

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

Excise Appeal No. 967 of 2011

(Arising out of Order-in-Appeal No. 04-05/M-I/2011 dated 03.03.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai-I)

M/s. Godfrey Phillips India Ltd.

Appellant

VKK Menon Road, Chakala,
Andheri (E), Mumbai 400 099.

Vs.

Commissioner of Central Excise, Mumbai-I

Respondent

115, New Central Excise Building, M.K. Road,
Churchgate, Mumbai 400 020.

AND

Excise Appeal No. 863 of 2012

(Arising out of Order-in-Original No. 53-54/M-I/2011 dated 29.02.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-I)

M/s. Godfrey Phillips India Ltd.

Appellant

VKK Menon Road, Chakala,
Andheri (E), Mumbai 400 099.

Vs.

Commissioner of Central Excise, Mumbai-I

Respondent

115, New Central Excise Building, M.K. Road,
Churchgate, Mumbai 400 020.

Appearance:

Shri Gajendra Jain with Ms. Payal Nahar, Advocates, for the Appellant
Shri Dharendra Kumar, Joint 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: 04.11.2022

Date of Decision: 04.11.2022

FINAL ORDER NO. A/86126-86127/2022

PER: SANJIV SRIVASTAVA

These appeals arise out of Order-in-Appeal No. 04-05/M-I/2011 dated 03.03.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai-I for the period July, 2008 to September, 2009 and Order-in-Original No. 53-54/M-I/2011

dated 29.02.2012 passed by the Commissioner of Central Excise, Mumbai-I for the period October, 2009 to November, 2010. By the impugned orders following show cause notices have been determined, confirming the demands made in the show cause notices along with the interest and the penalties have been imposed.

Appeal	Order in Appeal/ Original	SCN date	Demand in Rs
E/967/2011	04-05/M-I/2011 dated 3.3.2011	01.11.2010	7993296
		21.02.2011	22266667
E/863/2012	53-54/M-I/2011 dated 29.2.2012	04.08.2009	15591121
		28.01.2010	18517729
	Total		64368813

1.2 As the issue and facts are commons, the appeals are being taken up together for hearing and disposal. For ease we refer to the order in the appeal No E/863/2012.

"ORDER

26. In view of above discussion and findings, I pass the following order:-

- i) I confirm the duty amounting to Rs. 1,55,91,121/- (Rupees one crore fifty five lakhs ninety one thousand one hundred twenty one only) for the period 01.07.2008 to 31.12.2008 demanded in show cause notice dated 04.08.2009 and amounting to Rs. 1,85,17,729/- (Rupees one crore eighty five lakhs seventeen thousand seven hundred twenty nine only) for the period 01.01.2009 to 30.09.2009 demanded in show cause notice dated 28.01.2010, on pan masala manufactured and cleared by M/s. Godfrey Philips India Ltd., Sahar Road, Chakala, Andheri East, Mumbai- 400 093, under the provision of notification No. 42/2008-C.E. dated 01.07.2008 read with Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 and section 11A of the Central Excise Act, 1944.

- ii) *I order for recovery of interest at the appropriate rate on the amount of duty confirmed as above in terms of the Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008 read with section 11AB of the Central Excise Act, 1944 from M/s. Godfrey Philips India Ltd., Sahar Road, Chakala, Andheri East, Mumbai - 400 093.*
- iii) *I impose penalty of Rs.1,00,00,000/- (Rupees one crore only) on M/s. Godfrey Philips India td., Sahar Road, Chakala, Andheri East, Mumbai - 400 093, under rule 17 (1) of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008,"*

2.1 Appellant desirous of expanding its business to manufacture pan masala, vide their letter dated 14.5.2007 informed the jurisdictional authorities that they have put a pilot plant of Pan Masala falling under Chapter heading 21069020 within its cigarette manufacturing premises and further stating that the samples so manufactured will be used for 'testing purpose' and will be consumed within the factory premises along with some sample being sent out of the factory premises also for market research etc. Such samples would be unbranded and would not be in retail packs. Pursuant to installation of the pilot plant, vide letter dated 13.7.2007, the appellant applied for incorporation of pan masala in the registration certificate. The ground plan and the requisite machineries installed was also submitted.

2.2 Circular No. 854/12/2007 dated 7.9.2007 was issued by Board, for assessees manufacturing pan masala, gutkha and chewing tobacco, Appellant vide its letter dated 12.9.2007 sought clarification as to applicability of the said circular. In response to which by letter dated 14.9.2007. divisional authorities informed that the circular is squarely applicable to the appellant. Accordingly, the appellant filed declaration dated 28.9.2007 containing prescribed particulars with the jurisdictional Revenue authorities, although the appellant believed that the said Circular is not applicable as it was not packing pan masala with the aid of packing machine.

