FAX : 011-26108426

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
EXCISE APPEAL BRANCH

Dated: **14/12/2012**

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **A/1369/2012-EX[DB]** to A/1373/2012, Stay Order No. **SO/1971/2012** and dated **04/12/2012**

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section **35-C(1)** of **the Central Excise and Salt Act, 1944.**

Asstt. Registrar(EXCISE Appeal Branch)

	Application	Appeal	Name and Address of Appellant
1	E/Stay/378/2010	E/375/2010 E/2326/2010 E/2909/2009 E/2920/2009 E/2922/2009	**SARIN & SARIN** 17/95, CHILLI INT. ROAD, AGRA, (U.P.)
			Name and Address of Respondent
2			**C.C.E. KANPUR** 117/7, Sarvodaya Nagar, Kanpur 208005.

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Copy To

3 Advocate(s) / Consultant(s):

V. Laxmikumaran
5, Jangpura Extension,
Link Road,
New Delhi
Delhi
110014

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4 Bar Association, CESTAT, Delhi

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

13 C.D.R. 14 Office Copy 15 Guard File

Asstt. Registrar(EXCISE Appeal Branch)

P.T.O.-2

16. M/S. SOM PRODUCTS,
C-123, NARAINA INDL. AREA,
PHASE-I, N. DELHI-

17. M/S. ASHOK & COMPANY PAN BAHAR LTD.
20, NAJAFGARH ROAD, INDL. AREA, N. DELHI-15

18. M/S. ASHOK FRAGRANCES PVT. LTD.
49-A, RAMA ROAD, INDL. AREA,
N. DELHI-15

19. MS. S. JAIN & ASSOCIATES
84, DARYA GANJ, N. DELHI-2

20. CCE, DELHI-I

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing:7.11.2012
Date of pronouncement: 4.12.2012

For Approval and Signature:

Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Mr. Rakesh Kumar, Technical Member

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 26 of the CESTAT (Procedure) Rules, 1982?	
2	Whether it should be released under Rule 26 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

Stay Application No.378 of 2010 and
Central Excise Appeal No.375 of 2010

Arising out of the order in original No.1/Commissioner/2009 dated 20.11.2009 passed by the Commissioner , Central Excise, Kanpur.

M/s Sarin and Sarin ... Appellant

Vs.

C.C.E., Kanpur .. Respondent

Present for the appellant : Shri V. Laxmikumaran, Advocate
Present for the respondent : Shri I. Baig, A.R.

Central Excise Appeal No.2326 of 2010

Arising out of the order in original No.09/D-I/2010 dated 30.4.2010 passed by the Commissioner , Central Excise, Delhi I.

M/s Som Products ... Appellant

Vs.

C.C.E., Delhi-I .. Respondent

Present for the appellant : Ms. Seema Jain, Advocate
Present for the respondent : Shri Devender Singh, A.R. (Jt.CDR)

Central Excise Appeal No.2909, 2920 and 2922 of 2009

Arising out of the order in appeal No.140/CE/DLH/2009 dated 4.8.09 , No.142/CE/DLH/2009 dated 4.8.09 and No.141/CE/DLH/2009 dated 4.8.09 passed by the Commissioner (Appeals),Central Excise, Delhi I.

C.C.E., Delhi I ... Appellant

Vs.

M/s Ashok & Company Pan Bahar Limited .. Respondent
M/s Ashok Fragrances Private Ltd.

Present for the appellant : Shri I. Baig, A.R.
Present for the respondent : Ms. Seema Jain, Advocate

Coram: Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Mr. Rakesh Kumar, Technical Member

STAY ORDER No. 1971/2012-EX (BR)
FINAL Order No. A/1369-1373/2012-EX (BR)

Per Justice Ajit Bharihoke(Oral):

By this order we propose to dispose of above referred 5 appeals involving similar question of law and facts.

