IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Excise Appeal No. 830 of 2011

(Arising out of Order-in-Appeal No. 36/GHY/CE(A)/GHY/11 dated 27.06.2011 passed by Commissioner, Customs & Central Excise, (Appeals), Guwahati.)

Commissioner of Central Excise, Guwahati.
Sethi Trust Building, G.S. road, P.O.- Bhangagarh Guwahati-781005.

....Appellant (s)

VERSUS

M/s Dharampal Satyapal Ltd.,
Shed No. 15 & 16, Shed No. OS/2/R/16/16-17 & OS/1/2/6,
Bamunimaidan Industrial Estate, Guwahati-21.

....Respondent(s)

With

Excise Appeal Nos. 75863-75864 of 2014

(Arising out of Order-in-Original No. 05/Commr./CE/GHY/13-14 dated 26.02.2014 passed by Commissioner of Central Excise & Service Tax, Guwahati.)

M/s Dharampal Satyapal Ltd.,
Shed No. 15 & 16, Shed No. OS/2/R/16/16-17 & OS/1/2/6,
Bamunimaidan Industrial Estate, Guwahati-21.

....Appellant (s)

VERSUS

Commissioner of Central Excise, Guwahati.
Sethi Trust Building, G.S. road, P.O.- Bhangagarh Guwahati-781005.

....Respondent(s)

APPERANCE :
Shri K. Chowdhury, Authorized Representative for the Appellant/Revenue
Shri Pramod Rai & shri Dipankar Majumdar, both Advocates for the Respondent/Assessee

CORAM:
HON'BLE MR. ASHOK JINDAL MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...76543-76545/2023

DATE OF HEARING : 24.08.2023

DATE OF PRONOUNCEMENT: 04.09.2023

PER K. Anpazhakan:

1. M/s Dharampal Satyapal Limited (The Appellant) are engaged in the manufacture of Jarda scented tobacco bearing brand name 'Tulsi Royal 00', leviable to duty under Chewing Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 (hereinafter mentioned as CTPM Rules, 2010). Unit 1 and Unit 2 used the two packing machines - PK -91 GPM Model, procured from Pakona Engineering Ltd, by declaring them as 'single track machines' and paid excise duty as applicable to single track machines. Department initiated investigation to find out whether the packing machines used by the Units 1 and 2 were 'double track machines' mis-declared as 'single track machines'. After investigation, a Show Cause Notice dated 30.05.2011 was issued proposing to declare the two FFS Machines (PK-91 GMP Model), as 'double tracking machines' and demanded duty of Rs.5,71,75,000/- for the months of May 2010 and November 2010 and Rs. 7,10,53,226/- for the months June 2010 to October 2010, along with interest and penalty.(This amount includes Rs.2,02,10,484/- demanded as duty short paid for the month of May 2010, by denying the abatement , vide SCN dated 24.05.2011). The said Notices were adjudicated by The Commissioner vide Order-in-Original dated 26.02.2014, confirming the duty demanded in the Notices along with interest. Penalty equivalent to the duty confirmed was also imposed under Rule 18 of the CTPM Rules, 2010 read with Section 11AC of the

Central Excise Act, 1944. Aggrieved against the impugned order, the Appellant filed Excise Appeal Nos.75863 and 75864 of 2014.

2. In the month of January 2011, the Appellant submitted an Application in Form-1, for declaration of Annual capacity of production, in terms of Rule 6(6) of CTPM Rules, 2010, declaring the two FFS packing machines as 'single track machines', as declared and approved for the earlier period. However, the Deputy Commissioner of Central Excise, Guwahati passed order dated 05.01.2011, declaring the two packing machines as 'Double Track Machines' and determined the Annual Capacity and duty payable thereon accordingly. Aggrieved against the said order, the Appellant preferred appeal before Commissioner (Appeals), who vide his Order-in-Appeal dated 27.06.2011, set aside the Order-in Original dated 05.01.2011, passed by the Deputy Commissioner and allowed the appeal filed by the Appellant. Aggrieved against this impugned order dated 27.06.2011, the department is on appeal, by filing Excise Appeal No.830 0f 2011.