2.3 Notification No 38/2007-CE dated 19.12.2007 was issued as per which option was given to the manufacturer to pay the Central excise duty on the production basis. However appellant continued to follow the practice of payment of duty on advalorem basis.

2.4 Vide Notification No. 29/2008-CE(NT) dated 1.7.2008, pan masala was specified as notified goods falling under the Tariff item 21069020 and 29039990 to the first schedule of the Tariff with the condition that it is manufactured with the aid of packing machine and packed in pouches, as notified goods, on which there shall be levied and collected duty of excise in accordance with the provisions of Section 3A (compounded levy). Notification of even date No. 30/2008-CE (NT) was also issued under Section 3A(2) and (3) to notify the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008. Notification No. 42/2008-CE notified in exercise the powers under Section 3A(3) of the Central Excise Act notified the rate on the unit of production for pan masala/gutkha manufactured with the aid of packing machine and packed in pouches, as per RSP as mentioned in the table, the rate of duty specified in the corresponding entry in column 3 and 4 of the Table 1. Notification No 44/2008-CE dated 16.07.2008 rescinded the Notification No 38/2007-CE dated 19.12.2007. As consequence the manufacturer of pan masala had no option but to pay the excise duty on the notified goods on the deemed production basis, as per these notifications.

2.5 As appellant continued to pay the duty on advalorem basis, show cause notice dated 4th August 2009 was issued by the jurisdictional officers asking the appellant to show cause as to why:

- i. the Pan Masala falling under tariff item 2106.9020, manufactured and cleared by them without payment of appropriate CE duty as required under the provisions of notification no.42/2008 dt. 01.07.08 read with notification no.29/2008 & 30/2008 both dated 01.07.08, should not be held liable for confiscation under sub section (1) of rule 17 of notification no.30/2008 dated 01.07.08 read with "Pan

Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008;

- ii. the differential CE duty amounting to Rs. 1,55,91,121/- (Rupees one crore fifty five lakhs ninety one thousand one hundred twenty one only) (As detailed in Annexure I to this SCN) should not be demanded and recovered from them on the Pan Masala manufactured and cleared during the period from 01.07.08 to 31.12.08, under the provisions of notification no.42/2008 - C.E. dated 01.07.08 read with "Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008", read with Section 11A(1) of the CEA, 1944;
- iii. the interest at the appropriate rate should not be demanded from them under the provisions of "Pan Masala Packing Machines (Capacity Determination and Collection of Duty Rules, 2008" read with Section 11AB of CEA, 1944 in respect of differential CE duty payable by M/s GPIL as mentioned in Rule (ii) above:
- iv. penalty should not be imposed on them under the provisions of Rule 17 of the notification no.30/2008 C.E. (N.T.) dated 01.07.08 for the contravention of the provisions of the "Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008".

2.6 Show-cause notices dated 02.08.2010, 01.11.2010 & 23.02.2011 were issued for the subsequent period January, 2009 to Nov, 2010.

2.7 First two show cause notices were adjudicated by the Commissioner vide impugned order as indicated in para 1 above, Remaining two show cause notices were adjudicated by the jurisdictional officers, and the appeals filed against the said orders were determined by the commissioner appeal vide the order in appeal referred in para 1 above.

2.8 Aggrieved by the impugned orders appellant have preferred these appeals.

3.1 We have heard Shri Gajendra Jain with Ms. Payal Nahar, Advocates for the appellant and Shri Dharendra Kumar, Joint Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits that:

- Two factors which are sine qua non to attract duty in terms of Notification No 42/2008-CE i.e.
 - Manufacture with the aid of packing machines
 - Packed in pouches meant for the sale for a price to be declared as retail sale price

