CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 167 of 2012

(Arising out of Order-in-Appeal No. PIII/RS/315 /2011 dated 28.10.2011 passed by the Commissioner of Central Excise & Service Tax (Appeals-III), Pune)

M/s. Godfrey Phillips India Ltd. **Appellant**
Plot No. A-1/1, MIDC Industrial Area,
Baramati, Pune 413 102.

Vs.

Commissioner of Cen. Excise & ST, Pune-III **Respondent**
ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

WITH

Excise Appeal No. 168 of 2012

(Arising out of Order-in-Appeal No. PIII/RS/10 & 11 /2012 dated 24.01.2012 passed by the Commissioner of Central Excise & Service Tax (Appeals-III), Pune)

M/s. Godfrey Phillips India Ltd. **Appellant**
Plot No. A-1/1, MIDC Industrial Area,
Baramati, Pune 413 102.

Vs.

Commissioner of Cen. Excise & ST, Pune-III **Respondent**
ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

WITH

Excise Appeal No. 589 of 2012

(Arising out of Order-in-Appeal No. PIII/RS/10 & 11 /2012 dated 24.01.2012 passed by the Commissioner of Central Excise & Service Tax (Appeals-III), Pune)

M/s. Godfrey Phillips India Ltd. **Appellant**
Plot No. A-1/1, MIDC Industrial Area,
Baramati, Pune 413 102.

Vs.

Commissioner of Cen. Excise & ST, Pune-III **Respondent**
ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

AND

Excise Appeal No. 714 of 2012

(Arising out of Order-in-Appeal No. PIII/RS/39/2012 dated 13.02.2012 passed by the Commissioner of Central Excise & Service Tax (Appeals-III), Pune)

M/s. Godfrey Phillips India Ltd. **Appellant**
Plot No. A-1/1, MIDC Industrial Area,
Baramati, Pune 413 102.

Vs.

Commissioner of Cen. Excise & ST, Pune-III **Respondent**
ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Appearance:

Shri Gajendra Jain, Advocate, for the Appellant
Shri Anantha S. Krishnan, Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 16.03.2022
Date of Decision: 19.05.2022

FINAL ORDER NO. A/85481-85484/2022

PER: SANJIV SRIVASTAVA

These appeals are preferred against the Order-in-Appeal of the Commissioner (Appeals-III) of Central Excise, Pune. By the impugned order, the Commissioner (Appeals) upheld the Order-in-Original of Assistant Commissioner, Central Excise, Division IX Pune III, determining the Annual Capacity of Production and monthly duty liability for the appellants under the Pan Masala Packing (Capacity Determination & Collection of Duty) Rules, 2008 read with Notification No 30/2008 of the CE(NT) dated 01.07.2008 and Notification No. 42/2008-CE(NT) dated 01.07.2008 as amended.

Appeal No	Order in Appeal No	Order in Original No
E/167/2012	PIII/RS/315 /2011 dated 28.10.2011	R-01/C.EX/2011 dated 27.05.2011
E/168/2012	PIII/RS/10 & 11 /2012 dated 24.01.2012	08/C.EX/2011 dated 13.10.2011
E/589/2012	PIII/RS/10 & 11 /2012 dated 24.01.2012	R-02/2011-12 dated 18.10.2011

E/714/2012	PIII/RS/39/2012 dated 13.02.2012	R-03/2011-12 dated 03.11.2011

2.1 Appellant is engaged in manufacture and clearance of Pan Masala not containing tobacco, classifiable under Tariff Item 21069020 of the First Schedule to Central Excise Tariff Act, 1985. They filed the declaration in Form 1 from time to time as per Pan Masala Packing (Capacity Determination & Collection of Duty) Rules, 2008 read with Notification No 30/2008 of the CE(NT) dated 01.07.2008 and Notification No. 42/2008-CE(NT) dated 01.07.2008 as amended for determination annual capacity of production and monthly duty liability to the jurisdictional Assistant/ Deputy Commissioner. Assistant/ Deputy Commissioner determined the said capacity and the Monthly Duty Liability as per the order referred in table below:

Order in Original No R-01/C.EX/2011 dated 27.05.2011				
		A) Monthly Duty Liability		
S No	Retail Sale Price (per pouch)	No of packing machines installed	Rate of duty per packing machine per month (Rs in lakhs)	Monthly Duty Payable (Rs. in lakhs)
1	From Rs 2.01 to Rs 3.00 (Rs. 2.50)	1 X 04	26 X 4	104
2	From Rs 5.01 to Rs 6.00 (Rs. 6.00)	1 X 04	51 X 4	204
			Total Duty Payable	308
Order in Original No 08/C.EX/2011 dated 13.10.2011				
		Monthly Duty Liability		
S No	Retail Sale Price (per pouch)	No of packing machines installed	Rate of duty per packing machine per month (Rs in lakhs)	Monthly Duty Payable (Rs. in lakhs)
1	From Rs	1 X 03	18	54