2. Briefly stated the facts relevant for disposal of these appeals are that the appellant M/s Sarin and Sarin and M/s Som Products in Appeal No.E/375/10 and 2326/2010 and respondents Ashok & Company Pan Bahar Ltd. and M/s Ashok Fragrances Pvt. Ltd. in Revenue Appeals No.E/2909, 2920, 2922/10 were engaged in manufacture of pan masala/pan masala containing tobacco commonly known as gutkha falling under Chapter 21 & 24 of the First Schedule to the Central Excise Act, 1985.

3. Above referred assesses were operating under Notification No.38/07-CE dated 19.12.2007 issued under Rule 15 of Central Excise Rules, 2002. The Notification provided for optional compounded levy scheme in respect of specified excisable goods i.e. pan masala and pan masala containing tobacco (gutkha) which provided prescribed rates of duty per pan masala/gutkha packing machine per month.

4. On 10.5.2008, the Central Excise Act, 1944 was amended by incorporating Section 3A which empowered the Central Government to deviate from charging section 3 of the Central Excise Act, in order to protect interest of revenue , in the manner of charging duty on specified goods by way of issuing notification under said Section of the Act.

5. On 1.7.2008, Notification No.29/08-CE (NT) was issued under Section 3A of the Central Excise Act specifying pan masala and pan masala containing tobacco (gutkha) as notified goods on which duty shall be levied and collected under provisions of Section 3A of the Excise Act.

6. On 1.7.2008 another Notification No.30/08-CE (NT) was issued providing for Pan Masala Packing Machine (Capacity Determination and Collection of Duty) Rules, 2008 effective from 1.7.08. These rules were made applicable to all manufactures of pan masala and pan masala containing tobacco. Rules provided for quantity deemed to be produced by machine depending upon retail price of pouches produced by such machine. Rule 6 of the above referred Rules provided that manufacturer of notified goods shall file a declaration not later than 10 days gives information about number of packing machine installed etc. for determining of capacity of respective machines. The concerned jurisdictional Assistant Commissioner and Deputy Commissioner were required to determine the production capacity of the manufacturer based upon the number of machines and on the basis of the capacity so determined manufacturer /assessee was required to pay duty under compounded levy scheme in accordance with Notification No.42/2005-CE dated 1.7.08. This notification provided for rate of duty per packing machine per month and was issued Section 3A of the Central Excise Act.

7. Despite of issue of above referred Notification 29/08-CE(NT) and Notification No.52/08-CE, earlier Notification No.38/08-CE under which the assessees were operating , was not superseded or rescinded. However, on 16.7.08 Notification No.44/08-CE was issued rescinding the Notification No.38/08-CE.

8. The appellant M/s Sarin and Sarin and M/s Som Products as also the respondents M/s Ashok & Company Pan Bahar Ltd. and M/s Ashok Fragrances Pvt. Ltd. continued to operate under Notification No.38/07-CE till 15.7.2008 and paid excise duty in terms of said notification. The Department was of the view that with the issue of Notification No.29/08-CE, 30/08-CE and 42/08- CE under Section 3A of the Central Excise Act earlier notification No.38/2007-CE which provided for for optional scheme automatically got superseded and the assessees namely, the above referred appellants and respondents were required to pay excise duty in terms of Notification No.42/08-CE. Accordingly, show cause notices were served on the respective assessees raising demand for differential of excise duty paid by them under Notification No.38/07-CE and the excise duty payable by them under Notification No.42/08-CE.

9. Commissioner of Central Excise , Kanpur vide order in original dated 20.11.2009 adjudicated the show cause notices against the appellant M/s Sarin and Sarin and confirmed duty demand of Rs.82,64,516/- along with interest against him besides penalty of equal amount.

10. Commissioner, Central Excise, Delhi vide order in original dated 30.4.2010 adjudicated the show cause notices against M/s Som Dutt Products and confirmed duty to the tune of of Rs.2,52,00,000/- along with interest amounting to Rs.21,41,867/-.Commissioner (Adjudication) also ordered appropriation of a sum of Rs.2,52,00,000/- deposited by the appellant M/s Som Products under protest.