Are absent in present case and hence the demand made in terms of the said Notification is not applicable.
- Borrowing tariff value from a Notification issued under Section 3 for the purpose of levying duty under Section 3A of the Central Excise Act, 1944 is not permissible.
- Notification No 42/2008_CE is self contained code,
 - revenue could not have resorted to Pan masala Rules, 2008 for computing RSP.
 - It applies to goods manufactured with the aid of packing machines and do not apply to goods deemed to be manufactured with the aid of packing machines.
- There was no packing machine installed in the factory of the appellant since May 2008 and hence there cannot be any demand under Compounded levy scheme.
- Proviso to Rule 6(1) is applicable in case of commercial production by a new manufacturer. Since the job of proviso is to explain the main clause, rule 6 (1) which requires the filing of declaration, would also apply in case of commercial productions only.
- When the machinery for collection and computation fails, the levy is not intended to cover such a situation. –
 - PNB Finance [2008 (13) SCC 94]
 - Tata Sky [2013 (4) SCC 656]
- In any case Rule 11 and 12 of Pan Masala Rules, 2008 were not followed in the present case. There is no proposal for confiscation of the goods as provided under Rule 11.
- Appellant have vide letter dated 11.12.2008, intimated that they will not be using the packing machine lying in

their plant. Department took 22 months thereafter to seal the machine. No demand beyond the date of intimation can be sustained.

- Decisions relied upon by the revenue do not support the case
- No interest can be demanded and penalty imposed.

3.3 Arguing for the revenue learned Authorized representative while re-iterating the findings recorded in the impugned order relies on the following decisions in support

- Godfrey Philips India Ltd [2019 (369) ELT 706 (T-Mum)]
- Ashok & Co Pan Bahar Ltd. [2018 (359) ELT 329 (T-Del)]

4.1 We have considered the impugned orders along with the submissions made in appall and during the course of arguments.

4.2 Following findings have been recorded in the impugned order for confirming the demands made:

"18. On examination of records, it is observed the notices under adjudication were issued consequent to the issuance of notification No. 29/2008-C.E.(N.T.) dated 01.07.2008 specifying that pan masala falling under tariff item 2106 90 20 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) manufactured with the aid of packing machine and packed in pouches as notified goods, on which there shall be levied and collected duty of excise in accordance with the provisions of section 3A of the Act and other relevant notifications and instructions issued in this regard. This being the case, the issue to be examined is whether M/s GPIL were liable to pay duty of excise in accordance with the provisions of section 3A of the Act i.e. based on quantity deemed to be produced by use of packing machine/s per month read with relevant notifications and rules framed in this regard.

19. M/s GPIL in their submissions detailed herein above have contended that

- (i) notices were issued based on incorrect understanding of facts and without any enquiry being conducted;*

- (ii) *production based levy only applicable if a manufacturer undertook commercial production;*
- (iii) *compounded levy scheme not applicable on hand filled pan masala pouches produced in pilot test plant, as the said scheme is applicable only to pan masala manufactured with the aid of packing machine and packed in pouches;*
- (iv) *in the absence of retail sale price, the compounded levy scheme was not applicable as in such case neither the deemed production capacity nor the rate of duty can be determined;*
- (v) *section 3A of the Act being an anti abuse provisions, the said provisions and the relevant notifications issued and rules framed be read in context of the object and scope of the provisions of section 3A and excise liability be restricted to duty payable on actual quantity manufactured;*
- (vi) *pan masala produced in pilot test plant were not marketable therefore, did not qualify as notified goods to attract levy of excise duty under the compounded levy scheme;*
- (vii) *since may 2008 pan masala was hand filled, therefore, abetment of the entire duty demanded is allowed under section 3A(3) of the Act, though the prescribed procedure and rule 10 of the said rules were not followed;*
- (viii) *in the facts and circumstances of the instant case, the imposition of excise duty in terms of the said rules would result in retrospective operation of the legislation which is against established principles of taxation; and*
- (ix) *in view of the submissions no liability of excise duty, interest nor confiscation can be initiate and penalty imposable as no duty was required to be discharged.*

20. Now, taking up the first contention it is observed that M/s GPIL informed the department on 14.05.2007 that they intend to put up a pilot plant for manufacture of pan masala which would be used for testing purpose. Further, M/s GPIL on 13.07.2007

made an application enclosing ground plan indicating the proposed layout of the pan masala pilot plan / machinery installed and requested for incorporating the new product pan masala in their central excise registration, which was duly incorporated. M/s GPIL had in fact specifically stated in their letter dated 13.07.2007 that they had intimated the installation of equipment relating to pilot plan for manufacturer of pan masala. The above facts / documents establish that they had installed the machinery for manufacturer of pan masala well before the compounded levy scheme was made effective, i.e., from 01.07.2008. It is also on record that M/s GPIL, in spite of being informed by the departmental authorities vide letter dated 14.09.2007 that the instruction contained in circular No. 854/12/2007/CX dated 07.09.2007 issued under rule 31 of the Central Excise Rules, 1944 were squarely applicable, failed to file an intimation giving the details of packing machine, though the machine was installed, as required under para 2.1 of the said instructions. They therefore have clearly contravened the provisions of the said instructions. Further, after pan masala was specified as notified goods vide notification No. 29/2008-C.E.(N.T.) dated 01.07.2008 and the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 were introduced vide notification No. 30/2008 C.E.(N.T.) dated 01.07.2008, a manufacturer of pan masala was required to file a declaration under rule 6 of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 within ten days of the said rules, coming into force.

