

**Customs, Excise & Service Tax Appellate Tribunal  
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

**Excise Appeal No.10508 of 2021**

(Arising out of OIO-DMN-EXCUS-000-COM-026-20-21 dated 06/10/2020 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN)

**CHANDAN TOBACCO CO**

59 Government Industrial Estate Masat  
Silvassa, Gujarat

.....Appellant

*VERSUS*

**C.C.E. & S.T.-DAMAN**

3rd Floor...Adarsh Dham Building, Vapi-Daman Road, Vapi  
Opp.Vapi Town Police Station,  
Vapi, Gujarat-396191

.....Respondent

**APPEARANCE:**

Shri N.K. Tiwari, Consultant for the Appellant  
Shri Ghanasyam Soni, Joint Commissioner (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR  
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

**Final Order No. A/ 12259 /2022**

DATE OF HEARING: 23.11.2022  
DATE OF DECISION:22.12.2022

**RAMESH NAIR**

The present appeal is directed against the impugned order-in-original No. DMN-EXCUS-000-COM-026-20-21 dated 06-10-2020 passed by the Commissioner, Central GST & Central Excise, Daman.

2. Briefly the facts of the present case are that the appellant are engaged in the manufacture of Pan Masala and Pan Masala containing Tobacco (Gutka) falling under Chapter Sub-headings No. 21069020 and 24039990 of Central Excise Tariff Act, 1985. The departmental officers of HPIU-V gathered various intimation/permission letters submitted by the assessee and the reports/ other relevant records from the jurisdictional Division Office, Jurisdictional Range office, as well as from the assessee, to investigate correctness of the self -assessment and central excise duty payment made by the assessee. It appears during the course of the investigation that Appellant have submitted intimation/permission letters and filed declaration in Form-1 on 09.04.2009/16.04.2009 with the Deputy

Commissioner, Division –II, Silvassa and endorsed copies of the same to the Range office, in terms of Rule 6 (6) of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty), Rules, 2008; for addition of some new packing machines during the period of April -2009, June -2009 and July -2009 respectively, for manufacture of the aforesaid products. Accordingly, new packing machines were installed in the production area of the appellant as permitted by the Jurisdictional Deputy Commissioner vide his office letter dated 15.04.2009, 15.06.2009 and 16.07.2009 respectively. Further, it was observed that during the said investigation the Appellant had paid Central Excise Duty amount of Rs. 87,50,000/- and Rs. 10,87,500/- in respect of new packing machines added during the months of April 2009 and June 2009 respectively, on pro-rata basis from their date of installation. The Appellant also paid differential Central Excise Duty amount of Rs. 3,25,000/- in respect of two packing machines, converted from Pan Masala to Pan Masala Containing Tobacco (Gutka) during the Month of July 2009 on pro-rata basis from the date of conversion. Further it appeared that Appellant have submitted revised declaration in Form-1 on 05.09.2008, 19.05.2009 with department as per the Rule 6(6) of the Pan Masala Packing Machines (Capacity Determination and Collection Duty), Rules, 2008 for “replacement” of some existing packing machines during the month of September 2008, February-2009, May -2009 and June -2009 respectively for manufacture of aforesaid products. The New packing machines were added in the production area of the appellant by removal of old packing machines as permitted by the jurisdictional officers. However, investigation reveal that the Appellant has not paid any Central Excise Duty in respect of the new packing machines added during the relevant month on the ground that the number of old packing machine have been replaced with equal number machines and the total number of installed packing machines remained unchanged during the said relevant months. Statements of Shri Surendra Chhajer, Proprietor of Appellant’s firm was recorded. It was alleged that in the instant case Appellant have contravened the statutory provisions of Rule 6(4),7,8,9 and 13 of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008.