	1.51 to Rs 2.00 (Rs. 2.00)			
2	From Rs 2.01 to Rs 3.00 (Rs. 2.50)	1 X 03	26	78
3	From Rs 5.01 to Rs 6.00 (Rs. 6.00)	1 X 03	51	153
		Total Duty Payable (w.e.f 30.11.2010)		285
1	From Rs 1.51 to Rs 2.00 (Rs. 2.00)	1 X 04	18	72
2	From Rs 2.01 to Rs 3.00 (Rs. 2.50)	1 X 04	26	104
3	From Rs 5.01 to Rs 6.00 (Rs. 6.00)	1 X 04	51	204
		Total Duty Payable (w.e.f 04.01.2011)		380
Order in Original No R-02/2011-12 dated 18.10.2011				
Monthly Duty Liability				
S No	Retail Sale Price (per pouch)	No of packing machines installed	Rate of duty per packing machine per month (Rs in lakhs)	Monthly Duty Payable (Rs. in lakhs)
1	From Rs 2.01 to Rs 3.00 (Rs. 2.50)	1 X 04	26 X 4	104
2	From Rs	1 X 04	51 X 4	204

	5.01 to Rs 6.00 (Rs. 6.00)			
		Total Duty Payable (w.e.f 04.10.2011)		308
Order in Original No R-03/2011-12 dated 03.11.2011				
A) Monthly Duty Liability				
S No	Retail Sale Price (per pouch)	No of packing machines installed	Rate of duty per packing machine per month (Rs in lakhs)	Monthly Duty Payable (Rs. in lakhs)
1	From Rs 2.01 to Rs 3.00 (Rs. 2.50)	1 X 05	26 X 5	130
2	From Rs 5.01 to Rs 6.00 (Rs. 6.00)	1 X 05	51 X 5	255
		Total Duty Payable (w.e.f 13.10.2011)		385

2.2 Being aggrieved by the above referred orders determining the Monthly Duty Liability, appellants preferred appeals before the Commissioner (Appeals). The Commissioner (Appeals) dismissed these appeals and upheld the order of the adjudicating authority as per the impugned orders referred in para 1 above.

2.3 Aggrieved, appellants have preferred these appeals before the tribunal.

3.1 We have heard Shri Gajendra Jain, Advocate for the appellant and Shri S Anantha Krishnan, Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant, learned counsel submits:

- Under the scheme of Pan Masala Rules, the adjudicating authority was only required to determine the annual capacity of production. However, Assistant Commissioner has exceeded jurisdiction by also determining the monthly duty liability. Reliance is placed on the decision of CESTAT in case of Godfrey Phillips India Ltd. Vs. CCE – 2017 (352) ELT 232 (T).

- Determination Order dated 18.12.2009 was suo motu revised by the Deputy Commissioner vide Order dated 30.11.2010, whereas as per these rules Deputy Commissioner does not have any power to revise / review Determination Order passed earlier.
- Machine No. I was sealed by the jurisdictional Superintendent at midnight on 31.10.2009 and since then, it remained in sealed condition. This factual position is not disputed by Revenue. Once the machine is uninstalled and sealed by the Superintendent, said machine cannot be considered as operating packing machine even though it remains inside factory premises. Reliance is placed on Circular No. 81/17/2007/CX3 dated 20.4.2010, and following decisions:
    - Kay Pan Masala (P) Ltd. - 2014 (301) ELT 165 (All.).
    - Phool Chand Sales Corporation - 2018 (364) ELT 934 (T).
- For determination of annual capacity of production, following factors are relevant:
    - Number of operative packing machines in the factory; and
    - Actual RSP printed on pouches by each individual machine.
    - These factors are purely matters of fact which cannot be deemed under any circumstance whatsoever.
- Determination Orders have been passed entirely on the basis of assumptions / presumptions and hence, are bad in law.
- Deeming provision contained in Rule 8 of Pan Masala Rules is not applicable.
- Deeming provision contained in first proviso to Rule 8 has been substituted with retrospective effect from 13.4.2010.
- Configuration of packing machine is fixed. Modification takes considerable time and effort and it can be done only by the Original Equipment Manufacturer.

- Assistant Commissioner can differ with declaration filed in Form 1 in terms of Rule 6 only after conducting physical verification.

3.3 Learned authorized representative reiterates the findings as recorded in the impugned order and submits that the impugned orders are as per the relevant rules as they existed at the relevant time. However since these rules got amended retrospectively by the Finance (No 2) Act, 2014, the impact of these rules can be considered only if the matters are remanded back to the original authority for redetermination in terms of the retrospective amendments made in the Rules.