3. As the issues involved in all the appeals filed by the Appellant as well as the department are the same, they are taken up together for decision. The issue to be decided in all the appeals is whether the two FFS packing machines PK-91 GMP Model installed by the Appellant are 'single track' or 'double track' packing machines. The Annual Capacity of production and the duty thereon will be determined based on this factor.

4. In their grounds of appeal, the Appellant made the following submissions:

(i) Two Pakona Make packing machines were declared as "Single Track packing machines" and were installed at Noida factory of the Appellant in the year 2008.

(ii) In May 2010 another two Pakona make packing machines with identical functioning were installed at Unit-1 of the Appellant at Guwahati and functioned there in the month of May 2010. These machines were shifted to Unit-2 at Guwahati and have operated at Unit-2 from July 2010 to October 2010. Again, for the month of November 2010 they were shifted to Unit-1 and functioned there. Up to November 2010, the Appellant's declarations were accepted vide multiple appealable orders issued under Rule 6(2) of Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 after physical verifications, and the duty liability was determined by accepting the packing machine as 'single track' machines.

(iii) Investigation was conducted by the department in their Noida unit in 2011 and SCN was issued with respect to their Noida Unit by treating the said PK-91, GMP Model Pakona Make machines as "Double Track packing Machines'. The said issue has attained finality vide order of Allahabad High Court, which stands accepted, in view of CBIC Circular 1063/2/2018-Cx Dated 16.2.2018 .

(iv) Based on Noida investigation, the Deputy Commissioner Guwahati has not accepted their running declaration for the month of January 2011, as 'single track' machine and issued order dated 05.01.2011, declaring the same as 'double track' machine. This order was challenged before Commissioner (A), who allowed the appeal and is now subject

matter of departmental appeal E/830/2011. Similarly for earlier periods SCN was issued and demand was confirmed with respect to unit -1 & 2 at Guwahati by treating the machines as 'double track', which is subject matter of their appeal.

(v) The department has departed from the stand taken earlier for several months, only on the basis of the investigation conducted at their Noida Unit. The said issue has attained finality in respect of their Noida Unit, as per the order passed by the Hon'ble Allahabad High Court, which has been accepted by the department in CBIC Circular 1063/2/2018-Cx Dated 16.2.2018. Accordingly, they contended that the impugned order confirming the demand based on the order passed in respect of their Noida Unit, is liable to be set aside.

(vi) The entire issue raised by the department is based on two sets of reports. One issued by Two senior professors of IIT Delhi in 2010 and again in 2012, which describes the machines as Single-track duplex machines, which is referred by CESTAT while deciding the Noida matter. Second report was issued by an Assistant Professor of IIT Guwahati in 2011 and is relied by department in support of Double track proposition. IIT Delhi report focuses on single path traced by all the pouches for concluding the machines as single track. IIT Guwahati report in categorical terms does not say that machines are double track, rather focuses on two hoppers and two feed track for raw material and says machines are two feed track machines. Further IIT Guwahati report does not refer to IIT Delhi report. But, the Report of the two professors of IIT Delhi in 2012 was given after considering the report of Dr. Kore, of IIT, Guwahati. Hence, the Report of IIT Delhi is more reliable than

the report of IIT Guwahati. Accordingly, they prayed for declaring the said two FFS Packing machines as 'single track machines' and set aside the demands confirmed in the impugned order.

5. The Ld.A.R. submitted that the report of IIT Guwahati was submitted after physically verifying the same by Dr. Kore, whereas the professors of IIT Delhi has not seen the PK-91 GMP Model machines installed at the Guwahati Units of the Appellant. Hence, the packing machines are Double Track machines as concluded by Dr. Kore. Accordingly, he supported the impugned order. He also stated that the Commissioner (Appeals) has erred in declaring the two packing machines as 'single track' machines and hence the said order is liable to be set aside.

