are sealed by different workers does not come to the rescue of the appellants in view of the definition of packing machine i.e. to say that sealing, whether integrated or separate, won't alter the definition of packing machine which is used to aid the packing process.Ld Counsel for revenue argued that the inference drawn by the appellants that mere filling by a machine without sealing cannot be said to be resulting in packed pouch, is a mis-interpretation of the unambiguous definition and the same amounts to adding words which are not there in the notification. It is well settled that the notification has to be read in the way that its interpretation does not

make it nugatory. The Notification has to interpret on its working and no words not used in the Notification can be used.

4.14 For this assertion reliance was placed on the judgment of the Hon'ble Supreme Court in the case of CCE, Hyderabad Vs Sunder Steels Ltd. whereunder in Para 5 the Hon'ble Court observed as under:

"5. The Notification has to be interpreted on its wording. No words, not used in the Notification, can be added."

Similarly, in the case of Hem Raj Gordhandas Vs CCE & Cus 1978(2) ELT J350 (SC) the Hon'ble Supreme Court in Para 5 held as under:

"It is well established that in a taxing statute there is no room for any intendment but regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the notification. If the tax-payer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. If such intention can be gathered from the construction of the words of the notification or by necessary implication therefrom, the matter is different but that is not the case here."

4.15 Learned Counsel for revenue pointed out that the definition of packing machine in the notification reads **"..... and any other type of packing machine used for packing of pouches of notified goods"** is flanked by the specific type of packing machine i.e. "Form, Fill and Seal machines and profile pouch making machine, by whatever names called, *whether vertical or horizontal, with or without collar, single-track or multi-track and any other type of packing machine used for packing of pouches of notified goods.* He contested the claim of the appellants that only a machine which performs all the functions i.e. *Forming of Pouch, Filling of Pouch and Sealing of Pouch or Profile Pouch Making should qualify as* "any other type of packing machine used for packing of pouches of notified goods". Ld Counsel for revenue pointed out that the definition of a packing machine is just illustrative as the word 'includes' mentioned therein means:

- i. Includes all types of Form, Fill and Seal machines by whatever names called, *whether vertical or horizontal, with or without collar, single-track or multi-track; and*
- ii. Includes any other type of packing machine used for packing of pouches.

Thus, the contention of the appellants that their machine does not fall under the first part of the definition of Packing Machine even if correct would not alter the position that the said machines get covered within the definition by virtue of word 'any other type of packing machine used for packing of pouches'. According to the Ld counsel the decisions relied upon by the appellants in the case of CCE Vs Maharashtra Fur Fabrics Ltd.-2002(145)ELT 287 (SC) and Commercial Tax Officer Vs M.R.F Ltd -2009(235) ELT 802 (Raj) are of no use to them.

4.16 Learned Counsel for revenue contested the appellants argument that even if it is presumed that 'any other type of packing machine used for packing of notified goods' does not necessarily mean 'Form, Fill and Seal' machine' still the phrase would include only those machines which perform at least two functions (i) Filling (ii) sealing. Learned Counsel for revenue argued that from the reading of the Notification and the clarification given by the Board it is lucid that the process of sealing has never been embedded in the definition of packing machine. According to the Learned counsel even while clarifying the exclusion of hand operated fillers/spoons or a similar manually operated device the use of sealer has been excluded while clarifying the packing, meaning thereby that the process of sealing is not linked to the definition of packing but is one of the process for packing of Chewing tobacco in pouches. According to the Learned counsel it can be concluded from the notification that the definition of packing machine does not in any manner include sealing as the notification provides that Chewing tobacco manufactured with the "aid of" a packing machine, the goods would fall within the purview of 'Notified goods' for the purposes of levy under Section 3A of the Act. The appellants contention that definition of packing machine in the said notification and also in the Capacity Determination Rules would be machine which includes sealing, tantamount to reading the words in the notification which are not there.

4.17 Learned Counsel for revenue argued that under Rule 6 of the Capacity Determination Rules, a manufacturer had to file a declaration as regards the maximum packing speed at which it can be operated. The appellants substantiated their claim citing examples of the Union Budget of 2015 and 2016, the table of deemed production given in the Rules was amended to incorporate slabs with machines with various speeds. Ld Counsel for revenue argued that the contention of the appellant itself clarifies that in 2015 & 2016 there were incorporation of different slabs of duty based upon

the speed of the machines. Learned Counsel for revenue argued that it is Pertinent to note here that during the impugned period the duty was based solely on "MRP of the Notified goods and the number of machines installed", whether operational or not. Relevant Rule 4 & 5 of Capacity Determination Rules are reproduced below:

"4. Factor relevant to production. - The factor relevant to the production of notified good shall be the number of packing machines in the factory of the manufacturer.

5. Quantity deemed to be produced. - The quantity of notified goods, having retail sale price as specified in column (2) of the Table below, DEEMED TO BE PRODUCED by use of one operating packing machine per month, shall be as is equal to the corresponding entry specified in column (3) and column (4) of the said Table, as the case may be:-----."

4.18 Learned Counsel for revenue argued that for the purposes of charging of duty of the Notified Goods in terms of the provisions contained in Section 3A of the Act, only requisites were:

- i. The number of machines installed;
- ii. The retails sale price of the notified goods."

4.19 Learned Counsel for revenue argued that reliance by the petitioner to the Union Budget of 2015 and 2016, to contend that the Rules were amended to incorporate slabs with machines with various speeds is of no relevance in the present case.

4.20 Learned Counsel for revenue pointed out that the appellants contention that the technical reports had been obtain at their back is also devoid of any merits in the light of the fact that the entire proceedings had been drawn in the Panchnamas drawn on the respective dates and in the presence of Incharge /Production Incharge of the Appellants. Ld Counsel for revenue pointed out that both the technical opinions taken by the department were from Government/establish Institutes of Engineering and Technology. Ld Counsel for revenue argued that that the findings of the technical experts has not been assailed by the appellants at any stage.

4.21 Learned Counsel for revenue contested the appellant's argument that the technical opinion taken by the appellants did not find mention in the Show Cause Notice. Learned Counsel for revenue pointed out that the adjudicating officer in para 118 on page 215 has dealt with this contention of the appellant and has categorically held as under:

" With reference to the contention made by the noticee that the technical reports provided by them do not find a mention in the Show Cause Notice, I find that the Show Cause Notice has made allegations of non-payment of Central Excise duty, and the information /documents/ evidence, which have been relied upon to allege such non-payment of duty, have been made available to the Noticee. Now, whatever submissions have been made and the documents submitted by notice, during the course of the adjudication proceedings in their defence to the allegations made in the Show Cause Notice, the same are being duly examined and discussed in the present proceeding."