4.1 We have considered the impugned order, along with the submissions made in appeal and during the course of argument.

4.2 The relevant provisions of the Pan Masala packing Machines (Capacity Determination and Collection of Duty) Rules, 2008, (Notification No 30/2008-CE (NT) dated 01.07.2008 as amended by Notification No 31/2008 CE (NT) dated 15.07.2008, 35/2008-CE (NT), 08/2010-CE (NT) dated 27.02.2010 and 03/2014-CE (NT) dated 24.01.2014 as they were till the amendments made retrospectively by the Finance (No 2) Act, 2014 (25 of 2014) are reproduced below:

"TO BE PUBLISHED IN THE GAZETTE OF INDIA, EXTRAORDINARY, PART II, SECTION 3, SUB-SECTION (i)]GOVERNMENT OF INDIA MINISTRY OF FINANCE(DEPARTMENT OF REVENUE)Notification No. 30/2008-Central Excise (N.T.)New Delhi, the 1st July, 2008 G.S.R. (E).-

In exercise of the powers conferred by sub-sections (2) and (3) of section 3A of the Central Excise Act, 1944(1 of 1944), the Central Government hereby makes the following rules, namely:-

1. Short title and commencement. –

(1) These rules may be called the Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008.

(2) They shall come into force on the 1st day of July, 2008.

2. Definitions. –

In these rules, unless the context otherwise requires,-

(a) "Act" means the Central Excise Act, 1944 (1 of 1944);

(b) "notified goods" means goods specified by the Central Government by No.29/2008-C.E. (N.T.), dated the 1st July, 2008 under sub-section (1) of section 3A of the Act;

(c) "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;

(d) "pan masala" means excisable goods falling under tariff item 21069020 of the First Schedule to the Tariff Act;

(e) "pan masala containing tobacco" means excisable goods defined in Note 4 of Chapter 24 of the First Schedule to the Tariff Act and falling under tariff item 2403 99 90 of the same Schedule;

(f) "retail sale price" means retail sale price as specified by the Central Government, in Explanation 3 to the opening paragraph in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.42/2008-CE,dated the 1st July, 2008;

(g) "Tariff Act" means the Central Excise Tariff Act, 1985 (5 of 1986);

(h) the words and expressions used herein but not defined and defined in the Act shall have the meanings respectively assigned to them in the Act.

3. Application. - *These rules shall apply to pan masala and pan masala containing tobacco, commonly known as gutkha, notified under sub-section (1) of section 3A of the Act by the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.29/2008-CE (N.T.), dated the 1st July, 2008.*

4. Factor relevant to production. - *The factor relevant to the production of notified goods 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) of the said Table :*

Table

Sl. No.	*Retail sale price (per pouch)*	*Number of pouches per operating packing machine per month*
(1)	*(2)*	*(3)*
1.	*Up to Rs. 1.00*	*37,44,000*
2.	*From Rs. 1.01 to Rs. 1.50*	*37,44,000*
3.	*From Rs. 1.51 to Rs. 2.00*	*35,56,800*
4.	*From Rs. 2.01 to Rs. 3.00*	*35,56,800*
5.	*From Rs. 3.01 to Rs. 4.00*	*34,44,480*
6.	*From Rs. 4.01 to Rs. 5.00*	*34,44,480*
7.	*From Rs. 5.01 to Rs. 6.00*	*34,44,480*
8.	*Above Rs.6.00*	*33,69,600*

Sl. No.	*Retail sale price (per pouch)*	*Number of pouches per operating packing machine per month*
(1)	*(2)*	*(3)*
1.	*Up to Rs. 1.00*	*62,40,000*
2.	*From Rs. 1.01 to Rs. 1.50*	*62,40,000*
3.	*From Rs. 1.51 to Rs. 2.00*	*59,28,000*
4.	*From Rs. 2.01 to Rs. 3.00*	*59,28,000*
5.	*From Rs. 3.01 to Rs. 4.00*	*57,40,800*
6.	*From Rs. 4.01 to Rs. 5.00*	*57,40,800*
7.	*From Rs. 5.01 to Rs. 6.00*	*57,40,800*
8.	*Above Rs.6.00*	*56,16,000*

(w.e.f 24th January 2014)

Explanation . - 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.