6. Heard both sides and perused the Appeal records.

7. We observe that the issue to be decided in all the appeals is whether the two FFS packing machines PK-91 GMP Model installed by the Appellant are 'single track' machines as contended by the Appellant or 'double track' packing machines as contended by the department. We observe that the department has categorized the PK-91 GMP Model machines as 'Double Track Machines' on the basis of the Report received from Dr. Kore, of IIT, Guwahati. For the sake of ready reference, the relevant portion of the Report is reproduces below:

> **" 3. Classification of PAKONA form fill and Seal Machines installed at Dharampal Satyapal Ltd., Guwahati:**
>
> A study of determination of number of tracks or lines has been carried out at the Dharampal Satyapal Ltd., Bamunimaidan Industrial Estate, Guwahati, 781021, Assam on February 10, 2011. Observations are made for determining the number of hoppers, feed tracks work stations, inline work flow and rotary work flow mechanisms which are present on the two PAKONA make FFS machines used at Dharampal Satyapal Ltd., (DSL) Guwahati.

It is observed that the two PAKONA make FFS packing machines operating at DSI, has intermittent operations. It draws the packaging material horizontally off a supply reel by two rollers. It then passes through piercing device with a die and punch where two equidistance holes are made to form a stand up pouch. A folded W is then formed by converting the web with the help of folding plough and a gusset former. A formed pouch is transferred in vertical position in line to the sealing and zip fitting stations. Vertical and bottom seals of pouch are made at two stations simultaneously (Fig.5). Two pouches further get separated from the web with the help of two cutters. With the help of two grippers the two pouches are then transferred to the rotary indexing work part flow mechanism for further operations. Following operations are carried out at each indexing step at two work stations synchronously.

(a) Loading of pouches to the rotary indexing work flow mechanism with two grippers

(b) Opening of mouth of the pouches by vacuum suckers

(c) Opening of pouches with forming blocks as shown in Fig.6

(d) Filling of ingredients in the pouch as shown in fig. 7,8,9, and 10

(e) Mechanical closing of the pouch

(f) Sealing of pouches at the top by using heated pneumatic sealing jaws

(g) Unloading of pouches on to a belt conveyor

Based on the available pictures, videos and observations made during study visit, of the two FFS machines, following observations are made.

a. As shown in Fig. 5 two FFS machines have two work stations for sealing operation and one in-line work flow mechanism.

b. A rotary work part flow mechanism, shown in Fig.6 is found, for transfer of work part.

c. As shown in figures 7,8,9 and 10 two work stations for forming, filling and sealing operations, two hoppers and two feed tracks are present on both the FFS machines.

d. A combination of inline and rotary work flow mechanism is found on the machine. Thus FFS machines under study can be classified as multi station multi feed track, horizontal FFS packing machines with combined inline and rotary work flow configuration.

1. **Summary:**

The detailed study of FFS machines was carried out at DSL, Guwahati for determining number of lines and tracks. It has been observed that both the FFS machines are of PAKONA Make and have two processing stations for forming, filling and sealing operations, both the machines have two hoppers, two feed tracks and two grippers. The FFS machines have in-line and rotary work flow mechanisms. Packing material is fed to both the FFS machines in horizontal direction.

Based on the technical literature available for automation, FFS machines and transfer lines the form, fill and seal (FFS) packing machines under study operating at DSL, Guwahati can be classified as multi station, multi feed track, horizontal FFS packing machine with combined in-line and rotary work flow system.

7. We observe that IIT Delhi professors Dr. Sanjeev Sanghi and Dr. Sudipto Mukherjee has examined the PK-90 packing machines of Pakona make and gave their report in respect of the Noida Unit in October 2010, wherein they have concluded that PK-90 packing machine as 'single track machine'. The Report of Dr. Kore was shown to the Professors of IIT, Delhi for analysis and after studying the Report of Dr. Kore, IIT Delhi professors have given their Report in November 2012, wherein they have declared the Pakona PK-91 model packing machines as 'Single-Track machines'. For ready reference, the relevant part of the Report is reproduced below:

Introduction:

The scope of this work is to determine ónumber of tracks that are available in a Form Fill and Seal (FFS) Packing Machine PK-91 GMP model manufactured by M/s Pakona Engineers (I) Pvt. Ltd.,