21. As stated herein above, one packing machine was installed is an undisputed fact. M/s. GPIL, after introduction of the Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008, had in their letter dated 01.12.2008 stated that they had installed one pan masala packing machine for packing samples. The revenue authorities, after pan masala was notified as specified goods, had requested M/s GPIL to pay central excise duty in terms of notification No. 42/2008-C.E. dated 01.07.2008 and comply with the rules laid down under the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008. However, in spite of requests,

they maintained that as no commercial production had commenced of pan masala, they were not required to pay duty on deemed production basis. This contention of M/s GPIL is misplaced. The proviso to rule 6(x) of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 provides that a new manufacturer shall file declaration at least fifteen days prior to the commencement of commercial production of notified goods. M/s GPIL were not a new manufacturer but were engaged in manufacture of pan masala well before pan masala was specified as notified goods. They being not a new manufacturer of pan masala, it was mandatory for M/s GPIL to file declaration under 6(1) of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 in Form 1 within ten days of the said rules coming into force i.e. on or before 10.07.2008 which they failed to file, thereby they contravened the provisions of the said rules. Further if declaration had been filed by them, the appropriate authority after enquiry would have approved the declaration or rejected the declaration by passing a suitable order in terms of rule 6 (2) of the Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008. Moreover, after rescinding of notification No. 38/2007 C.E. dated 19.12.2007 vide notification No. 44/2008 C.E. dated 16.07.2008 no other option was available w.e.f. 01.07.2008 to a manufacturer of pan masala hence, the procedures prescribed under notification No. 30/2008 C.E. dated 01.07.2008 were required to be followed which M/s GPIL failed to follow comply with. These facts are on record and the provisions of the relevant notifications referred to above did not require any enquiry, therefore, the plea of M/s GPIL that notices were issued based on incorrect understanding of facts and without conducting enquiry is not tenable.

22. M/s GPIL have contended that production based levy is applicable only when a manufacturer undertook commercial production and would not be applicable on hand filled pouches. As stated herein above pan masala was specified as notified goods vide notification No. 29/2008 C.E. dated 01.07.2008 and the Pan Masala Packing Machines (Capacity Determination and

Collection of Duty) Rules, 2008 were made effective from 01.07.2008. The said rules provided that a manufacturer of pan masala shall file a declaration under rule 6 of the Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008 in Form 1, declaring therein the number of packing machines available in factory, number of packing machines installed, number of packing machines operational, etc., within ten days of the said rules coming into force i.e. before 10.07.2008. In the instant case, M/s GPIL were engaged in the manufacture of pan masala well before the said rules came into force and the packing machine was already available/installed in the factory is on record. Therefore, they were required to file the declaration on or before 10.07.2008 which they failed to file. I find that M/s GPIL was an existing unit already engaged in the manufacture of with the use of available / installed packing machine since March, 2008 hence, with the introduction of the said rules it was obligatory for them to file a declaration to that effect on or before 10.07.2007. I find that the option for filing of such declaration at least 15 days prior to the commencement of commercial production of notified goods was applicable to new manufacturers of pan masala. M/s GPIL being engaged in the manufacture of pan masala before the introduction of the said rules, the option to file declaration 15 days prior to commencement of commercial production was not available to them. M/s. GPIL have also contended that since May, 2008 the pouches were hand filled as the packing machine had developed technical snags. However, if that was the case the same was required to be declared in the declaration to be filed under rule 6 of the Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008, which as stated herein above was not filed by M/s. GPIL on the introduction of the said rules w.e.f. 01.07.2008. Further, the explanation to the said rule reads as under:

"Unless otherwise specified in these rules, for the purposes of these rules, the goods shall be deemed to have been manufactured or produced with the aid of packing machine, if they are cleared from a factory where a

packing machine is installed, irrespective of whether it is in use or not, or is in working condition or not."

From the plain reading of the said explanation it is clear that goods shall be deemed to be manufactured with the aid packing machine irrespective of whether it is in use or not, or is in working condition or not. As such, as M/s GPIL had not filed declaration for installed packing machine as detailed herein above and as the packing machine was actually installed in the factory, the duty was leviable on deemed production under the compounded levy scheme.