6. Declaration to be filed by the manufacturer. - *(1) A manufacturer of notified goods shall, immediately on coming into force of these rules, and, in any case, not later than ten days, declare, in Form 1, -*

i) the number of single track packing machines available in his factory

ii) the number of packing machines out of (i), which are installed in his factory

iii) the number of packing machines out of (ii), which he intends to operate in his factory for production of notified goods;

iv) the number of 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;

iv)(a) the number of multiple track or multiple line packing machine, which are incapable of performing additional processes specified in (iv);

v) the number of multiple track or multiple line packing machines out of (iv) and (iv)(a), which are installed in his factory;

vi) the number of multiple track or multiple line packing machines out of (v), which he intends to operate in his factory for production of notified goods;

vii) 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 notified goods of various retail sale prices;

viii) description of goods to be manufactured including whether pan masala or gutkha or both are to be manufactured, their brand names, etc;

ix) retail sale prices of the pouches to be manufactured during the financial year;

x) the plan and details of the part or section of the factory premises intended to be used by him for manufacture of notified goods of different retail sale prices and the number of machines intended to be used by him in each of such part or section,

to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, with a copy to the Superintendent of Central Excise:

Provided that a new manufacturer shall file such declaration at least seven days prior to the commencement of commercial production of notified goods in his factory.

(2) On receipt of the declaration referred to in sub-rule (1), the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, shall, after making such inquiry as may be necessary including physical verification, approve the declaration and determine and pass order concerning the annual capacity of production of the factory within three working days in accordance with the provisions of these rules:

Provided that the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case maybe, may direct for modifications in the plan or details of the part or section of the factory premises intended to be used by the manufacturer for manufacture of notified goods of different retail sale prices, as he thinks proper, for effective segregation of the parts or sections of the premises and the machines to be used in such parts or sections before granting the approval:

Provided further that if the manufacturer does not receive the approval in respect of his declaration within the said period of five working days, the approval shall be deemed to have been granted subject to the *modifications, if any, which the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, may communicate later on but not later than thirty days of filing of the declaration.*

(3) The annual capacity of production shall be calculated by application of the appropriate quantity that is deemed to be produced by use of one operating packing machine as specified in rule 5 to the number of operating packing machines in the factory during the month beginning which the capacity is being determined.

Provided that in case a new manufacturer commences production of notified goods, his annual capacity of production shall be calculated pro-rata on the basis of the total number of days in that year and the number of days remaining in that year starting from the date of commencement of the production of such notified goods.

Provided further that the annual capacity of production for the period from the 24th day of January, 2014 to the 31st day of January, 2014 shall be calculated on pro-rata basis for the total number of days in the month of January, 2014 and the number of days remaining in the month starting from and including the 24th day of January, 2014. (w.e.f from 24.01.2014)

(4) The number of operating packing machines during any month shall be equal to the number of packing machines installed in the factory during that month.

(5) The machines which the manufacturer does not intend to operate shall be uninstalled and sealed by the Superintendent of Central Excise and removed from the factory premises under his physical supervision:

Provided that in case it is not feasible to remove such packing machine out of the factory premises, it shall be uninstalled and sealed by the Superintendent of Central Excise in such a manner that it cannot be operated.

(6) In case a manufacturer wishes to make any subsequent changes with respect to any of the parameters which has been declared by him and approved by the Deputy Commissioner of Central Excise or the Assistant

Commissioner of Central Excise, as the case may be, in terms of sub-rule (2), such as changes relating to addition or removal of packing machines in the factory or making alterations in any part or section of the approved premises or in the number of machines to be used in such part or section or commencing manufacture of goods of a new retail sale price or discontinuation of manufacturing of goods of existing retail sale price, etc., he shall file a fresh declaration to this effect at least three working days in advance to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, who shall approve such fresh declaration and re-determine the annual capacity of production following the procedure specified in sub-rule (2).

7. Duty payable to be calculated. - *The duty payable for a particular month shall be calculated by application of the appropriate rate of duty specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.42/ 2008-CE, dated the 1st July, 2008 to the number of operating packing machines in the factory during the month.*

8. Alteration in number of operating packing machines. - *In case of addition or installation or removal or uninstallation of a packing machine in the factory during the month, the number of operating packing machine for the month shall be taken as the maximum number of packing machines installed on any day during the month:*

Provided that in case a manufacturer commences manufacturing of goods of a new retail sale price during the month on an existing machine, it shall be deemed to be an addition in the number of operating packing machine for the month:

Provided further that in case of non-working of any installed packing machine during the month, for any reason whatsoever, the same shall be deemed to be operating packing machine for the month.