11. As regards the Revenue's appeal No.E/2920, 2922/2010 filed against the respondents M/s Ashok Fragrance Ltd., the concerned Additional Commissioner vide two separate orders in original respectively dated 18.2.2009 confirmed the duty for differential duty raised by show cause notices against the respondents along with interest, however, no penalty was imposed. Respondent preferred appeals against the above referred orders in original which were allowed by Commissioner (Appeals) vide separate impugned orders and respective demands were dropped.

12. Show cause notice issued to M/s Ashok & Company Pan Bahar Ltd. (respondent in Appeal No.E/2909/09) was adjudicated by the jurisdictional adjudication Commissioner who confirmed the demand of Rs.40 lakhs being differential duty against the said respondent along with interest. Appeal preferred by M/s Ashok & Company Pan Bahar Ltd. against the orders in original was allowed vide impugned order by the Commissioner (Appeals) and duty demand against him along with interest was set aside.

13. M/s Sarin and Sarin and M/s Som Products being aggrieved of confirmation of duty demand against them and the Revenue being aggrieved of setting aside of the duty demand against the respondents M/s Ashok & Company Pan Bahar Ltd. and M/s Ashok Fragrancs Pvt. Ltd. have have preferred above noted appeals against the respective impugned orders in appeal.

14. Shri V. Lakshmikumaran, Advocate, ld. Counsel for the appellant M/s Sarin and Sarin and Ms. Seema Jain, Advocate, ld. counsel for the appellant M/s Som Products respondents M/s Ashok & Company Pan Bahar Ltd. and M/s Ashok Fragrances Pvt. Ltd. Ld. Counsels argued on almost similar lines. Ld. Counsels drew our attention to Notification No.42/2008-CE dated 1.7.2008. This notification does not supersede

or rescind the earlier notification No.38/07-CE under which the assessee (appellant respondent) were operating. That Notification No.38/07- CE was rescinded on 16.7.2008 vide Notification No.44/2008-CE dated 16.7.08. Ld. counsel assessees thus submitted that while issuing Notification No.42/2008-CE there was no intention on the part of the legislature to supersede or rescind the Notification No.38/2007-CE. As such, till 15th July 2008 both the Notifications No.38/07-CE and 42/2008-CE were operating , therefore, the assessees were well within their right to opt for the scheme under either of the notifications beneficial to them. Therefore, they have rightly discharged their excise duty liability in terms of Notification No.38/2007-CE. Ld. counsels have thus pressed for setting aside the demand confirmed against the appellant assessees and dismissal of Revenue's appeals against dropping of demands.

15. Ld. A.R. for Revenue on the contrary has refuted the contention of the assessees pleading that Notification No.42/2008-CE which was issued in furtherance of the powers conferred under Section 3A of the Central Excise Act, by implication has superseded the Notification No.38/2007-CE. Ld. A.R. submitted that perusal of the respective Notifications would show that Notification No.38/2007-CE provided optional compounded levy scheme whereas Notification No.42/2008-CE took away the option for the assessee and brought every manufacturer of Pan Masala and Gutkha under the net of compulsory compounded levey scheme. Thus it is clear that by introducing this notification the Govt. intended to bring all manufacturers within the net of the scheme and thus by implication had superseded the optional scheme provided under Notification No.38/2007-CE. Ld. A.R. has thus submitted that Revenue's appeals may be accepted and the appeals filed by the assessees against confirmation of demand of differential excise duty be dismissed.

16. Basic issue which needs consideration in these appeals is whether or not Notification No.42/2008-CE dated 1.7.2008 superseded the Notification No.38/2007-CE by implication or both the Notifications were simultaneously operating during the period in dispute i.e. from 1st July to 15th July, 2008.

17. The question posed by the appeals relates to the interpretation of statute. As per accepted principles of interpretation of statute normally there is presumption against repeal of earlier statute by implication. The reason behind this Rule is based on the theory that the legislation while enacting a law has complete knowledge of existing laws on the subject matter and therefore, when it does not provide of repealing provisions which gives out of intention of not to repeal the existing legislation. This presumption however is not absolute. The presumption however can be rebutted if the intention to repeal can be safely inferred from the later statute or the provisions of later statute are so inconsistent with or repugnant of the provisions of the earlier Act that the two cannot stand together.