23. M/s GPIL have also contended that in the absence of retail sale price, the compounded levy scheme was not applicable, as in such case neither the deemed production capacity nor the rate of duty can be determined. I observe that tariff value of pan masala, in retail packages has been fixed vide notification No. 03/2006 C.E.(N.T.) dated 01.03.2006 with regard to retail packages where sale price is not printed on retail pack and also where retail price is printed on the retail pack at Sr. No. 1 & 2 of the table to the said notification. Further, rule 12 of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 also provides for determination of retail sale price where manufacturer remove the notified goods when retail prices have not been declared. Further, the quantity deemed to be produced is to be determined by the Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be, as per the provisions of rule 6(2) and other provisions of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 on receipt of the declaration filed by the manufacturer in terms of rule 6(1) of the said rules. As discussed hereinabove, no declaration was filed by M/s GPIL even though mandatorily required, the annual capacity of production could not be determined by the appropriate authority. In view of the facts and circumstances of the instant case, this contention of M/s GPIL is not found tenable.

24. M/s GPIL have also contended that section 3A of the Central Excise Act, 1944 being an anti abuse provision, the said section and notifications issued thereunder ought to be read in

the context of the object and scope of the provisions of section 3A of the Act and excise liability is to be restricted to duty payable on actual quantity manufactured. I observe in this context that section 3A reads as under:-

.....

The provision of section 3A(1) starts with the words "Notwithstanding anything contained in section 3-----". These words make it clear that once the goods are notified under section 3A the question of payment of central excise duty on actual manufacture basis would not be in conformity with the provisions of section 3A. In the instant case, as pan masala was specified as notified goods, the duty is leviable on deemed production basis. M/s GPIL, as detailed hereinabove, had not complied with the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 framed in exercise of powers conferred by sub-section (2) and (3) of section 3A and thereby, contravened the provisions of the said rules. Further, as mentioned hereinabove, the declaration under rule 6(1) of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 was not filed, and therefore the jurisdictional Assistant Commissioner was in no position to make any inquiry and pass order concerning the annual capacity of production in terms of rules 6(2) of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008. It is also observed that no duty can be abated in the instant case in terms of proviso to section 3A (3) as, the abatement can be allowed only if the manufacturer fulfills such conditions as are prescribed in this regard. M/s GPIL had not filed declaration under rule 6(1) of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 nor did they file any intimation with the jurisdictional Assistant Commissioner under rule 10 of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 to the effect that the packing machine had not been used to produce pan masala since May, 2008. As such the conditions of intimation prescribed under the rules were not fulfilled and therefore, abatement of duty cannot be allowed.

25. As discussed hereinabove, M/s GPIL have failed to adapt and comply with the procedure in respect of pan masala manufactured, as envisaged in notification Nos. 29/2008, 30/2008 and 42/2008 all dated 01.07.2008 and failed to pay the central excise duty on deemed production basis during period 01.07.2008 to 30.09.2009 .Therefore, M/s GPIL have contravened the provisions of the Central Excise Act, 1944 and the rules made thereunder, as detailed hereinabove rendering such goods liable to confiscation and also themselves liable to penalty. Therefore, I hold that M/s GPIL are liable for penal action under rule 17 (1) of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008."

4.3 The text of the Section 3A in terms of which the Compounded Levy Scheme has been made is reproduced below:

Section 3A. Power of Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. -

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

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

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

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

(ii) provide for the determination of the annual capacity of production of the factory in which such goods are produced on the basis of such factor by an officer not below the rank of Assistant Commissioner of Central Excise and such annual capacity of production shall be deemed to be the annual production of such goods by such factory :

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

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

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

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

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

Explanation 1. - For the removal of doubts, it is hereby clarified that for the purposes of section 3 of the Customs Tariff Act, 1975 (51 of 1975), the duty of excise leviable on the notified goods shall be deemed to be the duty of excise leviable on such goods under the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985" (5 of 1986.), read with any notification for the time being in force.

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

4.4 In terms of the powers vested under this section Central Government issued Notification No 29/2008-CE (NT) which read as follows:

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

- (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,*

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

2. *This notification shall come into force on the 1st July, 2008.*

Explanation. - 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."

4.5 Plain reading of the provisions of the section 3A suggests that for the reason this section starts with a "**non obstante**" clause, the Central Government is empowered to notify the goods in respect of which the provisions of Section 3 of the Central Excise Act, 1944 shall not apply and the duty payable in respect of the said goods will be determined and paid on the notified goods in manner specified as per this section. In terms of the power conferred by the said section Central

Government has notified the goods as per Notification No 29/2008-CE (NT) referred above.