4.22 Learned Counsel for revenue contested the appellant's argument that the Adjudicating Authority erred in ignoring the visits made by the Central Excise Officers on 07.03.2010, 22.03.2010, 07.04.2010, 21.05.2010 and 12.07.2010 for conducting physical verification for sealing/removal of FFS machines. Learned Counsel for revenue pointed out that the above visits were at the instance of the appellant either for sealing/removal of specific FFS machines which was done by the deputed/jurisdictional officers and the same cannot be termed as physical verification. Ld Counsel for revenue pointed out that there is no evidence adduced that any other officer or officers of preventive/anti-evasions cell visited the premises of the appellant and these machines were also inspected or checked at any point of time. Moreover, it is pertinent to mention here that third machine was never even mentioned in any of the communication (therefore remained undisclosed), whereas other two machines were always stated to be manual machines to be used in case of emergency. The verification of the machines in question was carried out only on 24.07.2010 by the Anti-evasion branch of the Commissionerate, 06.08.2010 by the Anti-evasion branch along with Senior Instructor, Electrical Department from YMCA Institute of Engineering and Technology and on 25.09.2010 by the Anti-evasion branch along with Assistant Professor from the Department of Mechanical Engineering of the Indian Institute of Technology. For the said reasons, the adjudicating authority has rightly referred to the above visits by the officers of the department, which was in relation to the 3 machines in question.

4.23 Learned Counsel for revenue discussed various letters written by the appellants on various dates. Learned counsel for revenue argued that in terms of the Capacity Determination Rules, the appellants were required to provide the requisite declaration in Form-1 only and the said rules did not provide for declaration in any other form/format. Learned counsel for revenue argued that the appellants failed to declare all the packing machines in Form-1 and had therefore suppressed the material facts from the

department, in order to evade payment of appropriate duty of excise. In fact the installation of the third machine was not even intimated to the department in any form.

4.24 Learned counsel for revenue argued that the department initiated investigations to ascertain the correctness of the declaration filed by the appellants. During the investigations the following was revealed:

- i. That all the FFS machines purchased by the appellants were shown to have been purchased from different manufacturers. The said machines were however shown to have been purchased through dealers but in actual been purchased directly by the appellants from their sister concern and dealers were asked to issue invoices showing sale to the appellant's unit. Thus, the appellants in a planned manner had re-routed even the FFS machines, which were actually at the premises of their sister concerns, through the dealers who were declared to be the manufacturers of FFS machines.
- ii. That all the three machines claimed to be manual, were also procured in the same way. In respect of one of the said three machines, the purchase invoice of the dealer mentioned the description of the machine to be 'Dosing Filling Machine' whereas the sale invoice in showed the description as "Sealer (Paddle Operated)" and subsequently on the request of the appellants, the description was further changed to "Pedal Operated filler". Thus, even the machine that had been claimed to have been intimated to the department had in-fact been mis-declared with the intention to evade payment of duty. Another machine was accepted to be fabricated one by Sh. Manoj Gupta, Director of the appellants in his statement dated 24.07.2010, on being confronted with the statement of the purported manufacturer who stated it to be actually a frame with four hoppers with no attachments thereto.
- iii. One machine that was used to pack 500gms of Chewing Tobacco was never ever intimated to the department (the same was not even mentioned while explaining the working of other 2 machines on 22.5.2010). Even the working of other 2 machines was also mis-declared and there was wilful misstatement on part of the appellant in order to evade payment of duty under the Compounded levy scheme as the machines were always presented as manual fillers, whereas the same were admittedly pneumatically/compressor controlled and were running with the aid of power.

4.25 Learned counsel for revenue argued that not only the appellant had mis-declared the description of the machines and the use of electricity to run the same, they had also suppressed the number of machines installed in their factory premises. Further, they had also filed wrong declaration in terms of the provisions contained in Rule 6 of Capacity Determination Rules

solely with the intention to evade payment of duty under Section 3A of the Act.

4.26 Learned counsel for revenue argued that during in the investigations it was found that the description of the machines claimed to be manual had been changed by the appellants besides fabricating one machine at their own end. Learned counsel for revenue pointed out that the invoice submitted by the appellants during the present proceedings bearing S.No. 252 dated 18.06.1995 addressed to Hari Chand Shri Gopal, Baddi gives the description of the second machine as

"Pneumatic filling and sealing machine complete with four heads and DC Motor / Panel".

4.27 Learned counsel for revenue argued that the appellants had committed fraud with clear intention to evade payment of duty under Compounded levy scheme and fraud vitiates everything. Reliance was placed on the following judgments:

- i. Shahid Ali VsPr.Commr Customs – Final Order No. 51539-51546/2021 dated 02.06.2021 by CESTAT Delhi.
- ii. S.P.Chengalvarya Naidu vsJagannath 1994 AIR 3 1994 SCC(1)

4.28 Learned counsel for revenue argued that the benefit of any ambiguity in the exemption notification cannot be claimed by the assessee and the same must be interpreted in favour of the revenue. He relied on the decision of Hon'ble Apex Court in case of Commissioner of Customs, Mumbai v Dilip Kumar has held as under:

"52. To sum up, we answer the reference holding as under -

(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export Case (supra) stands overruled."

The question being dealt by the Hon'ble Constitution bench was

"This Constitution Bench is setup to examine the correctness of the ratio in Sun Export Corporation, Bombay v. Collector of Customs, Bombay, (1997) 6 SCC 564 [hereinafter referred as 'Sun Export Case' for brevity], namely the question is - What is the interpretative rule to be applied while interpreting a tax exemption provision/notification when there is an ambiguity as to its applicability with reference to the entitlement of the assessee or the rate of tax to be applied?"

4.29 Learned counsel for revenue pointed out that in the present case also the notification needs to be strictly interpreted and the definition of packing machine as contained in the notification if interpreted strictly would cover the machines being used by the appellants and since the appellants had mis-declared/not declared the packing machines, therefore the same amounts to fraud and it is also the settled position of law that fraud vitiates everything. Hence, extended period has rightly been upheld by the adjudicating authority. Learned counsel for revenue relied on the following decisions:-

- CCE Vs HMM Ltd -1995(76) ELT 497 (SC)
- Kaur & Singh Vs CCE -1997(94) ELT 289 (SC)
- CCE Vs Tripura Containers -2011(264) ELT 339 (Guj)
- UOI Vs Rajasthan Spg & Weaving Mills -2009(238) ELT 3 (SC)
- Pushpam Pharmaceuticals Co. Vs CCE-1995(78) ELT 401 (SC)
- Gopal Zarda Udyog Vs CCE-2005(188) ELT 251 (SC)
- Commissioner of Customs v Dilip Kumar -2018(69) GST239

4.30 Learned Counsel for revenue argued that the provisions for invoking the extended period of limitation are pari-materia to the provisions for imposition of penalty under Section 11AC of the Act. Hence, penalty equivalent to the duty evaded, has rightly been imposed by the adjudicating authority on the appellant unit under Section 11AC of the Act read with Rule 18 of the Capacity Determination Rules.

4.31 Learned counsel for revenue argued that the investigations have revealed that it is not a case of interpretation of the Notification, but the appellant unit in connivance with the Directors/employees had resorted to fraud, wilful mis-representation and contravention of the provisions of the Act and Capacity Determination Rules, with the intention to evade payment of duty.