2.1 After the detail investigation, show cause notice dated 30.09.2009 was issued for demand of Central Excise Duty under the provisions of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 and under Section 11A(1) of the Central Excise Act, 1994

alongwith interest and also for penalties. The above show cause notice was adjudicated by the Commissioner vide impugned Order-in-Original by which the Commissioner –

(a) confirmed the duty demand of Rs. 1,20,12,500/- against the appellant short paid during the months of April 2009 , June 2009 and July 2009, under proviso to Section 11A(10) of Central Excise Act, 1944, as made applicable vide Rule 18 of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 along with interest thereon under Section 11AB of Central Excise Act, 1944;

(b) confirmed the duty demand of Rs. 5,25,00,000/- against the appellant not paid on 42 number of new packing machines added in guise of replacement under proviso to Section 11A(10) of Central Excise Act, 1944, as made applicable vide Rule 18 of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 along with interest thereon under Section 11AB of Central Excise Act, 1944;

(c) imposed penalty of Rs. 3,20,00,000/- on the appellant under Rule 25 of Central Excise Rules, 2002 read with Rule 17 of the PMPM Rules 2008

2.2 Against the above order of the Commissioner, the present appeal has been filed.

03. Shri N.K. Tiwari, learned Consultant appearing for the appellant submits that impugned order passed 12 years after issuance of show cause notice. As the impugned order was not passed within a reasonable time, the impugned order ought to be set aside on this ground alone. He placed reliance on following decisions:-

- State of Punjab Vs. Bhatinda Distt Co-Op Milk – 2007(217) ELT 325 (SC)
- Serve Pharmaceuticals Vs. UOI -2019(366) ELT 49 (Guj.)
- Siddhi Vinayak Syntex Pvt. Ltd. Vs. UOI – 2017(352)ELT 455 (Guj)
- Sunrise Remedies Vs. UOI -2019(366) ELT 49 (Guj)

3.1 He also submits that the annual capacity of production is determined by the Deputy Commissioner under Rule 6(3) of the PMPM Rules. If there is any change in the parameters declared by the manufacturer, the Deputy Commissioner has to approve fresh declaration and re-determine the annual

capacity of production under Rule 6(6) of the PMPM Rules. The Deputy Commissioner has re determined the annual capacity of production and passed capacity determination order under Rule 6(6) stating that there will be no change in the capacity of production. The capacity was re determined taking into account the number of machines installed in the factory. The Appellant has paid duty on number of machines was that were considered by the Deputy Commissioner for re-determination of annual capacity. There was no short payment of duty in terms of the capacity determination Orders.

3.2 Capacity Determination Orders have been passed by the Learned Deputy/ Assistant Commissioner under Section 3A of the Central Excise Act and are appealable order Section 35 of Central Excise Act. In the present matter capacity determination orders passed by the Deputy/ Assistant Commissioner were not challenged by the Department, and have become final, matter cannot be re opened by issuance of show cause notice. The only recourse that the department had was to appeal against the capacity determination order which the department failed to do so.

3.3 He further argued that Duty demand of Rs. 5,25,00,000/- on machines which were installed as replacement is illegal. The procedure for addition and removal of machines prescribed in Rule 13 of the PMPM Rules was followed by the Appellant. The Rule 6(4) read with Rule 7 of the PMPM Rules prescribed the duty payable on installed/operating machines during the month. Accordingly, duty is payable on the number of installed machines which are deemed to be operating machines. The number of installed machines in the month remained the same before and after replacement of the machines because the machines that were replaced were first uninstalled reducing the number of installed machines to that extent. On installation of equal number of new machines the total number of installed machines increased to the same number as before installation. There was no alternation in the number of operating packing machines, therefore Rule 8 is not applicable. The uninstalation and removal of packing machines and installation of equal number of new packing machines did not alter the total number of packing machines. At the time of replacement, the total number of installed machines did not increase. The 2<sup>nd</sup> proviso to Rule 8 is a deeming provision whereby if the installed machines become non working/ is removed for any reason, the manufacturer will be liable to pay the duty for the whole month as duty is payable on the maximum number of machines

installed on any day during the month. In that scenario the manufacturer cannot plead that since the machine was not working he is not liable to pay duty. The case of the appellant is not non working of an installed machine. Duty is payable on the maximum number machines installed on any day or at any time in the month does not increase. The number of installed machines in the month did not exceed the number on which duty was paid by the Appellant. The show cause notice as well as the impugned order states that there is no provisions for replacement of the machines in the PMPM Rules. However, there was no need for a provision for replacement of the machines as Rule 6 of the PMPM Rules covers the issue of replacement also. The demand is unsustainable and ought to be set aside.