18. Now in the light of the above referred principles of interpretation of statute we proceed to have look on the relevant Notifications which are reproduced thus:

Notification No.38/2007-CE dated 19.12.2007

Pan masala and Gutkha — Option to pay Excise duty under special procedure on basis of no. of packing machines installed

In exercise of the powers conferred by rule 15 of the Central Excise Rules, 2002, the Central Government hereby specifies the excisable goods, namely, pan masala falling under tariff item 2106 90 20 and pan masala containing tobacco, commonly known as gutkha, falling under tariff item 2403 99 90 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the specified goods), subjected to the process of filling and packing in pouches with the aid of pouch filling and packing machine (hereinafter referred to as the packing machine), in respect of which an assessee shall have an option to pay the duty of excise on the basis of number of packing machine installed for packing of specified goods in his premises and fixes the rate of duty per packing machine per month, based on retail sale price printed on such pouches as specified in the Table below :-

Table

Sl. No.	*Retail sale price (per pouch)*	*Rate of duty Per packing machine per month (Rs. in Lakh)*	
		(3)	
		Pan masala	*Pan masala containing tobacco*
(1)	*(2)*	*(a)*	*(b)*
1.	*Upto Rs. 1.50*	*10*	*12*
2.	*From Rs. 1.51 to Rs. 2.00*	*12*	*16*
3.	*From Rs. 2.01 to Rs. 3.00*	*20*	*26*
4.	*From Rs. 3.01 to Rs. 4.00*	*23*	*31*
5.	*From Rs. 4.01 to Rs. 5.00*	*29*	*38*
6.	*From Rs. 5.01 to Rs. 6.00*	*34*	*45*

Explanation. - For the purposes of this notification, if there are multiple track or multiple line packing machine, each of such track or line shall be deemed to be an individual machine for the purposes of calculation of the duty liability :

Provided that no CENVAT credit of duty paid on any input, capital goods or input services used for manufacture of the specified goods shall be taken under the CENVAT Credit Rules, 2004 and the full amount of duty payable under this notification would be paid in cash only :

Provided further that the procedure and conditions mentioned hereinafter are followed.

***1. Application to avail special procedure.** - (i) The manufacturer shall make an application giving the details of the packing machine installed in his factory and other particulars in the form as specified in Appendix-I to this notification to the jurisdictional Assistant Commissioner or Deputy Commissioner of Central Excise, as the case may be, and the said Assistant Commissioner or Deputy Commissioner may grant permission for the period in respect of which the application has been made :*

Provided that if the said permission is not granted or rejected within next two working days of receipt of application, the permission shall be deemed to have been granted.

(ii) The manufacturer opting for the special procedure for the first time shall make the application so as to cover the period up to the end of the financial year in which the application has been made, thereafter, the option to avail the said procedure shall be exercised before the start of the financial year and such option, once exercised, shall not be withdrawn during the remaining part of the financial year.

***2. Manner of calculation and discharge of duty liability on payment of certain sum.** - (i) The manufacturer to whom permission has been granted under paragraph 1 shall pay a sum calculated at the rate specified in this notification, subject to the conditions herein laid down, and such payment shall be in full discharge of his liability for duty leviable on manufacture of specified goods from the said premises during the period for which the said sum has been paid :*

Provided that if there is revision in the rate of duty under this notification, the sum payable shall be recalculated on the basis of the revised rate, from the date of revision and liability for duty leviable on the manufacture of specified goods from that date shall not be discharged unless the differential duty is paid and in case the amount of duty so recalculated is less than the sum paid, the balance shall be refunded to the manufacturer :

Provided further that when a manufacturer makes an application for the first time under paragraph 1 for availing of the procedure contained in this notification, the duty liability for the month in which the application is granted shall be calculated *pro-rata on the basis of the total number of days in that month and the number of days remaining in the month from the date of payment of said sum.*

(ii) The sum payable under sub-paragraph (i) shall be calculated by application of the appropriate rate to the number of packing machines installed (other than those which have been sealed by the central excise officer) by such manufacturer in his premises on the first day of the calendar month.