4.6 Central Government issued notification no 30/2008-CE (NT) notifying the Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008. Relevant Extracts of the said rules are reproduced below:

"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

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

<i>Sl. No.</i>	<i>Retail sale price (per pouch)</i>	<i>Number of pouches per operating packing machine per month</i>
1	2	3

1	<i>Up to Rs. 1.00</i>	<i>37,44,000</i>
2	<i>From Rs. 1.01 to Rs. 1.50</i>	<i>37,44,000</i>
3	<i>From Rs. 1.51 to Rs. 2.00</i>	<i>35,56,800</i>
4	<i>From Rs. 2.01 to Rs. 3.00</i>	<i>35,56,800</i>
5	<i>From Rs. 3.01 to Rs. 4.00</i>	<i>34,44,480</i>
6	<i>From Rs. 4.01 to Rs. 5.00</i>	<i>34,44,480</i>
7	<i>From Rs. 5.01 to Rs. 6.00</i>	<i>34,44,480</i>
8	<i>Above Rs.6.00</i>	<i>33,69,600</i>

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.

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;

- (v) the number of multiple track or multiple line packing machines out of (iv), 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 fifteen 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 five 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.
- 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 fifteen 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.**

-

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 the 10th 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 Act on 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, and continues to operate any packing machine, he shall be liable to pay the duty for the remaining months of the financial year 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.

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

Every manufacturer shall declare the retail sale price of the notified goods on the package of such goods:

Provided that if the manufacturer fails to declare the retail sale price before removing the goods from the place of manufacture or declares a retail sale price which is not the retail sale price as required to be declared under the provisions of these rules or tampers with, obliterates or alters the retail sale price declared on the package of such goods after their removal from the place of manufacture, then, such goods shall be liable to confiscation and the retail sale price of such goods shall be ascertained in the manner specified in these rules and such price shall be deemed to be the retail sale price for the purposes of these rules.

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

Where a manufacturer removes the notified goods in the manner and circumstances specified in proviso to rule 11, then, the retail sale price of such goods shall be ascertained by the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, in the following manner, namely:-

- (i) *if the manufacturer has manufactured and removed identical goods, within a period of one month, before or after removal of such goods, by declaring the retail sale price, then, the said declared retail*

sale price shall be taken as the retail sale price of such goods.

- (ii) *if the retail sale price cannot be ascertained in terms of (i), the retail sale price of such goods shall be ascertained by conducting the enquiries in the retail market where such goods have normally been sold at or about the same time of the removal of such goods from the place of manufacture:*

Provided that if more than one retail sale price is ascertained under (i) or (ii), then, the highest of the retail sale price, so ascertained, shall be taken as the retail sale price of all such goods.

Explanation.- For the purposes of this rule, when retail sale price is required to be ascertained based on market inquiries, the said inquiries shall be carried out on sample basis.

- (iii) *Where a manufacturer alters or tampers the retail sale price declared on the package of goods after their removal from the place of manufacture, resulting into increase in the retail sale price, then such increased retail sale price shall be taken as the retail sale price of all goods removed during a period of one month before and after the date of removal of such goods:*

Provided that where the manufacturer alters or tampers the declared retail sale price resulting into more than one retail sale price available on such goods, then, the highest of such retail sale price shall be taken as the retail sale price of all such goods.

- (iv) *If the retail sale price of goods cannot be ascertained under (i) to (iii), the retail sale price shall be ascertained in accordance with the principles of this rule.*

4.7 By Notification No 42/2008-CE the rates of duty were specified. The text of the notification is reproduced below:

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) ofTable-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-1

<i>S.No.</i>	<i>Retail sale price (per pouch)</i>	<i>Rate of duty per packing machine per month(Rs. in lakh)</i>	
		<i>Pan masala</i>	<i>Pan masala containing tobacco</i>
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 136of the Finance Act, 2007 (22 of 2007) and shall be apportioned in the ratios specified in the Table-2 below.