Background

1.1 We have gone through Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 and Chewing Tobacco and Unmanufactured tobacco Packing Machines (Capacity Determination

of Collection of Duty) Rules, 2010 notified by Government of India. Ministry of Finance (Department of Revenue) vide Notification No. 30/2008-Central Excise (N.T) dated 1st July, 2008 and No. 11/2010-Central Excise (N.T.) dated 27th February, 2010 respectively and we find that these Rules Notifications do not establish a method to define the ótracksô or linesô in Form, Fill and Seal (FFS) Packing Machines.

1.2 We had earlier carried out extensive survey of technical materials on various automatic FFS Packing Machines. Prof. Sanjeev Sanghi also visited the plants at Noida and witnessed physical operations of various types of machines.

1.3 For selection of optimum parameters for classification of automatic FFS machines, we had adopted selection process from design perspective. We identified four independent categories for classification and also recommended configurations of machines based on current use.

FFS packing machine Model PK-90 manufactured by Pakona Engineers (I) Pvt. Ltd., has been classified as Single Line, Single track, Duplex Machine.

2. We are informed that D. Kore. Assistant Professor, Mechanical Engineering Department, Indian Institute of Technology Guwahati has conducted a study for determination of number of tracks or lines of Form Fill and Seal Packing Machine and submitted his report dated 24th February, 2011 to Government authorities. A copy of said Report has been provided to us for our reference and observations/ comments.

The said report discusses fundamentals of classification in relation to automatic systems such a FFS Machines as well as classification of FFS machines according to number of subsystems (processing stations and feed tracks) and physical configuration of work handling systems used in such machines.

The said report also discusses various sub-systems used in Pakona make FFS machines installed in the factory of Dharampal

Satyapal Limited Guwahati and classifies the said machines as 'multi station. Multi feed track, horizontal FFS machine with combined in line and rotary now system" .

3. We are informed that Pakona made FFS machines available at Guwahati factory of M/s Dharampal Satyapal Limited are PK-91 GMP model and that this model is a variant of model PK-90 that has been studied by us, modified for production of pouches of different size otherwise the functions and features of both the models are identical.

4. methodology adopted by Dr. Kore

4.1 It is seen that Dr. Kore has surveyed technical literature on automated production systems (Machines) that are used in various automated plants (such as automobile assembly, battery cell assembly and bottle filling) including automated form fill and seal machines.

4.2 A typical automatic FFS Packing Machine may consist of several sub-systems of work stations where the pouches are formed, material (to be packed) is fed in to the formed pouches and filled pouches are sealed as has been identified by Dr. Kore in his report. In technical literature each such process is called a unit operation. It has been stated that Automatic FFS machine can be classified based on these subsystems.

Dr. Kore has defined feed tracks' and work station on FFS Packing Machine as under:-

'Feed track' is a device which transfers the maerials (to be packed) from 'Hopper' to the location of work station of the FFS

machine where the material (to be packed) is tilled in the empty pouches.

"work station' is a location in assembly system at which various processing and assembly operations are carried out.

4.3. Dr. Kore in his report states that 'depending upon number of synchronous forming, filling and sealing stations used in any form fill and seal machine it can be classified as single or multi station form, fill and seal machine. Productively of FFS machines can be increased in the proportion of number of work stations used for an assembly or filling operation.

4.4 Dr. Kore in his report has described construction and operation of various work handing mechanism (such as 'in line segmented in line or rotary or hybrid) that are used in automated assembly systems.

4.5 Number of tracks or lines in Pakona FFS Machines installed at the factory of Dharampal Satyapal Limited Guwahati has been determined on the basis of hoppers feed tracks, work stations, in line work flow and rotary work flow mechanism used in the said machines.

4.6. Dr. Kore in his report has concluded that the FFS Packing Machines PK-91 GMP model are 'Multi Feed Track' Packing Machines.