5. We have gone through the rival arguments and the submissions made by both sides after the hearing. The facts of the case are that the appellants were engaged in the manufacture and packing of chewing tobacco in pouches and tins falling within tariff item 2403 99 10 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986). The dispute relates to levy of Central Excise Duty on Compounded basis, under section 3A of Central Excise Act 1944, on following machines used for manufacture of chewing tobacco.

1. Filler machine (1 Kg)
2. Filler machine (500 gms)

3. Pedal Filler and Heat Sealer machine (10 gms)

The levy was introduced vide notification No.10/2010-CE (N.T.) dated 27.02.2010. The appellants were using these machines in their Unit which according to them do not qualify as 'Packing Machines' in terms of the notification No.10/2010-CE (N.T.) dated 27.02.2010, whereas the revenue in the impugned order held that the said machines are 'Packing Machines'.

5.1 The Central Excise duty is normally levied on the goods manufactured. The actual quantity of goods manufactured and cleared is measured and duty is charged on actual clearance of goods under Section 3 of the Central Excise Act. However, in case of certain commodities the Central Excise duty is not charged on the actual production but on the deemed production based on the installed capacity or the number of machines installed based on their capacity of production. The duty in Compound Levy is charged on the number of machines installed. The duty charged on each machine is based, inter alia, on the deemed production of such machine. The Central Government is empowered by virtue of Section 3A of the Central Excise Act 1944 (CEA) to levy duty on the 'Deemed Production' where ever it considers it necessary in the interest of revenue. Section 3A of the CEA reads as under:

"SECTION [3A. Power of Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. — (1) *Notwithstanding anything contained in section 3, where the Central Government, having regard to the nature of the process of manufacture or production of excisable goods of any specified description, the extent of evasion of duty in regard to such goods or such other factors as may be relevant, is of the opinion that it is necessary to safeguard the interest of revenue, specify, by notification in the Official Gazette, such goods as notified goods and there shall be levied and collected duty of excise on such goods in accordance with the provisions of this section.*

(2) *Where a notification is issued under sub-section (1), the Central Government may, by rules, —*

(a) *provide the manner for determination of the annual capacity of production of the factory, in which such goods are produced, by an officer not below the rank of Assistant Commissioner of Central Excise and such annual capacity shall be deemed to be the annual production of such goods by such factory; or*

(b) (i) *specify the factor relevant to the production of such goods and the quantity that is deemed to be produced by use of a unit of such factor; and*

(ii) *provide for the determination of the annual capacity of production of the factory in which such goods are produced on the basis of such factor by an officer not below the rank of Assistant Commissioner*

of Central Excise and such annual capacity of production shall be deemed to be the annual production of such goods by such factory :

Provided *that where a factory producing notified goods is in operation during a part of the year only, the annual production thereof shall be calculated on proportionate basis of the annual capacity of production :*

Provided *further that in a case where the factor relevant to the production is altered or modified at any time during the year, the annual production shall be re-determined on a proportionate basis having regard to such alteration or modification.*

(3) *The duty of excise on notified goods shall be levied, at such rate, on the unit of production or, as the case may be, on such factor relevant to the production, as the Central Government may, by notification in the Official Gazette, specify, and collected in such manner as may be prescribed :*

Provided *that where a factory producing notified goods did not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfils such conditions as may be prescribed.*

(4) *The provisions of this section shall not apply to goods produced or manufactured, by a hundred per cent. export-oriented undertaking and brought to any other place in India.*

Explanation 1. — *For the removal of doubts, it is hereby clarified that for the purposes of section 3 of the Customs Tariff Act, 1975 (51 of 1975), the duty of excise leviable on the notified goods shall be deemed to be the duty of excise leviable on such goods under the [Fourth Schedule], read with any notification for the time being in force.*

Explanation 2. — *For the purposes of this section, the expression "hundred per cent. export-oriented undertaking" shall have the meaning assigned to it in section 3.]*

[Explanation 3. — *For the purposes of sub-sections (2) and (3), the word "factor" includes "factors".]*

The said section 3A empowers the Government to notify the goods on which the Central Excise Levy will be made on the basis of Deemed Production.

5.2 The product manufactured by the appellants was notified under Section 3A of the Central Excise Act, 1944. In terms of Section 3A of the Central Excise Act, 1944 ("Act") vide Notification No.10/2010-CE (N.T.) dated 27.02.2010, following were declared as the notified goods –

"In exercise of the powers conferred by sub-section 1 of Section 3A of the Central Excise Act 1944, the Central Government hereby specifies –

- i. Unmanufactured Tobacco; and*
- ii. Chewing tobacco falling under item 2403 99 10 of the said Tariff Act,*

Manufactured with the aid of packing machine and packed in pouches as notified goods, on which there shall be levied and collected duty of excise in accordance with the provisions of the said section 3A.”

5.3 To determine what constitutes a ‘Packing Machines’ and what shall be the capacity of such ‘Packing Machine’ the government notified Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 (for brevity ‘Capacity Determination Rules’) as amended effective from 08.03.2010. The rule 2(d) of the said rules described the “packing machine” as follows:-

2(d) “packing machine” includes all types of Form, Fill and Seal (FFS) Machines and Profile Pouch Making Machines, by whatever name called, whether vertical or , with or without collar, single track or multi-track and any other type of packing machine used for packing of pouches of notified goods;

Rule 5 of the said rules prescribed the deemed production, based on number of machines and the MRP of the pouches packed, in following manner:-

5. Quantity deemed to be produced. - The quantity of notified goods, having retail sale price as specified in column (2) of the Table below, deemed to be produced by use of one operating packing machine per month, shall be as is equal to the corresponding entry specified in column(3) and column (4) of the said Table, as the case may be:-

TABLE

S. No.	Retail sale price (per pouch)	Number of pouches per operating packing machine per month	
		Pouches not containing lime tube	Pouches containing lime tube
(1)	(2)	(3)	(4)
1.	UptoRs. 1.50	22,46,400	21,46,560
2.	From Rs. 1.51 to Rs. 2.00	20,21,760	19,21,920
3.	From Rs. 2.01 to Rs. 3.00	20,21,760	19,21,920
4.	From Rs. 3.01 to Rs. 4.00	18,96,960	17,72,160
5.	From Rs. 4.01 to Rs. 5.00	18,96,960	17,72,160
6.	From Rs. 5.01 to Rs. 6.00	18,96,960	17,72,160
7.	Above Rs.6.00	17,97,120	16,97,280

Explanation. - For the purposes of this rule, if there are multiple track or multiple line packing machines, one such track or line shall be

deemed to be one individual packing machine for the purposes of calculation of the number of pouches per operating packing machine per month.