(iii) The sum payable under sub-paragraph (i) shall be paid before the commencement of each month and an intimation in the form specified in the Appendix II shall be filed to the Jurisdictional Superintendent of Central Excise before the commencement of the month.

(iv) All packing machines installed in a premise shall be used for manufacture of specified goods of same retail sale price only :

Provided that duty rate per machine applicable for higher retail sale price product shall be payable for all packing machines for full calendar month, in case any goods of higher retail sale price are found to have been manufactured in the said premises.

(v) In case of non working of any packing machine for any reason whatsoever, the duty for full calendar month shall be payable.

(vi) The sum payable under this notification shall be calculated based upon the maximum number of packing machines installed on any day during the calendar month, irrespective of addition or removal of machines during the month and differential amount, if any, shall be payable before the end of the month.

***3. Default in sum payable.** - In case a manufacturer who has been granted permission under paragraph 1 does not pay the sum payable as referred to in sub-paragraph (iii) of paragraph 2, and continues to operate any packing machine, he shall be liable to pay the said sum for the remaining months of the financial year based on number of packing machines declared in the month for which duty was last paid by him or number of packing machines found installed in his premises during the said period, whichever is higher and during the period of default, the specified goods manufactured by the said manufacturer shall be liable for confiscation and consequences and penalties as provided in the Central Excise Rules, 2002 shall follow.*

***4. Addition or removal of packing machine.** - In case a manufacturer wants to add or remove a packing machine from his premises, the same shall be permitted under the physical supervision of a Central Excise officer, authorised for the purpose :*

Provided that in case of removal of the said packing machine out of the factory premises, the same shall be sealed by the Central Excise officer :

Provided further that in case it is not feasible to remove the packing machine which is not in working condition, out of the factory premises, it shall be sealed by a Central Excise officer in the manner that these cannot be operated :

Provided also that duty for the full calendar month shall be payable in respect of packing machines removed from the factory premises or sealed during the month.

***5. Exports.** - Except in accordance with such terms and conditions as the Central Government may by notification specify in this behalf, no rebate of excise duty shall be granted under rule 18 of the Central Excise Rules, 2002, in respect of specified goods manufactured in the premises for which special procedure under this notification has been availed and exported out of India.*

***6. Provision regarding factories ceasing to work.** - Notwithstanding anything contained in this notification, where a manufacturer who had availed the procedure contained in this notification ceases to work in respect of all the* *machines installed in the factory and who has filed an intimation for this purpose, the duty payable by him for the month shall be calculated pro rata on the basis of the total number of days in the said month and total number of days before filing the said intimation and the amount already paid for the month in accordance with the notification shall be adjusted towards the duty so calculated and on such adjustment, if there is any excess payment, it shall be refunded to the manufacturer and deficiency, if any, shall be recovered from him.*

Explanation. - For the purposes of this paragraph, a manufacturer, who ceases to operate his factory for one or two shifts only, shall not be deemed to have ceased to work.

***7. Confiscation and penalty.** - If any manufacturer contravenes any provision of this notification in respect of specified goods, then all such goods shall be liable to confiscation, and the manufacturer shall be liable to penalty under rule 25 of the Central Excise Rules, 2002.*

***8.** Except as herein provided, all provisions of the Central Excise Act, 1944 and the Central Excise Rules, 2002, including those relating to recovery of dues and interest payable shall apply mutatis mutandis.*

Notification No.42/2008-CE dated 1.7.2008

Pan masala — Rate of duty on the basis of production capacity

In exercise of the powers conferred by sub-section (3) of section 3A of the Central Excise Act, 1944, the Central Government hereby specifies on, -

(i) pan masala falling under tariff item 2106 90 20 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) except the pan masala containing not more than 15% betel nut; and