5. Analysis of Dr. Kore's Report.

5.1. It is evident that observations made by Dr. Kore in his Report are based on survey of technical literature and operation of Pakona PK-91 GMP model FFS packing machine available in

Guwahati factory of M/s Dharampal Satyapal Limited and it appears that Dr. Kore has not surveyed the operation and features of other FFS Packing Machines that are available in the market.

5.2. Various essential operations e.g. forming, filling and sealing of pouches in a FFS Packing machine are carried out sequentially. First operation is forming of the pouches followed by filling and sealing of filled pouches. It is thus evident that the processes in FFS Packing machines are serial.

5.3 In FFS Packing Machine, a unit operation is carried out at a work station and work stations serially arranged, and configured for different operations, are used for completion of entire process. Definition of 'work station' given by Dr. Kore is not applicable to automatic FFS Packing machines as only unit operations are carried out an each station.

5.4 The operations were timed in our study, and we have observed that there is a mismatch in the completion times of unit processes used in FFS Packing machines as reported by us in our Report. [Page 3]

It is thus evident that the processes in FFS Packing machine are asynchronous

5.5 Productivity of FFS Packing machine can be increased by using additional work station for each operation on the same line or track.

Productivity can be optimized by using multiplicity of work stations at specific locations (of the same line or track) that consumer disproportionate processing time.

Use of additional work station does not inevitably lead to corresponding increase in productivity, thus the observations of Dr. Kore in Para 2.1.3 of his Report "Productivity of FFS machines can be increased in the proportion of number of work stations used for an assembly or filling operation" is not correct.

5.6. Dr. Kore in his report has failed to relate various work handing mechanism viz a viz machine productivity. Configuration of various types of work handling mechanisms may not be relevant to subject matter unless use of any specified system results in improved productivity. It may be useful for selection of mechanism for the purpose of machine design viz a viz processing time and cost etc.

5.7 For definition of 'line' in reference to FFS Packing machine, we wish to refer to celebrated book by Mikel P. Groover on Automation, Production Systems, and Computer-Integrated Manufacturing. The same reference has also been cited extensively by Dr. Kore. Production units and plants specialized in production of one class of products in large volumes such as FFS Packing machines have been classified as product-flow layout. [Refer page-25]

It has been further stated that in this type of a layout, the processing and assembly processes are placed along the line of flow of the product. The product in reference to FFS Packing

machine is the pouch and 'line' would mean the path along which various processes such as forming, filling and sealing are carried out. This concept is further detailed as a 'transfer line'.[Refer Page37]

In Pakona Machine in question, the laminate and ALL the pouches flow horizontally along a single line in space at various stages (forming-filling-sealing). There cannot be two opinions that the Pakona make FFS packing Machine is a Horizontal and single line machine.

5.8. Variety of feed tracks used in automated production plants units have been discussed in above referred book by Groover. [Refer Page 86]

"Feed track" has been defined as a channel meant for transfer of material (to be packed) from hopper to the location where process of filling is carried out.

Multiple feed tracks are typically used where more than one material are required to be filled in the same pouch. In this case there would be no increase in the productivity of the machine but is necessary for getting the right mix. In this instance, the filling material is premixed and so multiplicity of feed track is not needed.

It is thus evident that count of the number of feed tracks in an automated production plant/unit is not an indicator of its productivity as such, but an indicator of the misbalances of time to completion of various unit processes in the line. In our

considered opinion, FFS Packing machines need not be classified on the basis of number of feed tracks.

'Feed Track' in relation to FFS Packing Machine is not synonymous to 'line' whereas a 'track' is the physical embodiment implementing flow along 'line' and hence is synonymous as explained in our previous report. [para B and C @ Page 2]

5.9. During course of our survey of functioning of various FFS Packing machines, we have not witnessed any horizontal machine having multiple tracks whereas we have seen several vertical machines having multiple tracks.

Conclusion

This report defines a 'line' which has been mentioned but not defined in No.11/2010 Central Excise (N.T.) date 27th February, 2010 based on accepted technical literature. We find that a 'track' mentioned in the same is the physical embodiment implementing flow along 'line' A feed track' mentioned in the report by Dr. Kore is a subsystem level classification, and different from 'track' referred to in No. 11/2010 Central Excise (N.T.) dated 27th February, 2010.