The said table was revised from time to time to incorporate factors like inclusion of lime pouch or filter haini in addition to the MRP of the product manufactured. For example vide notification 11/2010 CE (NT) dated 27.2.2010 following table was introduced

“TABLE

Sl. No.	Retail sale price (per pouch)	Capacity of production per packing machine per month for chewing tobacco (including Filter Khaini), unmanufactured tobacco and jarda scented tobacco (number of pouches)		
		Without lime tube/lime pouch	With lime tube/lime pouch	Filter Khaini
(1)	(2)	(3)	(4)	5
1	Upto Re. 1.00	2246400	2146560	1497600
2	From Re. 1 to Rs. 1.50	2246400	2146560	1497600
3	From Rs. 1.51 to Rs. 2.00	2021760	1921920	1422720
4	From Rs. 2.01 to Rs. 3.00	2021760	1921920	1347840
5	From Rs. 3.01 to Rs. 4.00	1896960	1772160	1272960
6	From Rs. 4.01 to Rs. 5.00	1896960	1772160	1198080
7	From Rs. 5.01 to Rs. 6.00	1896960	1772160	1148160
8	From Rs. 6.01 to Rs. 7.00	1797120	1697280	1098240
9	From Rs. 7.01 to Rs. 8.00	1797120	1697280	1048320
10	From Rs. 8.01 to Rs. 9.00	1797120	1697280	998400
11	From Rs. 9.01 to Rs. 10.00	1797120	1697280	948480
12	From Rs. 10.01 to Rs. 15.00	1697280	1597440	948480
13	From Rs. 15.01 to Rs. 20.00	1597440	1522560	-
14	From Rs. 20.01 to Rs. 25.00	1497600	1422720	-
15	From Rs. 25.01 to Rs. 30.00	1422720	1347840	-
16	From Rs. 30.01 to Rs. 35.00	1322880	1248000	-
17	From Rs. 35.01 to Rs. 40.00	1248000	1173120	-
18	From Rs. 40.01 to Rs. 45.00	1173120	1123200	-
19	From Rs. 45.01 to Rs. 50.00	1123200	1073280	-
20	Rs. 50.01 and above	1797120	1697280	-

By and large the deemed production is lower for higher MRP products. It essentially means that the capacity of production of larger (more expensive) pouches will be less than the capacity of smaller (cheaper) pouches. Though in real practice it may not away be so. It is therefore apparent that an estimate of deemed production is made on the basis of approximation and duty is levied on basis of such approximate Deemed Production.

5.4 After determination of Deemed Production the duty liability was determined vide notification 16/2010-CE dated 27.2.2010 as follows”-

TABLE-1

S. No.	Retail sale price (per pouch)	Rate of duty per packing machine per month (Rs. in lakh)			
		Unmanufactured Tobacco		Chewing tobacco	
		Pouches not containing lime tube	Pouches containing lime tube	Pouches not containing lime tube	Pouches containing lime tube
(1)	(2)	(3)	(4)	(5)	(6)
1.	UptoRs. 1.50	8.50	8.00	12.00	11.50
2.	From Rs. 1.51 to Rs. 2.00	10.25	9.75	14.25	13.50
3.	From Rs. 2.01 to Rs. 3.00	15.25	14.50	21.50	20.25
4.	From Rs. 3.01 to Rs. 4.00	19.00	17.75	26.75	25.00
5.	From Rs. 4.01 to Rs. 5.00	23.75	22.25	33.50	31.25
6.	From Rs. 5.01 to Rs. 6.00	28.50	26.75	40.00	37.50
7.	Above Rs. 6.00	28.59 + 4.51 * (P-6), where P represents retail sale price of the pouch	26.71 + 4.26 * (P-6), where P represents retail sale price of the pouch	40 + 6.33 * (P-6), where P represents retail sale price of the pouch	37.46 + 5.98 * (P-6), where P represents retail sale price of the pouch

5.5 It is gathered from above that the scheme of the compounded levy is such that for each packing machine the deemed production is determined in terms of the Capacity Determination Rules. The total deemed production of each machine is measured in terms of 'Capacity Determination Rules'. For an assessee total duty amount is based on the number of machines installed/used in the factory and the MRP of the pouches manufactured on such machines. Duty is levied on the number of machines installed/used (subject to some conditions prescribed in Capacity Determination Rules and notifications issued from time to time). The actual physical production becomes irrelevant in such circumstances. The sole criterion for the determination of total duty payable is the number of "Packing machines" installed/used and the MRP of the pouches manufactured on respective machines.

5.6 In this regard it seen that even if the actual physical production is higher than the 'deemed production' the duty is levied only on the deemed production determined by 'Capacity Determination Rules'. In this regard the circular of CBEC No. 980/4/2014-CX., dated 24-1-2014 is relevant. It prescribes as follows

"Representations have been received from trade and industry that the field formations are following divergent practice of assessment with respect to compounded levy scheme applicable for various tobacco products. Certain field formations have also sought clarification on the excise duty leviable under the said compounded levy scheme.

2. Under the compounded levy scheme, excise duty is chargeable with respect to deemed production based on the number of packing machines in the factory of the manufacturer. The issue raised is whether excise duty can be re-determined based on the speed of the packing machine and actual production thereof, which may be higher than the deemed production.

*3. Presently, the mandatory compounded levy scheme is applicable to Pan Masala, Gutkha and chewing tobacco manufactured with the aid of packing machine & packed in pouches. The factor relevant to the production on which excise duty is leviable has been notified to be the number of packing machines in the factory of the manufacturer under the Pan Masala Packing Machines (CapacityDetermination and Collection of Duty) Rules, 2008 and the Chewing Tobacco and Unmanufactured Tobacco Packing Machines (CapacityDetermination and Collection of Duty) Rules, 2010 read with section 3A(2) and (3) of the Central Excise Act, 1944. **The monthly deemed production per operating machine per month is prescribed based on the average speed of packing machines and average working hours of a factory.** Excise duty is chargeable at the rates notified on the basis of Retail Sale Price (RSP) slabs on per machine basis (notification No. 42/2008-C.E., dated 1-7-2008 and notification No. **16/2010-C.E.**, dated 27-2-2010 refer). In order to minimize the element of subjectivity and to ensure certainty and objectivity, the number of packing machines installed in the factory has*

been notified to be the only factor relevant to the production of the notified goods under the said rules.

5. Accordingly, it is clarified that the duty payable under notification No. 42/2008-C.E., dated 1-7-2008 and notification No. 16/2010-C.E., dated 27-2-2010 may be determined based on deemed production with respect to the number of operating packing machines in the factory during the month and the Retail Sale Price printed on the pouches and not on the basis of actual production by a unit."

It is seen that the capacity is determined on the basis of average speed of the machines and on the basis of average number of working hours of each machine. Deemed production is determined on the basis of such calculations. Duty is fixed on the basis of such deemed production measured by the number of machines installed/used and the MRP of the product being manufactured.