3.4 He also submits that demand of Rs. 98,37,500/- on addition of machines in the middle of the month not sustainable. Appellant added / installed machines in the factory in the middle of the month under Rule 6(6) and Deputy Commissioner passed Capacity Determination Order directing appellant to deposit duty on pro rata basis from the date of installation of the machines. The revised capacity determination order did not revise the annual capacity from the beginning of the month in which new machines were added. The duty in terms of Rule 7 was deposited by the Appellant

3.5 He also argued that there is no error in the capacity determination order which have determined the annual capacity of the added machines. Section 3A of the Central Excise Act provide for pro rata determination of annual capacity where there is a change in declared parameters. The Capacity determination orders determined the Annual capacity on pro rata basis in terms of Section 3A. Rule 8 of the PMPM Rules cannot be interpreted to contradict Section 3A. The PMPM Rules have to be harmonious to the section under which they are issued. The Rules cannot be interpreted to result in levy of duty on the quantity which is more than the annual capacity re-determined vide Capacity determination orders passed by the Deputy /Assistant Commissioner. The capacity determination orders were not challenged by the department, and have become final, demand cannot be raised by issuance of show cause notice.

3.6 As regards the duty demand of Rs. 21,75,000/- on use of same machines for manufacture of Pan Masala for part of the month and Gutkha for remaining part of the month he submits that the said demand is illegal.

The Appellant paid the duty on pro rata basis for manufacture of Pan Masala and Gutkha of the same MRP on the same machine in terms of the capacity determination Order passed by the Deputy Commissioner. Capacity determination order has become final. It is not in dispute that there was neither addition of machines, nor was there manufacture of goods of new MRP, Rule 8 is not applicable. Pan Masala and Gutkha are both covered under the PMPM Rules. The rate of duty payable for Pan Masala and Gutkha is different. The deemed capacity for a machine manufacturing Pan Masala and Gutkha is the same. It is settled law that Rule 8 of the PMPM Rule cannot be interpreted so as to result in levy of duty on the quantity which is more than the deemed production per machine per month as specified in Rule 5. When for the purpose of Rule 5, in case of one packing machine manufacturing Gutkha or Pan Masala pouches of RSP of Re. 1, the annual capacity of production cannot be double the deemed capacity. He placed reliance on the decisions of Durga Trading Com -2011 (273) ELT 474.

04. Shri Ghanasyam Soni, Learned Joint Commissioner (AR) defended the impugned order by reiterated the Commissioner's findings.

05. We have carefully considered the submissions from both the sides and perused the records. As regard the demand of Rs. 1,20,12,500/- we find that the case of the department is that provisions of Rule 8 nowhere provide the pro-rata payment of duty on the basis of date of installation of new Machines. As per department Appellant was required to pay duty for the whole month. The Learned Commissioner in impugned order also held that the Appellant was not entitled for the abatement of duty in case of non-production of the notified goods as provided in Rule 10. It should be appropriate at this juncture to re-visit the legal provisions. Section 3A of the Central Excise Act, 1944 reads as follows :-

***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 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 of production 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 only 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 redetermined 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, 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 provision 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 expressions "hundred per cent export-oriented undertaking" shall have the meanings assigned to it in section 3."*

5.1 In pursuance to the aforesaid section, the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 has been framed vide Notification No. 30/2008-C.E. (N.T.), dated 1-7-2008 and pan masala and Gutakha has been notified for the purpose of Section 3A. As per the said rules, the factor relevant to production of the individual goods shall be the number of packing machines in the factory of the manufacturer. The quantity of notified goods deemed to be produced is dependent on the number of pouches per packing machine per month which in turn is dependent on the retail sale price per pouch. Thus, the quantity deemed to be produced is dependent upon the number of packing machines operating as well as the retail sale price. The manufacturer operating under the scheme has to file a declaration under Rule 6 of the Rules wherein he has to declare the number of packing machines of various types installed in the factory and intended to be operated for the production of the notified goods. The manufacturer also has to declare the retail price of the pouches to be manufactured. On receipt of the application containing the above details and after making such enquiry as necessary, including physical verification, the annual capacity of production of the factory has to be determined under sub-rule (2) of the said Rules. Rule 7 provides for calculation of the duty payable depending upon the rate of duty specified in Notification No. 42/2008-C.E., dated 1-7-2008. Rule 8 deals with alteration in the number of packing machines. Rule 9, which deals with manner of payment of duty and interest.