In view of above discussions and on the basis of study conducted by in past, we reconfirm that FFS Packing Machines PK-90/PK-91 GMP model manufactured by Pakona Engineers (I) Pvt. Ltd. are Horizontal, Single Line, Single Track, duplex machines for forming filling and sealing of pouches.

9. From the Two reports, we observe that Dr. Kore's Report was based on his survey of PK-91 model machine alone and he has not surveyed the operation and features of other FFS Packing Machines that are available in the market. The Report of IIT, Delhi has analyzed the Report of Dr. Kore and categorically states that in the Pakona Machine in question, the laminate and ALL the pouches flow horizontally along a single line in space at various stages (forming-filling-sealing). There cannot be two opinions that the Pakona make FFS packing Machine is a Horizontal and single line machine. The Report of IIT, Delhi has referred the book 'Automation, Production Systems, and Computer-Integrated Manufacturing' of Mr. Groover where "Feed track" has been defined as a channel meant for transfer of material (to be packed) from hopper to the location where process of filling is carried out. Multiple feed tracks are typically used where more than one material are required to be filled in the same pouch. In this case, there would be no increase in the productivity of the machine but is necessary for getting the right mix. In the instance case, the filling of material is premixed and so multiplicity of feed track is not needed. It is thus evident that count of the number of feed tracks in a automated production plant/unit is not an indicator of its productivity as such, but an indicator of the misbalances of time to completion of various unit processes in the line. Accordingly, they opined that the FFS Packing machines need not be classified on the basis of number of feed tracks and concluded that the PK-91 GMP Model installed in the Guwahati unit is of

'Single Track' duplex packing machine. In our opinion, the conclusion arrived in the IIT, Delhi Report is correct due to the following reasons:

(i) The Report of Dr. Kore has categorically not stated that PK-91 GMP Model is a Double Track machine. The Report only says that the machine can be classified as multi station, multi feed track, horizontal FFS packing machine with combined in-line and rotary work flow system.

(ii)The Report of IIT, Delhi has analyzed the Report of Dr. Kore also and given their findings wherein it is categorically stated that the PK-91 GMP Model packing machine is a single track machine.

(iii) In PK-91 model packing machine, the pouches flow horizontally, along a single line in various stages of forming, filling and sealing. The IIT, Delhi Report categorically says that they have not witnessed any horizontal machine having multiple tracks whereas they have seen several vertical machines having multiple tracks.

(iv) Multiple feed tracks are typically used where more than one material are required to be filled in the same pouch. In this case there would be no increase in the productivity of the machine but is necessary for getting the right mix. In the instant case, the filling material is premixed and so multiplicity of feed track is not needed.

(v) It is a fact on record that a single laminate roll along with zip is fed into the machine. As the roll moves on, it is folded and sealed from three sides and the sip is embedded in between, by

> the machine. Then, two cutting knives cut two pouches at the same time. Just because two pouches are cut at the same time, it cannot be called a double track machine. Since a single laminate roll is fed into the machine, it is only a single track machine.

10. Thus, we agree with the findings of the IIT, Delhi Report and hold that the PK-91 GMP Model Packing machine is a 'single track' machine. As per 'Explanation' to Rule 5 of the CTPM Rules, 2010, if there are multiple track or multiple line packing machines, then each one of 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. Since, it has been concluded that PK-91 GMP Model packing machine is a 'single track' machine, we hold that duty has to be calculated by treating it as single track packing machine.