5.7 In the instant case the dispute relates to rate of duty applicable to certain machines used by the appellants. Based on the investigations conducted, a Show Cause Notice dated 21.07.2011 was issued to the appellants, Directors and employees of the appellants proposing a demand of Rs.250.12 Crores under Rule 19 of the Capacity Determination Rules read with Section 11A(1) of the Act along with interest under Section 11AB of the Act, besides proposing penalty under Section 11AC of the Act read with Rule 18 of the Capacity Determination Rules and Rule 25 of the Central Excise Rules, 2002. SCN also proposed confiscation of three machines and the goods seized valued at Rs.2.31 Cr. Besides, penalty under Rule 26 of the Rules read with Rule 19 of the Capacity Determination Rules, was also proposed on Sh. Manoj Gupta, Director, Sh.Sharad Chaudhary, Director, Shri. Vipin Kumar Aggarwal, Director, Sh. S.K. Aggarwal, Director, Shri ShriGopal Gupta, Chairman of Copal Corporation Ltd. and Gopal Group of Companies, Sh. Yogesh Arora, General Manager (Purchase) and Sh. P.V. Subramaniam, Manager (Purchase).

5.8 Thus the fundamental question which needs to be answered is if the following machines

1. Filler machine (1 Kg)
2. Filler machine (500 gms)
3. Pedal Filler and Heat Sealer machine (10 gms)

are 'Packing machines'. The rule 2(d) of the 'Capacity Determination Rules' described the "packing machine" as follows

2(d) "packing machine" includes all types of Form, Fill and Seal (FFS) Machines and Profile Pouch Making Machines, by whatever name called, whether vertical or horizontal, with or without collar, single track or multi-

track and any other type of packing machine used for packing of pouches of notified goods;

It is obvious that the said definition has three parts:-

- (i) Form, Fill and Seal (FFS) Machines by whatever name called, whether vertical or , with or without collar, single track or multi-track
- (ii) Profile Pouch Making Machines and by whatever name called, whether vertical or , with or without collar, single track or multi-track
- (iii) any other type of packing machine used for packing of pouches of notified goods

The appellants are claiming that these machines do not fall in any of the three categories. It is not in dispute that these machines are not 'Form, Fill and Seal (FFS) Machines' or 'Profile Pouch Making Machines'. Therefore revenue is of the opinion that these machines fall in the category of

"any other type of packing machine used for packing of pouches of notified goods"

5.9 On request of the revenue the use of these machines has been examined by various experts organizations like

- (i) the YMCA Report
- (ii) the IIT Delhi Report

On request of the appellants the machines have been examined by a Chartered Engineer Shri A K Govil. The functioning of the Pedal Filler and Heat Sealer machine (10 gms) was correctly summed up in para 3.1 in the arguments of Ld Counsel for appellants as follows

- (i) Pre-formed pouches are obtained from the outside the Unit;
- (ii) Pre-formed Pouch is hand held by the worker below the nozzle of the machine;
- (iii) Upon pressing of the pedal by the worker manually, an estimated quantity of the product is dropped in the pouch hand held by the first worker;
- (iv) The filled pouch is handed over to the second worker;
- (v) The second worker then weighs the pouch on a weighing scale and corrects the weight of the pouch either by taking out or putting in the product in / from the pouch by the aid of a spoon by hand;
- (vi) The weighed pouch is handed over to the third worker who uses a heat sealer (which uses electricity for generating heat) to enable hot sealing or by guiding the pouch on a band sealer

(which again uses electricity to generate heat) to enable sealing, and the pouch is sealed.

The functioning of the other two machine was also correctly summed up in para 3.1 in the arguments of Ld Counsel for appellants as follows:-

1. Pre-formed pouches are procured from external sources and are not produced in the factory.
2. These procured pre-formed pouches are held below the hopper by the first worker.
3. On pressing the pedal by the worker, the electricity is triggered which rotates the disc on the hopper from which tobacco is dropped in the pouch due to pneumatic pressure.

5.10 These two machines do not perform weightment or sealing. Those functions are performed on separate machines, operated by different workers.

5.11 We find that the questionnaire sent by the Revenue to the experts was as follows:-

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Questionnaire supplied by the Office of the Anti-Evasion wing of the Commissioner,
Central Excise Commissionerate, Delhi-IV, Faridabad.

Question 1: Whether the equipment can be categorized as any type of packing machine used for packing of chewing tobacco in pouches, as examined at the site on 25/09/2010 during visit to the premises of M/s Shree Flavours Private Limited, 11/7, Mathura Road, Faridabad in presence of Mr. Manoj Mittal, Production In-charge of the said factory along with the officers from Central Excise Department as detailed in Panchnama drawn during my visit and verification.

	YES/NO
Equipment 1	YES
Equipment 2	YES
Equipment 3	YES

Question 2: The number of tracks in the equipment

	YES/NO
Equipment 1	4 (Four)
Equipment 2	1 (One)
Equipment 3	1 (One)

Question 3: Whether the equipments (1, 2 and 3 above) are covered under the term hand operated fillers or spoons or a similar manually operated device. Whether the equipments numbered 1, 2 and 3 as above can be equated to manual packing or can they be functionally termed hand operated fillers or spoons or similar like manually operated device.

	YES/NO
Equipment 1	NO*
Equipment 2	NO*
Equipment 3	NO*

* These are machines with the manifest aid of electrical, pneumatic energy with the minimum human intervention.

P. Pandey
12.10.2010
Dr. PULAK M. PANDEY
Assistant Professor
Department of Mechanical Engineering
Indian Institute of Technology
New Delhi-110 016

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(Ashwan Sharma, Advocate)

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It is seen that the first question of the questionnaire asks the expert from IIT if the machines examined are 'Packing machines'. The definition of the packing machine is the subject matter of the entire dispute and the said question has to be answered by the authorities and not technical experts. It is seen that the scope of question No. 3 of the aforesaid questionnaire is very narrow. The Revenue is seeking the expert's opinion on if the said machines are covered under the description

"Hand operated fillers or spoons or a similar manually operated device"

It is seen that this term i.e. "Hand operated fillers or spoons or a similar manually operated device" does not exist anywhere in notification rules or

acts. This terms has been extracted from a circular issued by Circular No. 341/24/2010-TRU dated 05.03.2010.

"I am directed to say that certain issues have been raised by Field formations as well as trade regarding implementation of compounded levy scheme for chewing tobacco and branded unmanufactured tobacco w.e.f 08th March, 2010. These issue have examined and the following instructions are being issued in terms of Rule, 19 of chewing tobacco and unmanufactured tobacco packing machine (Capacity determination and collection of duty), Rules, 2010 read with Rule 31 of Central Excise Rules, 2002.

3. Requests have also been received to clarify whether manual packing of pouches of notified goods and their further sealing with the help of heat sealers/band sealers/candles/hot iron would come within the purview of compounded levy scheme or not. The scheme covers the said notified goods manufactured with the aid of packing machine. However, there is no intention to levy duty on compounding basis on pouches which have not been packed with the aid of packing machines but are packed manually with the help of "hand operated fillers or spoons or a similar manually operated device and sealed with heat Sealers/band sealers/candles/hot iron and the like". These would be leviable to duty in terms of Section 3 of the Central Excise Act, 1944. It is also clarified that the manufacturer would also be allowed to keep packing material required for packing of such manually packed pouches in his factory premises."