9. Manner of payment of duty and interest.- *The monthly duty payable on notified goods shall be paid by the 5th day of same month and an intimation in Form - 2 shall be filed with the Jurisdictional Superintendent of Central Excise before the10th day of the same month:*

Provided that monthly duty payable for the month of July, 2008 shall be paid on or before 15th day of July, 2008:

Provided further that if the manufacturer fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with the interest at the rate specified by the Central Government vide notification under section 11AB of the Acton the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount:

Provided also that in case of increase in the number of operating packing machines in the factory during the month on account of addition or installation of packing machines, the differential duty amount, if any, shall be paid by the 5th day of the following month:

Provided also that in case a manufacturer permanently discontinues manufacturing of goods of existing retail sale price or commences manufacturing of goods of a new retail sale price during the month, the monthly duty payable shall be recalculated pro-rata on the basis of the total number of days in that month and the number of days remaining in that month counting from the date of such discontinuation or commencement and the duty liability for the month shall not be discharged unless the differential duty is paid by the 5th day of the following month and in case the amount of duty so recalculated is less than the duty paid for the month, the balance shall be refunded to the manufacturer by the 20th day of the following month:

Provided also that if there is revision in the rate of duty, the monthly duty payable shall be recalculated pro-rata on the basis of the total number of days in that month and the number of days remaining in that month counting from the date of such revision and the duty liability for the month shall *not be discharged unless the differential duty is paid by the 5th day of the following month and in case the amount of duty so recalculated is less than the duty paid for the month, the balance shall be refunded to the manufacturer by the 20th day of the following month:*

Provided also that in case it is found that a manufacturer has manufactured goods of those retail sale prices, which have not been declared by him in accordance with provisions of these rules or has manufactured goods in contravention of his declaration regarding the plan or details of the part or section of the factory premises intended to be used by him for manufacture of notified goods of different retail sale prices and the number of machines intended to be used by him in each of such part or section, the rate of duty applicable to goods of highest retail sale price so manufactured by him shall be payable in respect of all the packing machines operated by him for the period during which such manufacturing took place:

Provided also that in case a manufacturer does not pay the duty payable by the due date, and continues to operate any packing machine, then till the time such non-payment continues, he shall be liable to pay the monthly duty based on the number of operating packing machines declared in the month for which duty was last paid by him or the total number of packing machines found available in his premises at any time thereafter, whichever is higher:

Provided also that in case a new manufacturer commences production of notified goods in a particular month, his monthly duty payable for that month shall be calculated pro-rata on the basis of the total number of days in the month and the number of days remaining in that month starting from the date of commencement of the production of such notified goods and shall be paid within five days of such commencement.

10. Abatement in case of non-production of goods.- *In case a factory 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 provided the manufacturer of such goods files an intimation to this effect with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, with a copy to the Superintendent of Central Excise, at least three working days prior to the commencement of said period, who on receipt of such intimation shall direct for sealing of all the packing machines available in the factory for the said period under the physical supervision of Superintendent of Central Excise, in the manner that these cannot be operated during the said period:*

Provided that during such period, no manufacturing activity, whatsoever, in respect of notified goods shall be undertaken and no removal of shall be effected by the manufacturer except that notified goods already produced before the commencement of said period may be removed within first two days of the said period::

Provided further that when the manufacturer intends to restart his production of notified goods, he shall inform to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, of the date from which he would restart production, whereupon the seal fixed on packing machines would be opened under the physical supervision of Superintendent of Central Excise.

11. Retail sale price to be declared on the package.- *……*

12. Determination of retail sale price in case of non-declaration, obliteration, tampering, etc.- *…….*

13. Addition or removal of packing machines and other restrictions. *–*

(1) In case a manufacturer does not intend to further operate a packing machine, he shall intimate the same to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, at least three working days in advance, whereupon the same shall be uninstalled and sealed by the Superintendent of Central Excise and removed from the factory premises under his physical supervision

Provided that in case it is not feasible to remove such packing machine out of the factory premises, it shall be uninstalled and sealed by the Superintendent of Central Excise in such a manner that it cannot be operated.

(2) In case a manufacturer wants to add or install a packing machine in his premises, he shall give a notice to this effect at least three working days in advance to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, who shall allow the addition or installation, as the case may be, under the physical supervision of Superintendent of Central Excise.

(3) No manufacturer shall be allowed to keep in his factory any stock of packing material for goods of those retail sale prices which have not been declared by him in accordance with provisions of these rules.

(4) No manufacturer shall be allowed to trade in notified goods of retail sale prices not declared by him in accordance with provisions of these rules, from his factory premises.

(5) In case a manufacturer permanently discontinues manufacture of goods of existing retail sale prices, he shall declare the balance stock of notified goods of existing retail sale prices and their packing material on the day he discontinues manufacturing of goods of existing retail sale prices.