5.2 From a reading of Section 3A, it becomes obvious the clause (a) of sub-section (2) of Section 3A provides for the manner of determination of annual capacity of production and such annual capacity shall be deemed to be the annual production. Thus, the deeming provision applies to the annual capacity of production. In terms of the powers conferred by sub-section (2)



and (3) of Section 3A, PanMasala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 has been formulated. Under the said rule, the factor relevant to the production is number of packing machines in the factory of manufacturer and the quantity deemed to be produced is based on the number of operating machines and the retail sale price of the goods produced. Since what is deemed is the quantity of production, which is based on both the number of machines operating and installed and also the retail prices of the goods produced. In certain situations, the rules provided for deeming the number of packing machines operating. For e.g., Rule 8 says that in case of addition or installation or removal of packing machines in the factory during a month, the number of operating packing machines for the month shall be taken as the highest number of packing machines installed on any day during the month.

5.3 Rule 6 provides for declaration to be filed by the manufacturer stating details in Form 1, as below:-

- (i) Number of single track packing machines available in the factory.
- (ii) Number of packing machines out of (i), which are installed in his factory.
- (iii) Number of packing machines out of (i), which he intends to operate in his factory for production of notified goods.
- (iv) 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.
  - (a) Number of multiple track or multiple line packing machine, which are incapable of performing additional processes specified in (iv).
- (v) Number of multiple track or multiple line packing machines out of (iv) and (iv)(a), which are installed in his factory.
- (vi) 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) Name of the manufacturer of each of the packing machine, its identification number, date of 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 price 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 with a copy to the Superintendent of Central Excise. Further provided that a new manufacturer shall file such declaration at least 7 days prior to the commencement of commercial production of notified goods in his factory.

5.4 Sub-rule (2) of Rule 6 provides that on receipt of the declaration referred to in sub-rule (1), the adjudicating authority 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 3 working days in accordance with the provisions of these rules.

5.5 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 machine in the factory' during the month beginning, which the capacity is being determined.*

5.6 Rule 6(4) further provides 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.*

5.7 Further, Rule 6(5) provides that the machine(s) 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 where such packing machines is not feasible to remove such packing machine out of the factory premises, it shall be uninstalled and sealed by the Superintendent in such a manner that it cannot be operated.

5.8 Rule 6(6) provides that 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 authority 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 commencing manufacture of goods of a new retail sale price or discontinuation of manufacturing of goods of existing retail sale price (RSP) etc., he shall file a fresh declaration to this effect at least 3 working days in advance to the authority, who shall approve such fresh declaration and re-determine the annual capacity of production following the procedure specified in sub-rule (2)

5.9 Thus, it is noticed that a detailed and exhaustive procedure has been provided for determination of the annual capacity as well as the procedure for any change in the number of machines or retail sale price etc., resulting into enhancement or reduction of liability under the Act. This is in conformity with the 2nd proviso to Section 3A(2)(b) read with Section 3A(3) of the Act, wherein it is provided that in case the factor relevant to the production is altered or modified (i.e. number of packing machines or RSP) at any time, during the year, the annual production shall be re-determined on a proportionate basis. Further, the duty shall be levied at such rate, on the unit of production or as the case may be, on such factor of production, as may be notified.

5.10 Further, Rule 7 provides that 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-C.E., dated 1-7-2008 to the number of operating packing machines in the factory during the month.

5.11 Rule 13 provides that in case a manufacturer does not intend to further operate a packing machine, he shall intimate the same to the authority, at least three working days in advance, whereupon the same shall be uninstalled and sealed by the Superintendent of Central Excise. Similarly, Rule 13(2) provides that 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 authority*, who shall allow the addition or installation, as the case may be, under the physical supervision of Superintendent of Central Excise.

5.12 Further, Rule 9 provides for 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. Form-2 requires mentioning of number of packing machines manufacturing goods of particular RSP, details of duty paid, with evidence in particular, etc.