The above Circular clarifies that in case of Chewing Tobacco has not been packed with the aid of packing machine but are packed manually with the help of

"hand operated fillers or spoons or a similar manually operated device and sealed with heat Sealers/band sealers/candles/hot iron and the like"

There will be no levy on compounding basis. It is obvious that the description "Hand operated fillers or spoons or a similar manually operated device" is cited in the circular as an example and not as an exhaustive list of equipment that do not qualify as 'Packing Machines'. There can be many machines, other than those listed in circular, which may not qualify as "Packing machine". It is seen that this question posed before the expert is defective. The question which needs to be answered is if the disputed machines can be called 'packing machines' in terms of Capacity Determination Rules, 2010 or not. This question can only be answered by Revenue Officers and not by technical experts from YMCA University of Science and Technology or IIT Delhi. Such expert organization can only be used to get facts regarding the machines and its functions. In the instance

case there is no dispute regarding the process undertaken with these machines. The expert reports are useful only to the extent that they describe this process and also describe the fact that electrical energy or compressed air is used in the process of filling and sealing. In view of above the description of the functioning of machine by the experts can be accepted as evidence but the opinions of experts on law points are of no use to the revenue. Moreover the appellants were refused an opportunity to cross examine these experts. While there is no significant difference on facts regarding the manner of functioning of these machines, but if revenue wished to rely of the opinion of experts the opportunity of cross should have been allowed.

5.12 Now we examine the machines in dispute namely

1. Pedal Filler and Heat Sealer machine (10 gms)
2. Filler machine (500 gms)
- 3.- Filler machine (1 Kg)

- (i) Pedal Filler and Heat Sealer machine (10 gms) In the case of "Paddle Filler and Heat Sealer" the same is used for packing 10 gm pouches. The preformed pouches are obtained from outside. The said pouches are held by an operator under the dispenser. The said operator presses a paddle which is pneumatically operated. The said operation of the paddle results in opening of a slot in the equipment for a certain duration and a certain quantity of Tobacco comes out due to gravity. The said pouch is sealed by an operator passing the same between two hot rolls in the sealer attached to the machine itself. The compressor which provides compressed air for the process is operated electrically.
- (ii) Filler machine (1 Kg) The second equipment, which is used for 1 Kg tobacco pouches, is powered by an electric motor. The tobacco is first filled in the hopper. On pressing of a paddle the said hopper releases approximately 1 kg of tobacco which moves into the pouch under the force of gravity. The weight is corrected on a weighing scale manually by an operator. The pouch is then weighted and the amount of tobacco is managed to 1 kg. Thereafter, the said pouch is sealed in a separate sealing machine by an operator.
- (iii) Filler machine (500 gms) The third equipment is for packing 500gms tobacco in pouches. It operates in a manner identical to the machine filling 1 kg pouches at S. No. (ii) above.

It is seen that all 3 machines require significant human effort. In all the machines the pouches are obtained preformed from outside and the pouches are not made within the machine or factory. In all three machines the pouches are held manually by the operator for the purpose of filling. The machines use, either gravity or pneumatic power, to fill the approximate quantity of tobacco in the pouches. Thereafter, the weight of the tobacco in the pouches is adjusted manually by adding or removing same quality. Thereafter, the pouches are sealed either on a sealer attached to the same machine (in case of "Paddle Filler and Heat Sealer) or on a separate sealing machine. The operation may require two or more persons on each machine/line.

5.13 The first issue raised by the appellant is if the process undertaken on this machine can be called packing at all. It has been argued that the said machines are merely fillers which fill tobacco in the pouches and thereafter the said pouch containing tobacco is passed to a different machine for the purpose of sealing. Revenue has argued that the sealing is not an essential requirement for packing. It was argued that the Notification No. 10/2010-CE (N.T) dated 27.02.2010 notified chewing tobacco manufactured "with the aid of a packing machine and packed in pouches" as notified goods. Learned Counsel for revenue argued that it was not necessary that the entire process of packing should happen on one machine. We do not find force in this argument of revenue for the reason that the same Notification No. 10/2010-CE (N.T) also defines the terms 'packing machine'. Thus, each and every machine used in the process of packing of tobacco does not qualify as a 'packing machine' though the same is used for one of the processes involved in packing. Only the machines which fit in the definition of packing machine provided in the said notification qualify as a 'packing machine'. In the instance case the packing is done not only with the aid of the filler machine but also with the aid of a separate sealer machine in case of 500gm and 1 kg pack. There is no doubt that sealing is also one of the processes involved in packing of goods. In the instance case the goods cannot leave the premises without sealing and cannot be bought and sold in the market without sealing. The argument of Revenue is that sealing is not an essential component of the packing process and therefore, if a machine only fills chewing tobacco in the preformed pouches, it is sufficient to qualify as 'packing machine'. We find that this argument is misplaced. For packing of any goods it is necessary that it should make it suitable for safe transport, and in the case of chewing tobacco in pouches, also fit for sale in the market. It is obvious that without sealing the pouches cannot be possibly transported or sold in the retail market for which the same are intended. The

other two machines specifically mentioned in the definition of 'Packing Machine', namely Form, Fill and Seal (FFS) Machines and Profile Pouch Making Machines, perform both the functions of filling as well as sealing. There are two machines specifically listed in the definition of the "packing Machine" and both perform the sealing as an integral part of the process. In fact the 'Form, Fill and Seal (FFS) Machines' not only fill and seal but also form the pouch. Forming of pouch is also a part of the packing process in that case, though it may not constitute part of packing process if done elsewhere. The appellant has both the filling machines and sealing machines. The packing is done with the aid of both the machines. On one machine the pouch is filled and on other the same is sealed. The argument of revenue is that any machine with the aid of which the packing is done is 'packing machine'. If we accept the argument of revenue then the 'filler and sealer' both will independently and separately qualify as 'packing machine' leading to absurd conclusions. Further, this band sealer has been specifically mentioned as not covered in Compound Levy Scheme vide Board clarification dated 05.03.2010. Moreover even revenue in their final synopsis have stated as that sealing is part of process of packing.

From the reading of the Notification and the clarification given by the Board it is lucid that the process of sealing has not been embedded in the definition of packing machine. Even while clarifying the exclusion of hand operated fillers/spoons or a similar manually operated device the use of sealer has been excluded meaning thereby that the process of sealing is not linking the definition of packing but is one of the process for packing of Chewing tobacco in pouches.

Thus even revenue and Board recognizes sealing as one of the processes for packing. That implies that packing is not complete without sealing.