(ii) pan masala containing tobacco, commonly known as gutkha, falling under tariff item 2403 99 90 of the said Tariff Act (hereinafter referred to as specified goods),

manufactured with the aid of packing machine and packed in pouches having retail sale prices as specified in column (2) of Table-1 below, the rates of duty specified in the corresponding entry in column (3) or column (4) of the said Table, as the case may be :

Table I

S. No.	**Retail sale price (per pouch)**	**Rate of duty per packing machine per month (Rs. in lakh)**	
		Pan masala	**Pan masala containing tobacco**
(1)	(2)	(3)	(4)
1.	Up to Rs. 1.00	9.25	12.50
2.	From Rs. 1.01 to Rs. 1.50	14	19
3.	From Rs. 1.51 to Rs. 2.00	18	24
4.	From Rs. 2.01 to Rs. 3.00	26	36
5.	From Rs. 3.01 to Rs. 4.00	34	47
6.	From Rs. 4.01 to Rs. 5.00	43	59
7.	From Rs. 5.01 to Rs. 6.00	51	70
8.	Above Rs.6.00	50 + 8.36 * (P - 6), where P represents retail sale price of the pouch	69 + 11.45 * (P - 6), where P represents retail sale price of the pouch

Illustration. - The rate of duty per packing machine per month for a gutkha pouch having retail sale price of Rs. 8.00 (i.e. 'P') shall be = Rs. 69 + 11.45(8-6) lakhs*

= *Rs. 91.90 lakhs*

Explanation 1. - For the purposes of this notification, "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.

Explanation 2. - For the purposes of this notification, if there are multiple track or multiple line packing machine which besides packing the specified goods in pouches, perform additional processes involving moulding and giving a definite shape to such pouches with a view to distinguish the brand or to prevent the counterfeiting of the goods, etc., two such tracks or lines shall be deemed to be one individual packing machine for the purposes of calculation of the duty liability.

Explanation 3. - For the purposes of this notification, "retail sale price" means the maximum price at which the specified goods in packaged form may be sold to the ultimate consumer and includes all taxes, local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement, delivery, packing, forwarding and the like and the price is the sole consideration for the sale :

Provided that where on the package, more than one retail sale price is declared, the maximum of such retail sale prices shall be deemed to be the retail sale price :

Provided further that if the goods are cleared in wholesale packages containing a number of standard packages with retail sale price declared on them, then, such declared retail sale price shall be taken into consideration for determining the rate of duty under respective S. Nos. referred to in Table-1.

2. The number of packing machines, for the purpose of computation of the rate of excise duty specified in the opening paragraph shall be determined in terms of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008.

3. The duty levied and collected on such specified goods shall be the aggregate of the duty leviable under the Central Excise Act, 1944 (1 of 1944), the additional duty of excise leviable under section 85 of the Finance Act, 2005 (18 of 2005), the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001 (14 of 2001), Education Cess leviable under section 91 of the Finance Act, 2004 (23 of 2004) and Secondary and Higher Education Cess leviable under section 136 of the Finance Act, 2007 (22 of 2007) and shall be apportioned in the ratios specified in the Table-2 below.

Sr. No.	**Duty**	**Duty ratio for pan masala**	**Duty ratio for pan masala containing tobacco**
(1)	*(2)*	*(3)*	*(4)*
1	*The duty leviable under the Central Excise Act, 1944*	*0.3161*	*0.7355*
2	*The additional duty of excise leviable under section 85 of the Finance Act, 2005*	*0.1355*	*0.0883*
3	*National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001*	*0.5193*	*0.1471*
4	*Education Cess leviable under section 91 of the Finance Act, 2004*	*0.0194*	*0.0194*
5	*Secondary and Higher Education Cess leviable under section 136 of the Finance Act, 2007*	*0.0097*	*0.0097*

[Notification No. 42/2008-C.E., dated 1-7-2008]