5.13 In the present matter undisputedly appellant had followed the procedure, as the appellant filed declaration regarding change of number of packing machines and the declaration was accepted by the proper officer after due verification, the declaration was accepted and the annual capacity of the machine was fixed by the competent jurisdictional officers and the appellant accordingly paid the duty. The same is also clear from the following correspondences. There is no misdeclaration found by Revenue on the part of appellant regarding number of machines used for manufacture of notified goods. In such circumstance demands of duty over and above the duty determined by the Jurisdictional officer legally not correct.

- (i) Appellant vide letter dated 09.04.2009 informed the jurisdictional Deputy Commissioner that they wished to add 14 No. of pouch packing machine for production Gutkha w.e.f. 16.04.2009.
- (ii) Appellant also filed a declaration in Form-I as required under Rule 6 of the PMPM Rules 2008.
- (iii) Vide Panchnama dated 16.04.2009, the 14 Pouch packing machines were installed in Appellant's premises.
- (iv) an Order F.No. V/16-10/CTC/08-09/Pt II/228 dated 15.04.2009 was passed by the Deputy Commissioner fixing the Annual Capacity of production for the 14 additional machines in the factory w.e.f. 16.04.2009 at 6,28,99,2000 Pouches per annum and assessing the duty liability for 15 days w.e.f. 16.04.2009 to 30.04.2009 at Rs. 87,50,000/
- (v) Accordingly the Appellant paid the duty assessed by the Deputy Commissioner.
- (vi) Similarly, Appellant vide letter dated 09.07.2009 informed the Deputy Commissioner that they wish to convert 2 Nos of

- pouch packing machines of Pan Masala into Manufacturing of Gutkha.
- (vii) The Appellant also filed declaration in Form -I as required under Rule 6 of the PMPM Rules 2008.
  - (viii) Vide Panchanam dated 17.07.2009 the 2 pouch packing machines were converted to manufacturing of Gutkha in the Appellant's premises
  - (ix) Order F.No.V/16-10/CTC/08-09/Pt II/1553 dated 16.07.2009 was passed by the Deputy Commissioner fixing the Annual Capacity of production for the 2 additional machines in the factory w.e.f 17.07.2009 at 1,12,32,000 Pouches per annum and assessing the duty liability for 15 days w.e.f. 17.07.2009 to 31.07.2009 at Rs. 3,25,000/-.
  - (x) As per the said order appellant paid the duty assessed by the Deputy Commissioner.
  - (xi) Appellant vide letter dated 09.06.2009 informed the Deputy Commissioner that they wish to add 2 Nos of pouch packing machines, 1 machine for production of Gutkha and 1 machine for production of Pan masala.
  - (xii) In this context the Appellant also filed declaration in Form-I as required under Rule 6 of the PMPM Rules 2008.
  - (xiii) Vide Panchanama dated 16.06.2009 the 2 pouch packing machines were installed in the Appellant's premises
  - (xiv) Order F.No. V/16-10/CTC/08-09/Pt II/1183 dated 15.06.2009 was passed by Deputy Commissioner fixing the annual capacity of production for the 2 additional machines in the factory w.e.f. 16.06.2009 at 8,98,56,2000 pouches per annum and assessing the duty liability for 15 days w.e.f. 16.06.2009 to 30.06.2009 at Rs. 6,25,000/- for Gutkha and Rs. 4,62,500/- for Pan Masala.
  - (xv) Accordingly Appellant paid the duty assessed by the Deputy Commissioner.

06. We also observed that in terms of Rule 7 of Pan Masala Packing Machine Rules, the duty payable for a month is to be calculated by applying the appropriate rate of duty specified in Notification No. 42/2008-C.E., dated 1-7-2008 to the number of operating packing machines in the factory during the month, that Notification No. 42/2008-C.E., prescribes rate of duty per

packing machine per month, that in view of this, when a particular packing machine is not operated during certain days of a month, the duty payable for that month has to be proportionately reduced and the duty cannot be charged for the entire month, that Rule 8 would apply only in two circumstances—firstly when either the manufacturer has not filed the declaration under Rule 6 and has not made further declaration under Rule 6(6) in case of change in parameters already declared under Rule 6(1) and secondly where in case of addition or installation of machines, the manufacturer has not filed any intimation to the Deputy/Assistant Commissioner in writing as per the mandate of Rule 13. In this case all the required procedure was followed by the Appellant and the same is not under dispute, therefore, the application of Rule 8 does not arise and no duty demand is sustainable in this matter.