11. In their submissions, the Appellant raised various grounds based on which the impugned order is not sustainable. The Appellant stated that the Notice in this case was issued based on an investigation conducted by the department in their Noida unit in 2011, by treating the said PK-91, GMP Model Pakona Make machines as "Double Track packing machines' . They stated that the said issue has attained finality as per the order of the Hon'ble High Court of Allahabad, which stands accepted by the department, in view of CBIC Circular 1063/2/2018-Cx Dated 16.2.2018 . We find merit in the argument of the Appellant. In respect their Noida Unit, the Hon'ble Allahabad High Court has categorically held that the PK-90 GMP model machine is a 'single track' machine. The relevant portion of the decision is reproduced below:

"7. We find that óGutkhaô and õPan Masalaô packed in retail pouches for sale has been notified under Section 3-A(1) of the Act for assessment of duty under Section 3-A of the Act. Rules have been framed under Section 3-A(2) and 3-A(3) of the Act, namely, the PMPM Rules, Rule 5 of the PMPM Rules specifies the deemed production of number of pouches per operating packing machine per month. For facility, Rule 5 of the PMPM Rules is extracted herein :

ñ[**RULE 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, having maximum packing speed at which it can be operated for packing of notified goods as specified in column (3) or column (4) or column (5) of the Table below, as the case may be, per month shall be as is equal to the corresponding entry specified in column (3) or column (4) or column (5) of the said Table, as the case may be.

		Number of pouches per operating packing machine per month		
Sl. No.	**Retail sale price (per Pouch)**	**Upto 300 pouches per minute**	**301 to 750 pouches per minute**	**751 pouches per minute and above**
(1)	(2)	(3)	(4)	(5)
1.	Up to Rs. 1.00	6864000	11232000	24960000
2.	From Rs. 1.01 to Rs. 1.50	6864000	11232000	24960000
3.	From Rs. 1.51 to Rs. 2.00	6520800	10670400	23712000
4.	From Rs. 2.01 to Rs. 3.00	6520800	10670400	23712000
5.	From Rs. 3.01 to Rs. 4.00	6314880	10333440	22963200
6.	From Rs. 4.01 to Rs.	6314880	10333440	22963200

	5.00			
7.	From Rs. 4.01 to Rs. 5.00	6314880	10333440	22963200
8.	Above Rs. 6.00	6177600	10108800	22464000

For the purposes of this rule, if there are multiple track or multiple line packing machine which besides packing the notified 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 number of pouches per operating packing machine per month :

Provided that in case of multiple track or multiple line packing machine which are incapable of performing such additional processes, 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.]ò

8. The proviso to the Explanation to Rule 5 provides that in case of multiple track or multiple line packing machine, which are incapable of performing such additional processes, 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. It means that if a machine has two tracks or more multiple lines, the said track or lines would be treated as an individual packing machine.

9. On the basis of this Rule, the Commissioner passed the order in original holding that since 150 pouches were being produced per minute, which was double the capacity of an ordinary packing machine, the said machine would be treated as a double track machine and accordingly, excise duty was levied.

10. The Tribunal after considering the matter found that as per technical literature of the machine supplied by the supplier, the machine in question is a duplex machine, but there is only one track in which pouches are formed and are later filled with pan masala. The Tribunal further found that the only innovation in this machine is that on the same line or track, at a time, two pouches are being cut and filled resulting in higher speed of production of pouches. The Tribunal

held that since there was only one track or one line, the machine purchased by the assessee would be treated as a single track machine and would not be treated as a multiple track machine.

11. Having heard Shri B.K.S. Raghuvanshi, the learned counsel appearing for the appellant and Shri Kasif Zaidi, the learned counsel for the assessee, we find that Rule 5 of the PMPM Rules only distinguishes between a single track and multiple track machines and the duty is paid accordingly. Duty is not paid on the basis of number of pouches produced per minute per month. As per the notification dated 1-7-2008, the rate of duty has been fixed per packing machine per month and not on the turnover of the pouches manufactured. The Central Excise and Customs Board has also issued a circular dated 24-1-2014 clarifying that the duty payable under the notification dated 1-7-2008 is determined on deemed production with respect to the number of operating packing machines in the factory and not on the basis of the actual production by a unit.

12. In the light of the specific finding given by the Tribunal, being the last fact finding authority, to the effect that the machine purchased by the assessee is a single track machine, the duty payable by the assessee on the basis of a single track machine, should have been levied. The Commissioner fell in error in treating the said machine as a two track machine. The order of the Commissioner was rightly set aside by the Tribunal.