Table-2

Sr.No.	Duty	Duty ratio for pan masala	Duty ratio for pan masala containing tobacco
1	The duty leviable under the Central Excise Act, 1944	0.3161	0.7355
2	2The 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 section136 of the Finance Act, 2007	0.0097	0.0097

4.8 Further from the basic scheme as of levy as outlined by the above section 3A and the notifications issued thereunder, it

is evident that factor of production have been specified as number of packing machines in the factory of the manufacturer as per Rule 4, and the unit of production as per the Rule 5 is based on the retail sale price declared by the manufacturer on the pouches produced and cleared. Admittedly in the present case the goods were cleared in the pouches on which no RSP has been specified, as these were not cleared for the retail sale but were cleared for specific purpose of market research and testing. Specific provision has been made under Pan Masala (CD&CD) Rules, in terms of the Rule 6, 7 and 9 to prescribe the manner in which the scheme will be made operational. Proviso to Rule 9 provides to deal with the situations

- wherein if the manufacturer is found to be manufacturing the notified goods with the aid of packing machine and not paying duty as specified
- for the manner of determination of duty in respect of clandestine manufacture and/or clearance. Further these goods were not produced using the packing machines.

It is the contention of the appellant that the samples cleared by them were not manufactured of power operated packing machines but were made by hand filling and hence the provisions of these rules do not apply to them. They also contend admittedly a fact not in dispute that the sample packs were meant for consumption within the factory and for market research hence cleared without declaration of any RSP. We do find merits in the contention of the appellants.

4.9 Rule 11 of the Rules, specifically provides for declaration of the RSP, and Rule 12 provides for the manner in which the RSP needs to be determined by the departmental authorities in case where the goods were cleared without declaration of RSP or the RSP was obliterated etc., after the clearance of the goods. The Rule 12 do not prescribe the manner in which revenue has proceeded to determine the RSP for making these demands by referring to the tariff values as per the notification issued under Section 3 of the Central Excise Act, 1944. In Annexure II to the Show Cause Notice, in remarks column the manner of determination of the RSP has been stated "*Retail packs of 4 gms Cleared without printing RSP. Tariff Value 3 per unit pack (Notfn*

No 3/2006-CE (NT) dated 01..03.2006as amended.) Duty Payable per packing machine per month as per Sr No 4 of table 1 to Notification No 42/2008_CE dated 01.07.2008 as amended.”

Thus it is seen that RSP has been determined on the basis of the Notification issued under Section 3, fixing Tariff Value. Such method of determination of RSP is not even prescribed method for the determination of RSP as per Rule 12. It is settled law that when a statute prescribes a manner of doing the thing then it would be done in the manner prescribed or not at all. Hence we are not in position to approve of the manner in which RSP has been determined specifically by referring to Notification issued under Section 3 which by use of non obstante clause in Section 3A.

4.10 We also take note of the decision referred to by the counsel of appellant holding as follows in the support of the contention

PNB Finance [2008 (13) SCC 94]

17. As regards applicability of Section 45 is concerned, three tests are required to be applied. In this case, Section 45 applies. There is no dispute on that point. The first test is that the charging section and the computation provisions are inextricably linked. The charging section and the computation provisions together constituted an integrated Code. Therefore, where the computation provisions cannot apply, it is evident that such a case was not intended to fall within the charging section, which, in the present case, is Section 45. That section contemplates that any surplus accruing on transfer of capital assets is chargeable to tax in the previous year in which transfer took place. In this case, transfer took place on 18.7.1969. The second test which needs to be applied is the test of allocation/attribution. This test is spelt out in the judgment of this Court in Mugneeram Bangur & Co. (supra). This test applies to a slump transaction. The object behind this test is to find out whether the slump price was capable of being attributable to individual assets, which is also known as item-wise earmarking. The third test is that there is a conceptual difference between an undertaking and its components. Plant, machinery and dead stock are individual items of an Undertaking. Business

Undertaking can consists of not only tangible items but also intangible items like, goodwill, man power, tenancy rights and value of banking licence. However, the cost of such items (intangibles) is not determinable. In the case of CIT v. B.C. Srinivasa Setty reported in (1981) 128 ITR 294, this Court held that Section 45 charges the profits or gains arising from the transfer of a capital asset to income-tax. In other words, it charges surplus which arises on the transfer of a capital asset in terms of appreciation of capital value of that asset. In the said judgment, this Court held that the "asset" must be one which falls within the contemplation of Section 45. It is further held that, the charging section and the computation provisions together constitute an integrated Code and when in a case the computation provisions cannot apply, such a case would not fall within Section 45. In the present case, the Banking Undertaking, inter alia, included intangible assets like, goodwill, tenancy rights, man power and value of banking licence. On facts, we find that item-wise earmarking was not possible. On facts, we find that the compensation (sale consideration) of Rs. 10.20 cr. was not allocable item- wise as was the case in Artex Manufacturing Co. (supra).