5.14 Learned Counsel for the revenue has relied on the Circular No. 341/24/2010-TRU, dated 05.03.2010 to assert that only if the goods are packed with the help of "hand operated fillers or spoons or a similar manually operated device and sealed with heat Sealers/band sealers/candles/hot iron and the like" the same would not qualify for the compounded levy. This circular of the revenue does not say what Learned Counsel is asserting. The circular says that there is no intention to levy duty on compounding basis on 'pouches which have not been packed with the aid of a 'packing machines'. It goes ahead to if pouched are packed with state that "hand operated fillers or spoons or a similar manually operated device and sealed with heat Sealers/band sealers/candles/hot iron and the like" the same would not qualify for the compounded levy. After stating that duty

cannot be charged on compounded basis on goods not packed with 'packing machine' the above circular did not need any further elaboration. The law is that duty on compounding basis cannot be levied on notified goods not manufactured with the aid of 'packing machine'. The description of 'hand operated fillers or spoons or similar manual operated devices/sealers' is just an example cited in the circular and does not necessarily cover all machines which may be outside the ambit of the term 'packing machine'. In view of the above reliance on the circular to say that if these machines do not fall in the category of 'hand operated fillers or spoons or similar manual operated devices/sealers', the same need to be assessed on compounding basis is incorrect.

5.15 One major argument of the revenue is that the disputed machines operate with the aid of electricity and compressed air. It has been argued that only those machines that do not involve the use of electricity or power would be excluded from the purview of the Compounded levy. We do not find any provision in law that prescribes that or supports the contention that if power or electricity is used the machine will become 'Packing machine'. The definition of the term 'Packing Machine' also does not support this argument. The band sealers, which the circular dated 5.3.10 excludes from the purview of compounded levy also operate with electricity. This assertion of revenue is not supported by any provision of law.

5.16 We find that all these machines operate with manual intervention. The duty rates are fixed on the basis of capacity of machines to manufacture the pouches. The capacity of the machines was originally prescribed in table form in the notification 11/2010 CE (NT) dated 27.2.2010. It is seen from the tables reproduced in para 5.9 above that the lowest number of pouches manufactured per month prescribed in this notification is 17,97,120, and duty has been fixed on that basis. That quantity works out to manufacturing capacity of 41 pouches per minute nonstop 24 hrs a day seven days a week. The disputed machines which operate with manual intervention cannot possibly operate at such speeds continuously nonstop throughout the year. The manual operation involves picking up an empty pouch, holding it under the dispenser, correcting the weight, putting it in sealing machine and then sealing the same. It is apparent that these machines are not of the same kind or speed that are specifically mentioned in the definition of 'Packing Machine'. This is another reason to reject the revenue allegations.

5.17 Another argument of the appellants is that the Form 1 needs to be filed by the assesses in terms of Rule 6 of the Capacity Determination Rules 2010. This form, inter alia, requires the manufacturer to declare the capacity

of the machines. The appellants have argued that capacity of automatic machines can be determined but if the machines require such high level of human intervention there is no way to determine the capacity of the machine. It will all depend on the efficiency of the workers. The argument being that the scheme envisages to cover only the automatic machines which operate at high speeds and those which do not require human element. We find significant force in this argument too.

5.18 The appellants have relied on following decisions which support their arguments.

COMMISSIONER OF CENTRAL EXCISE, UDAIPUR Vs. M/s MIRAJ PRODUCTS PVT LTD reported at 2018-TIOL-427-CESTAT-DEL has specifically held in Para 7 of the said Order-

"7. We have examined the provisions of Chewing Tobacco Rules, 2010. Rule 5 of the said rules 10 which determines the quantity of production based on the capacity of the machine as well as read with the Notification number 16/2010 makes it clear that the notified goods are goods which are for retail sale produced by using packing machines, as per the table mentioned therein. The explanation 5 in the notification makes it abundantly clear that for the purpose of said notification 'Filter Khaini means chewing tobacco which is packed in sachets of filter paper or fabric before being packed in pouches with the aid of packing machines'. The contention of the revenue is that the aid of packing machines should be for sachet and not for pouch. We are not able to appreciate such interpretation of the explanation. A plain reading of the explanation shows that packing in pouches should be with the aid of packing machines. In this contention, we also refer to clarification issued by the board vide letter dated 53/2010. It was categorically clarified that packing of pouches of notified goods and further filling with the help of manual process will not attract the Chewing Tobacco Rules and duty will be leviable in terms of Section 3 only."

COMMISSIONER OF CENTRAL EXCISE, CHANDIGARH Vs. M/s TEJ RAM DHARAM PAUL reported at 2013-TIOL-1192-CESTAT-DEL (2013(297)ELT 0125 (Tri.- Del.)) has categorically held in Para 14 as under-

"14. After taking into consideration the entire facts he has held that in terms of Explanation 5 and the clarification given by the Board he came to conclusion that Section 3A covers only pouches packed with the aid of packing machine and not the pouches that are packed manually. Inasmuch as the plastic pouches, in the present case, are pre-sealed and zipped from one side and the sachets are put in manually and the pouch is sealed with the help of hot iron/band sealer, it cannot be said that the plastic pouches are packed with the help of packing machine."

The ratio of these decisions also applies to the appellant's case.

5.19 The appellants have raised the issue of limitation also. We find that the revenue's case does not hold on merits so the issue of limitation becomes secondary. In the instant case we find that the revenue has strongly relied on the apparent misdeclaration in the description or source of procurement

of various machines. Revenue has sought to invoke extended period of limitation on the grounds that the appellants had mis-declared the names of machines or obtained machines from dubious sources. Even if we assume the allegations to be correct, for the reasons that we found that the machines found in their premises do not qualify as 'Packing Machine' such allegations, even if true, become irrelevant.

5.20 Revenue has alleged that the appellants had not filed the required declaration under the rules. The appellants have taken us through following communications between Department & Appellant before and after the introduction of Compounded Levy Scheme:

Sr. No	DATE	PARTICULARS
1.	22.07.2009 & 23.07.2009	Copy of the intimation, filed by the Appellant with the Department in terms of Rule 31 of the Central Excise Rules, declaring the machines to be procured in their unit.
2.	02.03.2010	Appellant addressed a detailed letter to Deputy Commissioner, Central Excise, with a copy to Commissioner, Central Excise and Joint Secretary (TRU) informing them of the full number of FFS Machines, Tin Packing Machines, sealing machines and the manual machines under reference. The difficulty in implementing the Compound Levy Scheme was also highlighted therein.
	05.03.2010	The Appellant filed with the Department, the Declaration under Rule 6 of the CT Rules declaring and giving details of '16 FFS machines', 05 nos. of manual sealing / filling and 04 nos. of Tin / Jar machines and requested the Department to seal all the Packing Machines used in the packing of notified goods in their unit. 12
4.	08.03.2010	Letter of the Deputy Commissioner, Central Excise, informing the Appellant that all machines, including the Tin packing machines are also covered under CT Rules, 2010.
5	10.03.2010	The Appellant's replied to letter dated 08.03.2010 of DC, explaining that the Tin packing machines and the 05 'manual machines' being used by the Appellant are not covered under the ambit of CT Rules, 2010.