13. In our view, no substantial question of law arises for consideration.

14. The appeals fail and are dismissed.

12. We observe that the Pakona made FFS machines available at the Guwahati factory of the Appellant are PK-91 GMP model and that this model is a variant of PK-90 model, modified for the purpose of production of pouches of different sizes, otherwise the functions and features of both the models are identical. Hence, we observe that the decision of the Hon'ble High Court of Allahabad is squarely applicable in this case. Accordingly, we hold that the demand confirmed in this order by treating the two FFS packing machines as 'Double Track Machines' is

not sustainable. Since the demand itself is not sustainable, the question of imposing penalty does not arise.

13. Regarding the Appeal filed by the department, we observe that the appeal was against the Order-in-Appeal dated 27.06.2011, wherein the order dated 05.01.2011 passed by the Deputy Commissioner was set aside by the Commissioner (Appeals). We observe that the Appellant has been filing declarations as per Rule 6 of the CTPM Rules in 2010 and the Deputy Commissioner has passed orders fixing their Annual Capacity of production and the duty payable thereon, by treating the PK-91 packing machines as 'single track' machines. However, the Deputy Commissioner, Guwahati has not accepted their running declaration for the month of January 2011, based on the investigation initiated by the department in their Noida Unit. The Pakona make PK-91 packing machines installed at Guwahati Unit are identical to the Pakona make PK-90 packing machines installed at their Noida unit, which is evident from the Technical Literature as well as the report of IIT, Delhi. The Appellant contended that the earlier orders passed by the Deputy Commissioner by treating the packing machines as 'single track' machines were appealable orders which were not challenged by the department and hence they attained finality. The department cannot raise any demand for the past period without challenging those orders. In January 2011, when they filed the Form-1 for fixing the Annaual Capacity of production, the Deputy Commissioner has passed order dated 05.01.2011, without issuing any notice to the Appellant. We agree with the contention of the Appellant that the department cannot change their stand and treat the machines as 'double track machines' without issuing any Notice to the Appellant.

14. We observe that the Commissioner (Appeals) has set aside the order dated 05.01.2011 passed by the Deputy Commissioner on the following grounds:

(i) The Lower Authority has suo moto passed the impugned Order-in-Original without giving any chance of hearing to the opposition party, thereby denied their right of natural justice.

(ii) The Lower Authority has erred in not issuing the Show cause Notice to the Appellant for modifying the Annual Capacity of production of the disputed machine from 'Single track' to 'Double track'.

(iii) The Lower Authority has erred by reviewing his own order, thereby violated Section 35 of the Central Excise Act, 1944.

15. We observe that the department has not adduced any explanations for the above said violations, in their grounds of appeal. We observe that the Commissioner (Appeals) has given a categorical finding that the Lower Authority has not followed the principles of natural justice before modifying the earlier orders, which were appealable orders. We agree with the view of the Commissioner (Appeals) that the department cannot modify the earlier orders without issuing Notice to the Appellant. As no appeal has been filed against the earlier orders, fixing the Annual Capacity of production by treating the machines as 'single track' machines, we hold that the demand for the past period from May 2010 to November 2010 confirmed in the impugned order is not sustainable. Thus, we hold that the order dated 05.01.2011 passed by the Deputy Commissioner, modifying the Annual Capacity of production by treating the 'single track' machines as 'double track' machines, is not sustainable. Accordingly, we uphold the impugned order passed by the Commissioner (Appeals) and reject the appeal filed by the department.

15. In view of the above discussion, we hold that the two PK-91 GMP Model packing machines are 'single track' machines. The demand of duty confirmed in

the impugned order by treating the machines as 'Double Track' machines is not sustainable. Accordingly, the impugned order confirming the demand of duty along with interest and imposing penalty equivalent to the duty, is set aside, and the Appeal filed by the appellant is allowed. The Order-in-Appeal passed by the Commissioner (Appeals) is upheld and the department appeal is rejected.

(Pronounced in the open court on……04.09.2023….)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar Kr.