18. For the aforestated reasons, we hold that on the facts and circumstances of this case, which concerns assessment year 1970-71, it was not possible to compute capital gains and, therefore, the said amount of Rs. 10.20 cr. was not taxable under Section 45 of the 1961 Act. Accordingly, the impugned judgment is set aside.

Tata Sky [2013 (4) SCC 656]

"35. On a careful examination of the 1936 Act as a whole, and more particularly on a conjoint reading of clauses (a) ["Admission to an entertainment"], (b) ["Entertainment"] and (d) ["Payment of admission"] along with section 3 creating the charge and section 4 providing the collection machinery, we find ourselves in agreement with the submission made on behalf of the appellants that the provisions of 1936 Act are applicable only to place-related entertainment. In other words, the provisions of the 1936 Act cover an entertainment which takes place in a specified physical location to which persons are admitted on

payment of some charge as defined under clause (d) of section 2 of the 1936 Act. The legislative history and the amendments introduced in the 1936 Act also show that it was how the scheme of the 1936 Act was viewed by the State itself. It was earlier found that the provisions of the 1936 Act were inadequate to bring shows by video cassette recorder or video cassette and player cable T.V. operations within the taxing net and hence, the legislature considered it necessary to amend the 1936 Act and to insert section 3-A and section 3- B respectively with effect from May 1, 1999 and April 1, 2001. In this regard, it is also very important to note that both in the case of shows by video cassette recorder or video cassette and player, cable T.V. operations, the collection machinery is in-built and provided within the respective provisions of section 3-A and section 3-B. and in those two cases the collection of duty does not take place under section 4 of the 1936 Act."

4.11 Authorized representative has in his submissions referred to the decisions as follows:

➤ Godfrey Philips India Ltd [2019 (369) ELT 706 (T-Mum)]

11. *On the issue of abatement on sealing of machines, Revenue's contention is that if one machine is sealed and the remaining machines available in factory are functional, then abatement for the closure period for that machine is not allowed, unless the 'factory' as a whole remain closed for the period for which the abatement is claimed. The relevant Rule 10 of PMPM Rules, 2008 reads as under :-*

"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 seven 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 goods shall be effected by the manufacturer :

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."

A plain reading of the said provisions makes it clear that unless all packing machines available in the factory have been sealed and factory remains completely closed, abatement for the sealing of one machine cannot be allowed. Since we are remanding the matter to the Adjudicating authority, the issue of abatement may also be considered, keeping in view our aforesaid observations.

➤ Ashok & Co Pan Bahar Ltd. [2018 (359) ELT 329 (T-Del)], in this case following was specifically held in para 6 and 7

6. *First, we consider the demand attributable to Pan Masala packed manually in tins. The appellant has cited the C.B.E. & C. circular dated 4-8-2008 in which it has been clarified that the Compounded Levy Scheme notified under Section 3A will not be applicable to Pan Masala packed in tin containers manually. Such scheme is specifically notified only for Pan Masala packed in FFS machines. On perusal of the C.B.E. & C. circular the above fact is confirmed. Consequently the demand of duty on Pan Masala packed in tin containers cannot be sustained and is set aside.*

7. *Next, we turn to the demand of duty made on the basis of pouch packing machines installed in the factory on 1-7-2008. From a perusal of Section 3A ibid, along with the relevant Notification Nos. 29 and 30/2008-C.E. (N.T.), dated 1-7-2008, it is evident that the Compounded Levy Scheme notified mandatorily required the manufacturer to pay duty as per the number of FFS machines installed in the factory. The*

manufacturer has the option of getting his machines sealed to avoid demand of duty under the above scheme. From the record, we find that on 2-7-2008, the appellant has requested the Department to seal all their machines. Accordingly from 2-7-2008 onwards there is no duty liability on the appellant. However, it is not disputed that the machines were installed in the factory and not sealed on 1-7-2008 i.e. available for manufacture of Pan Masala on 1-7-2008. Consequently, in terms of the scheme notified under Section 3A, the appellant is liable to pay duty for one day on 1-7-2008 for the machines which were installed in the factory and are sealed.

In our view the said decisions do not support the contention of the revenue or the manner in which the RSP has been determined by the revenue for making these demands. Further the second decision specifically holds that in case of hand filled pouches/ tins the provisions of this scheme do not apply. It is also to be noted that appellants have specifically contended that no packing machine was installed in their premises after May 2008, much prior to the introduction of the scheme of levy as per Section 3A, it is not the case that the packing machines were installed and functional and thereafter abatement sought in respect of un-operational machines.

5.1 Thus, the impugned orders are set aside and the appeals are allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

tvu