14. Rebate of duty.- *…..*

15. Cenvat credit not admissible.- *…….*

16. Factories ceasing to work. - *……*

17. Penalty for contraventions, etc.- *…….*

18. Provisions to apply mutatis mutandis. - *…….”*

4.3 Interpreting the said rules, Commissioner (Appeals) has in the order dated 28.10.2011 observed as follows:

“9. Before considering the specific issues, it is relevant to list out the salient features of the compounded levy scheme for Pan Masala under Pan Masala Packing Machine (Determination and Collection of Duty) Rules, 2008. Salient features of the scheme areas given below:

- *Quantity of Pan Masala deemed to be produced by use of one operating packing machine per month is specified on the basis of retail sale price per pouch. Actual production is of no relevance or consequence for payment of excise duty.*
- *In the case of multiple track or multiple line packing machine, each track or line is treated as one operating packing machine for the purpose of calculating quantity of goods deemed to be produced.*
- *Proper officer determined and passed an order concerning the annual capacity of production of the factory.*
- *Number of operating packing machines during any month shall be equal to the number of packing machines installed in the factory during that month. Installation of a machine is relevant and not its actual use.*
- *The machine which the manufacturer does not intend to operate shall be uninstalled and sealed and removed from the factory premises.*
- *Duty payable for a particular month is calculated on the basis of the appropriate rate of duty specified and the number of operating packing machines installed in the factory during the month.*
- *Maximum number of packing machines installed any day during the month shall be taken for calculation of the monthly duty payable.*
- *Commencing manufacture of goods of a new retail sale price during the month on an existing machine shall be deemed to be addition in the number of operating packing machines for the month*
- *Non-working of any installed packing machine during the month, for any reason whatsoever, shall be deemed to be operating packing machine for the month and monthly duty liability is to be calculated accordingly.*

10. Compounded levy Scheme for payment of Central Excise duty under section 3A of the Central Excise Act, 1944 is on the basis of capacity of production specified in respect of notified goods and not on the basis of actual production. Quantum of production per machine is determined on deeming basis and not on actual basis. Number of pouches for specified retail price per *operating packing machine per month is prescribed under Rule 5. Proviso to Rule 8 deems manufacture of pan masala of a new retail sale price during the month on an existing machine to be an addition in the number of operating packing machine for that month. Rule 5 deems the quantity of notified goods produced per machine per month and Rule 8 deems the same machine producing new retail sale price as an additional machine and also non working of any installed packing machine during the month shall be deemed to be operating packing machine during the month.*

11. Rule 6 requires the manufacturer to file declaration in the prescribed Form-1. Based on the declaration filed, Assistant Commissioner, Central Excise determines and pass order on the Annual Capacity of Production of the factory. The Annual Capacity of Production of a factory is calculated by multiplying appropriate quantity that is deemed to be produced by one operating packing machine with the number of operating machines during the month. As per Rule 6(4), the number of operating packing machines during any month shall be equal to number of packing machines installed in the factory during that month. Rule 6(5) requires, non-operating packing machine to be uninstalled and sealed by the Superintendent, Central Excise and removed from the factory premises under physical supervision. If it is not feasible to remove such packing machine out of the factory premises, it shall be uninstalled and sealed by the Superintendent, Central Excise in such a manner that it cannot be operated. As per the first proviso to Rule 8, commencing manufacturing of goods of a new retail sale price during the month on an existing machine shall be deemed to be addition to the number of operating packing machine for the month. Proviso two to the said rule also states that non-working of any installed machine during the month, for any reason what so-ever, shall be deemed to be operating packing machine for the month."

4.4 In their submissions the appellants have explained the legal provisions stating as follows:

"I Relevant Legal Provisions

1. Statutory provisions governing levy of excise duty on Pan Masala are contained in Section 3A of the Central Excise Act, *1944 read with Notification No 12/2008 CE dated 01.07.2008 and Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 (hereinafter referred to as "Pan Masala Rules").*

2. Section 3(2)(b)(i) enables the Central Government to specify the factor relevant to production and the quantity that is deemed to be produced by use of a unit of such factor by framing rules. Section 3(2)(b)(ii) empowers the Central Government to enact rules providing for determination of the annual capacity of production of factory on the basis of such factor and such annual capacity of production shall be deemed to be the annual production.

3. Rule 4 of the Pan Masala Rules provides that the factor relevant to production of notified goods shall be the number of packing machines in the factory of the manufacturer.

4. Rule 6(1) of the Pan Masala Rules provides for declaration to be filed by the manufacturer intimating the number of installed packing machines which the manufacturer intends to operate as well as Retail Sale Price ("RSPP) of pan masala pouches intended to be manufactured. Rule 6(2) provides that the Assistant Commissioner or Deputy Commissioner of Central Excise shall pass an order determining the annual capacity of production of the factory on receipt of declaration from the manufacturer. Rule 6(3) provides that the annual capacity of production shall be calculated by application of the appropriate quantity that is deemed to be produced by use of one operating packing machine as specified in Rule 5 to the number of operating packing machines in the factory during the month beginning for which the capacity is being determined.