6	15.03.2010	The Appellant, vide its letter further explains, in detail, the process and manner in which the Impugned Machines are being operated and used by the Notice.
7	22.03.2010	The Appellant informed the Department that they will be getting one Paddle Operated Filler Machine along with Four Paddle Heat Sealer & two band sealer for manual filling and sealing of the pouch.
8	25.05.2010	The Appellant, pursuant to visit of Anti-Evasion team of the Excise Department, vide their letter to the Assistant Commissioner (Anti-Evasion), explaining in detail the working of the Impugned Machines and also the fact that the said machines use electricity.

Further, appellants have pointed out that following visits were done by the Department after the introduction of the Compounded Levy Scheme –

Sr. No	DATE	PARTICULARS
1	07.03.2010	First Visit of the Dept. Department visited the Unit of the Appellant and sealed 16 FFS machines, which as per them were covered under CT Rules, 2010. Certificate of Sealing issued. Sealing and de-sealing register was also maintained under the signatures of the Department officer. There also, only 16 FFS machines were entered.
2	17.03.2010	Second Visit of Dept. The Department, after the visit to the premises for physical verification, informs the Appellant that on re-examination that there is no levy of duty on compounding basis on Tin packing machines and on pouches which have not been packed with the aid of packing machines but are packed manually with the help of hand operated fillers or similar manually operated device and sealed with heat sealers/band sealers/candles/hot iron and the like. 13
3	22.03.2010	Third Visit of Deptt. The Commissioner, Additional Commissioner, Superintendent and Inspector of Central Excise visits the premises of the Appellant.
4	5.4.2010 & 7.4.2010	On the request of the Appellant dated 05.04.2010 to shift 4 FFS machines to its other unit, the said machines were removed under the physical supervision of the Superintendent Excise vide his Certificate of Removal dated 07.04.2010

5.21 Revenue has argued that in letter dated 02.03.2010 the appellants had merely stressed upon that the product covered under the said Notification is 'Khaini' and the one manufactured by them i.e. Chewing Tobacco was not

covered. They had further, stressed that other than FFS machines they will be using Heat Sealer or filler only in case of emergency. It is seen that revenue is not denying that some of the disputed machines were declared in the letter. They had also declared their belief that these machines are not 'Packing Machines' in terms of the CT Rules. Revenue has admitted that in letter dated 05.03.2010 the appellants had declared that they shall not be undertaking any manufacturing activity of the notified goods for a continuous period of 15 days, pending clarification, but will be taking under production and clearance by way of manual packing of pouches and on machines which did not fall within the ambit of Capacity Determination Rules. That they are filing declaration under Rules 6 of the said Rules 'under Protest' and requested for sealing the FFS machines effective from 07.05.2010. Accordingly, a declaration in Form 1 in terms of Rule 6 of the Capacity Determination Rules was filed by the appellants but only declaring the 16 FFS machines. It is evident from the declaration of the appellants that in Form-1, they had declared only the FFS machines whereas the declaration required all the single track and multi track packing machines available in the factory of the manufacturer of notified goods. In these circumstances it is apparent that appellants had acted as per their declared belief that they are not liable to be assessed under Compounded levy in respect of disputed machines. Revenue has admitted in letter dated 15.03.2010 the appellants had declared the working of two of the machines in question as:

- (i) Dosing machine (for manual pouch filling)
- (ii) Manual Filling and manual sealing device for zipper pouch.

The said machines were pneumatically controlled/compressor operated and all of them could be operated only and only with the use of electricity. Revenue has admitted that in letter dated 22.03.2010 the appellants intimated that they will be getting one 'Paddle Operated Filler Machine' (besides some other machines) but it was argued that the appellants never intimated the department about its installation. It is apparent that the appellants believed that they are not liable to be assessed under Compounded levy in respect of such machines and their behaviour is according to that belief. Revenue has admitted that in letter dated 25.05.2010 the appellants again gave note on the working two machines which was earlier also informed vide their letter dated 15.03.2010 but this time they mentioned about the use of electricity in both the machines and also described the machines as 'manual filling and manual sealing device for zipper pouch'.

5.22 Revenue has also not denied that the appellants had declared these machines under Rule 31 of the Central Excise Rules, 2002 vide letter, dated 22.07.2009 and 23.07.2009 in terms of Circular No. 854/12/2007 dated 07.09.2007 even before the Compound Levy Scheme was conceptualized. Appellants have argued that they were using manually operated machines, using electricity at the time of notification of Capacity Determination Rules. That the machines in questions, were acquired in July, 2009. Learned Counsel argued that an intimation had been duly given to the Department under Rule 31 of the Central Excise Rules, 2002 vide letter, dated 22.07.2009 and 23.07.2009. This intimation was given to the Department in terms of Circular No. 854/12/2007 dated 07.09.2007 wherein in Para 2.4 it is stated:-

"In case, the unit brings any new filling and packing machine into the factory, the intimation should be filed before 24 hours of bringing in the said machine."

Even in the said letters the Appellant described the machines as manual machines. These machines were procured by the Appellant even before the Compound Levy Scheme was conceptualized. The revenue has not disputed these facts.

5.23 From the above correspondence coupled with the numerous visits of the officers it is apparent that appellants harbored a view that these machines are not 'Packing Machines' liable to be assessed under the Compounded levy scheme. They also communicated this belief to the authorities. It is seen that vide letter dated 8th March, 2010 the Deputy Commissioner informed them that all machines including the Tin machines and the manual machines are covered under the Compound Levy Scheme (CLS). It clearly shows that the department were aware of the impugned machine. The Appellant duly replied to the Deputy Commissioner's letter dated 8th March, 2010, informing that the impugned machines are not covered under the Compound Levy Scheme CLS and vide its letter dated 15th March, 2010 duly informed the working of the machines under reference. In response the Deputy Commissioner vide letter dated 17th March, 2010 informed that the department has re-examined the issue and that there is no levy of duty on compounded basis on Tin Packing machine and on pouches which have not been packed with the aid of packing machine, but are packed manually with the help of hand operated fillers or similar manually operated device and sealed with heat sealers/band sealers/candles/hot iron and the like. No specific action was taken by Deputy Commissioners against the impugned machines by way of demanding duty under Compound Levy Scheme (CLS) or otherwise. It appears that the

appellants had a bonafide belief that they are not covered under compounded levy scheme in respect of the disputed machines. The Deputy Commissioners also was aware of the facts.

5.24 Revenue has raised the issue of admission of liability before Settlement Commission. In view of the fact that we do not find there is any case of revenue on merits it does not matter if appellants have admitted any liability before the Settlement Commission or not.

6 In this background we do not find any merit in the impugned order either on Merit as well as on limitation. The impugned order is set aside and appeals are allowed.

(Pronounced in the open court on 24.08.2022)

(RAJU)
MEMBER (TECHNICAL)

(AJAY SHARMA)
MEMBER (JUDICIAL)

Prachi