19. On comparative reading of the above Notifications we find that Notification No.38/2007-CE provided for optional compounded levy scheme under which the manufacturer of specific category of pan masala and gutkha had option either to pay excise duty as per Capacity Determination in terms of Notification No.38/2007-CE on per machine per month basis or discharge its excise duty liability in terms of Section 3 of the Central Excise Act, 1944 based upon actual production whereas Notification No.42/2008-CE introduced compulsory compounded levy scheme for all the manufacturers of pan masala and gutkha pouches of specific category. The fact that Notification No.42/2008-CE introduced compulsory scheme for levy of excise duty gives an impression that intention of the legislature while issuing Notification No.42/2008-CE was to do away with the optional compounded levy scheme. Otherwise also, Notification No.38/2007-CE has been issued by the Central Government in exercise of powers conferred by Rule 15 of Central Excise Rules, 2002. Rule 15 of Central Excise Rules, 2002 authorises the Central Government to provide for giving option to the assessee by way of notification to pay duty of excise in respect of specified goods on the basis of such factors as may be relevant to production of such goods and at such rate as may be specified in the notification. This obviously is an extension of the only levying section of Central Excise Act at the relevant time in providing the procedure and manner of payment of excise duty on optional basis by the manufacturer of Pan Masala and Gutkha. The Government by Finance Act, 2008 introduced a new Section 3A in the Central Excise Act which provision is in the nature of exception to the Section 3 and it starts with *non obstente* clause "Notwithstanding anything contained in Section 3".That being the case, the Notification No.42/2008-CE having been issued under Section 3A

has an effect of superseding the Notification No.38/2007-CE. Thus we find that with the advent of Notification No.42/2008-CE dated 1.7.2008 , Notification No.38/2007-CE automatically got superseded. Further if we compare the Notifications we find that Notification No.38/2007-CE provided for optional scheme whereas the Notification No.42/2008-CE has introduced compulsory compounded levy scheme applicable to all the manufacturers of pan masala and gutkha pouches of specific category. Excise tax structure provided in these notifications is different. Therefore, in our view the above referred two notifications are so inconsistent with or repugnant to each other that both cannot be stand together and such repugnancy arises from different criteria for charging excise duty. If both the Notifications are allowed to operate simultaneously this will obviously create an anomaly for the reason that it would discriminate between two sets of manufacturers of pan masala and gutkha, one who earlier to issue of the Notification No.42/2008-CE were operating under Notification No.38/2007-CE and others who were operating under normal scheme of payment of excise duty under Section 3 of the Excise Act. In view of the above noted repugnancy between the Notifications we find that Notification No.42/2008-CE intended to repeal Notification No.38/2007-CE and it had superseded Notification No.38/2007-CE by implication. We may note that similar issue came up before the Hon'ble Supreme Court in the matter of Dharangadhra Chemicals Works vs. Dharangadhra Municipality – AIR 1985 Supreme Court 1729 relating to octroi duty issue wherein the Hon'ble Supreme Court while dealing to be implied repeal, inter alia observed thus:

> "9. *In our view the contention proceeds upon a misconception of the legal position in the matter and ignores the object with which the Ordinance of 1949 had been promulgated as also the object of inserting Rule 3 and Bye-Law 3 in the Municipal Octroi Rules and*

Bye-Laws 1965. It cannot be disputed that the subject matter dealt with by the Ordinance and the Government Rules framed thereunder was levy and collection of octroi duty and the subject matter dealt with by the Bombay Act and the Municipal Rules and Bye-Laws framed thereunder (and said to be continued under the Gujarat Act) is also levy and collection of octroi duty; in other words both the pieces of legislation, validly enacted and intended to operate within Municipal limits of the Respondent – Municipality, deal with the same subject matter. In such a situation if there is a repugnancy between the two pieces of legislation, to such an extent that both cannot stand together and operate simultaneously, the later will have the effect of impliedly repealing the former."

20. Next contention on behalf of the assessee (appellant and respondent) is that Notification No.38/2007-CE dated 19.12.2007 provides that once the manufacturer opts for compounded levy scheme he cannot withdraw till the end of financial year. It is argued that in view of said condition, the appellant could not have opted out of the scheme under the notification during the current financial year. As such they have rightly discharged their duty liability in terms of Notification No.38/2007-CE.