5. Rule 7 of the Pan Masala Rules provides that the duty payable for a particular month shall be calculated by application of the appropriate rate of duty as notified to the number of operating packing machines in the factory during the month.

6.1 Rule 8 of the Pan Masala Rules deals with alteration in number of operating packing machines. It provides that where there is addition or installation or removal or uninstallation of a packing machine in the factory during the month, the number of *operating packing machines for the month shall be taken as the maximum number of packing machines installed on any day during the month.*

6.2 First proviso to Rule 8 states that where the manufacturer commences manufacturing of goods of a new retail sale price during the month on an existing machine, it shall be deemed to be an addition in the number of operating packing machines for the month. Therefore, if a manufacturer actually commences manufacture of new retail sale price during the month, then the first proviso of Rule 8 can be invoked to deem that there has been an addition in the number of operating packing machines for the month."

4.5 Explaining the case of revenue as per the impugned orders appellant have in their submissions given illustrations as follows:

Illustration-1

Machine No.	RSP	Operative machines as per Appellants	Operative machine as per department (by assuming that each machine is capable of packing all RSPs)
Machine No. 1 (uninstalled & sealed)	Nil	Nil	Two machines (RSP 2 and RSP 6)
Machine No. 2	RSP 2	1	Two machines (RSP 2 and RSP 6)
Machine No. 3	RSP 2	1	Two machines (RSP 2 and RSP 6)
Machine No. 4	RSP 6	1	Two machines (RSP 2 and RSP 6)
Total		3 machines	8 machines (4 machines multiplied by two RSPs)

Illustration-2

Machine No.	RSP	Operative machines as	Operative machine as per department (by

		per Appellants	assuming that each machine is capable of packing all RSPs)
Machine No. 1 (uninstalled & sealed)	Nil	Nil	Three machines (RSP 2 and RSP 4 and RSP 6)
Machine No. 2	RSP 2	1	Three machines (RSP 2 and RSP 4 and RSP 6)
Machine No. 3	RSP 4	1	Three machines (RSP 2 and RSP 4 and RSP 6)
Machine No.4	RSP 6	1	Three machines (RSP 2 and RSP 4 and RSP 6)
Total		3 machines	12 machines (4 machines multiplied by three RSPs)

4.6 The scheme of the Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008, has been well explained in the impugned order and the during the course of arguments by the appellants. In terms of the said rules the appellant are required to make the declaration in terms of Rule 6 of the said rules, declaring the number of installed packing machines in their factory and the retail sale price of the pouches to be produced by them. On the basis of the declaration made and after causing the verification of the same the Assistant/ Deputy Commissioner passes an order determining the Annual Capacity of production as have been held by the tribunal in the case of appellants referred earlier in para 3.2. In terms of Rule 7 and 9, on the basis of the capacity of production so determined the appellant determines and pays the duty every month at the start of month. Subsequently the duty so paid is determined on the actual basis in subsequent month after allowing for any abatement as per Rule 10.

4.7 Rule 8 provides for the determination in case of the alteration in the packing machines etc for the purpose of the determination of the duty payable in terms of rule 7 and 9. In case if a particular machine is sealed in the manner as provided for in Rule 10, following has been held by Hon’ble High Court of Allahabad, in case of Kay Pan Masala [2014 (301) ELT 165 (All.)]

*"**5.** In the present case, it is not denied that the machines, on the request of the party, were sealed by the department and they were found to be in sealed condition on physical checking. The Central Excise Authorities, however, imposed liability on the ground that though the machines were sealed and that there is no dispute that the machines were not unsealed without which they could not be operated, since the machines have wheels and could be moved out of the factory and used for manufacturing final product, the same should have been taken into account for consideration while fixing duty liability. The Central Excise Authorities had dropped the proceedings initiated on the show cause notice on the ground that since the machines had wheels, even if they were sealed they could be moved out and used for manufacture.*

***6.** The CESTAT dismissed the appeal for the following reasons :-*

"4. I find no reason to interfere in the impugned order of both the authorities below. Admittedly, the machines are sealed and Revenue's submission is in the arena of assumption and presumption. For using the said machines, the seal has to be broke open which can only be done with the consent and permission of the Revenue. As such, I find no merits in the Revenue's appeal.

5. Accordingly all the appeals filed by the Revenue are rejected."

***7.** We agree with the reasoning recorded by the CESTAT that once the machines were sealed and there was no evidence that the machines were de-sealed, without which they could not be used for manufacture, the imposition of the excise duty, only on the ground that since the machines had wheels and could be moved out, was based only on assumptions and presumptions. All the Central Excise Authorities had concurrently held that the dues were proposed to be imposed only on assumptions and presumptions."*

In case of Phool Chand Sale Corporation [2018 (364) ELT 954 (T)], tribunal has held as follows:

"7. Having considered the rival contentions and on perusal of records, we are not in position to appreciate the argument of Revenue that once a machine is installed, it shall be treated as operational machine even if the machine was sealed in such a manner that it became unoperative. We do not find any merit in the grounds raised by Revenue. We, therefore, reject the appeal filed by Revenue. The respondent shall be entitled for the consequential relief as per law."

Thus the impact of the these decisions is that once the packing machine is sealed in the manner as prescribed then the same shall be treated as uninstalled and shall not be taken into account for determination of the Annual Capacity and duty payable."

4.7 These rules were amended retrospectively by the Section 109 (reproduced below) of The Finance (No 2) Act, 2014 (25 of 2014) in the following manner:

"109. (1) In the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008, as published in the Official Gazette vide notification of the Government of India in the Ministry of Finance (Department of Revenue) number G.S.R. 127 (E), dated the 1st July, 2008, rule 8 shall stand amended and shall be deemed to have been amended retrospectively, in the manner specified in column (2) of the Fourth Schedule, on and from the date specified in column (3) of that Schedule.

(2) For the purposes of sub-section (1), the Central Government shall have and shall be deemed to have the power to make rules with retrospective effect as if the Central Government had the power to make rules under sub-sections (2) and (3) of section 3A of the Central Excise Act, retrospectively, at all material times.

(3) The refund shall be made of all such duty of excise which has been collected but which would not have been so collected, had the rule referred to in sub-section (1), been in force at all material times, subject to the provisions of section 11B of the Central Excise Act.

(4) Notwithstanding anything contained in section 11B of the Central Excise Act, an application for the claim of refund of duty of excise under sub-section (3) shall be made within a period of six months from the date on which the Finance (No. 2) Bill, 2014 receives the assent of the President.

(5) No act or omission on the part of any person shall be punishable as an offence which would not have been so punishable had the rule referred to in sub-section (1) not been amended retrospectively.

THE FOURTH SCHEDULE

(See section 109)

Provisions of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 to be amended	*Amendment*	*Date of effect of amendment*
(1)	*(2)*	*(3)*
Rule 8 of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008, published vide notification number G.S.R.127 (E), dated the 1st July, 2008 [30/2008-Central Excise (N.T.), dated the 1st July, 2008]	*In the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008, in rule 8, for the first proviso, the following proviso shall be substituted with effect from the date specified in column (3), namely:—* *"Provided that where a manufacturer uses an operating machine to produce pouches of different retail sale prices during a month, he*	*13th April, 2010.*

	shall be liable to pay the duty applicable to the pouch bearing the highest retail sale price for the whole month:"	

4.8 Interestingly all the impugned orders are dated 28.10.2011, 24.01.2012, and 13.02.2012, i.e. prior to the amendments made retrospectively in the rule retrospectively with effect from 13th April 2010. Hence these orders need to be reconsidered in terms of the said amendments made by the Finance (No 2) Act, 2014, and decisions referred to earlier by us which all are subsequent to the impugned orders. Ideally matter needs to be remanded back to the original authority for determination of the Annual Capacity of Production after taking into account the above amendments and decisions.

4.9 The amendments made in the year 2014, should ideally had been brought to the notice of the bench at that time itself and remand sought by the appellant/ respondent. However even though the said order was passed in the year 2012, revenue never came up seeking vacation of stay and remand in the matter when so ever the matter got listed earlier. This delay, has led to considerable delay in finalization of the duty payment considerably. In our view the proceedings for the determination of Annual Capacity of Production themselves have become redundant with the passage of time. The use of the such determination was for determination of the duty payable at start of every month, to be subsequently adjusted/ finalized in the next month. Thus mere remand for determination of the Annual Production Capacity will only further delay the proceedings for determination of the final duty that was payable every month. We have been informed by the appellant counsel that notices have been issued by the revenue for final determination of the duty to them, which have been kept in call book awaiting the decision in these appeals.

4.10 Thus while remanding the matter to the original authority for redetermination of the Annual Capacity of Production after taking into consideration the amendments made retrospectively by the Finance (No 2) Act, 2014, and the observations made by us in this order, the authority should also finalize and determine the duty by adjudicating all the show cause notices issued to the appellant in the matter in a time bound manner. In any case all the show cause notices should be finalize within three months of the receipt of this order.

5.1 In view of above the appeals are allowed and the matter remanded to the original authority as per the observations made in para 4.10 above.

(Order pronounced in the open court on 19.05.2022)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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