21. We are not convinced with the aforesaid argument. We have already concluded that Notification No.42/2008-CE dated 1.7.208 by implication superseded the Notification No.38/2007-CE. That being the case, there is no question of their being any restraint on the assessee for opting out of the scheme which had already been superseded. We may note that the first proviso to clause 2 of procedure and conditions detailed in Notification No.38/2007-CE provides that in case of revision in the rate of excise duty the same shall be recalculated on the basis of revised rates from the date of revision and the liability of duty leviable on the manufacturer of the specified goods from that date shall not be discharged unless differential duty is paid and in case the amount of duty so recalculated is less than the sum paid then the differential amount

shall be refunded to the manufacturer. Obviously, the excise duty rates have been enhanced vide Notification No.42/2008-CE as such, in view of above noted condition of Notification No.38/2007-CE the assessee - appellant - respondent are liable to pay differential of excise duty based upon different rates in excise duty on account of enhancement of rate of excise duty.

22. The next contention on behalf of the assessee (Appellant/Respondents) is that undisputedly, the assessee had discharged their duty liability for the month of July 2008 in June, 2008 and as such by bringing the subsequent notification No.42/2008-CE, the Revenue cannot demand differential excise duty from the appellant. In support of this contention the respective assessees (appellants/respondents) have relied upon the judgments of supreme Court in C.C.E., Baroda vs. Indian Petro Chemicals - 1997 (92) ELT 13 (SC), HCL Limited. vs. C.C., New Delhi - 2001 (130) ELT 405 (SC) and Share Medical Care vs. Union of India - 2007 (209) ELT 321.

23. We do not find merit in the above contention for the reason that admittedly, the payment made in June 2008 by the assessees was advance payment of excise duty liability pertaining to the production in month of July, 2007. Merely because the appellant asssessee has made advance payment of excise duty on provisional basis would not absolve of their liability to discharge the actual excise duty liability. Further, as earlier discussed in view of the proviso to clause 2 of the procedure and condition detailed in Notification No.38/2007-CE in the revision of rate of duty by Notification No.42/2008-CE, the assessees are liable to make good of differential excise duty. The judgments relied upon by the appellants in our view are not applicable to the facts of the present

cases because the dispute before us is regarding the applicability of excise duty levy Notification No.42/2008-CE issued under Section 3A of the Central Excise Act whereas the aforesaid judgments are in respect of exemption Notifications wherein the Supreme Court held that if two exemption Notifications are holding the field then the assessee is entitled to choose and he can take advantage of the Notification which is more beneficial to him.

24. In view of the discussion above, we find that the appellant M/s Sarin and Sarin and Som Products as also the respondents M/s Ashok & Company Pan Bahar Ltd. and M/s Ashok Fragrances Pvt. Ltd. are liable to pay differential excise duty in terms of Notification No.42/2008-CE for the period with effect from 1.7.2008 to 15.7.2008. As regards the penalty of Rs.82,64,516/- imposed on the appellant M/s Sarin and Sarin under Rule 17 of the Pan Masala Packing Machine (Capacity Determination and Collection of Duty) Rules, 2007 read with Section 11AC of the Central Excise Act,1944 we are of the view that imposing penalty on the appellant is not justified because the question of interpretation regarding applicability of Notification No.38/2007-CE or Notification No.42/2008-CE was involved and therefore, no intention to evade payment of excise duty can be inferred under the circumstance.

25. The result of above discussion is that the appeal of M/s Sarin and Sarin is partly accepted while upholding the confirmation of duty demand amounting to Rs.82,64,516/- along with interest we set aside the impugned orders so far as imposing of penalty of equal amount is concerned. Appeal filed by M/s Som Products is set aside.

26. Appeals filed by Revenue against M/s Ashok & Company Pan Bahar Ltd. and M/s Ashok Fragrances Pvt. Ltd. are allowed.