6.1 We also find that Rule 10 of the PMPM rules speaks about the abatement in case of non-production of goods. That the said Rule states that when the 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 follows the procedure laid down therein. In the instant case, the authority below has denied the abatement stating that conditions are not satisfied. It is not disputed that the appellant paid duty as per the annual capacity of production determined by the Jurisdictional officers. It is also not disputed that the machines were neither installed nor operated during the disputed period for which revenue demanded duty. Rule 10 provides that appellant is eligible for abatement during the period for which goods were not produced if such period is not less than 15 days. In this case, if appellant has paid duty for whole month, as per compounded levy scheme, this Rule would help the appellant to get abatement for the period when goods are not produced. This is because no duty can be demanded when goods are not produced in the peculiar facts of this case. Therefore considering Rule 10 also, we are of the view that the appellants are entitled to abatement. The issue is covered by the judgment laid by Hon'ble Rajasthan High Court in the case of *CCE, Jaipur-II v. Jupiter Industries* reported in [2006 \(206\) E.L.T. 1195](#) (Raj.) wherein it was held that no duty is leviable for the period when a machine has not been operated or has been dismantled, as when there is no production in respect of a machine, which is not in existence, there is no question of charging any Central Excise Duty in respect of that machine. The

ratio of judgment of Hon'ble Rajasthan High Court is squarely applicable to the facts of the present case.

6.2 We also find that Learned Commissioner has also confirmed the duty demand of Rs. 5,25,00,000/- on the ground that the new packing machines were added in the production area of the assessee and old packing machines were removed as permitted by the Jurisdictional Deputy Commissioner, in the presence of the Jurisdictional Range officers under Panchanama proceedings. Second proviso to Rule 8 of the Rules *ibid* makes it amply clear that in case of non-working of any installed packing machines during the month, for any reason whatsoever, the same shall be deemed to be operating packing machine for the month. In the instant case, the assessee have informed on 05.09.2008 to the Deputy Commissioner regarding replacement of 15 old packing machines with 15 new packing machines and consequently, 15 new packing machines were added on 09.09.2008 and 15 old packing machines were removed on the same day. It is clear that the aforesaid 15 old packing machines were installed in the factory and were used for production upto 09.09.2008 i.e. the day of their removal and they become non- working of these machines for the rest of the period w.e.f. 10.09.2008 onwards. The same shall be deemed to be operative for the whole months of September 2008, therefore, the duty liability on these packing machines remains unchanged even after removal of the said packing machines. Similarly, the assessee have added 4 packing machines in February 2009 , 10 Packing machines in May 2009 and 13 Packing machines in June 2009 against the replacement. Hence the, assessee is required to pay the Central Excise Duty on said replaced machine for the whole months as contended by the department. However, we find that demand of duty on this ground is legally not correct. It is admitted facts that appellant requested the Jurisdictional Officers for permission to replace the machines in three months , September 2008, February 2009 and March 2009. The replacement of machines was carried out under the supervisions of the Central Excise officers. In this regard Rule 6(5) provides that the machine(s) 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 where such packing machines is not feasible to remove such packing machine out of the factory premises, it shall be uninstalled and sealed by the Superintendent in such a manner that it cannot be operated. In the present matter there is no

dispute that the old machines were uninstalled by the Jurisdictional officers. The procedure for addition and removal of machines prescribed under PMPM Rules was followed. Here, the Appellant not added new machines but replaced the machines with old machines. The number of installed machines in the month remained the same before and after replacement. The uninstillation and removal of packing machines and installation of equal number of new packing machine did not alter the total number of packing machines used during the month. Rule 6 (4) of PMPM Rules provided that

*Rule 6(4) – The number of operating packing machines during any month shall be equal to the number of packing machines installed in the factory during the months*

Further, Rule 7 of the PMPM Rules prescribed the duty payable on installed/ operating machine during the month as under:

*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-C.E., dated the 1st July, 2008 to the number of operating packing machines in the factory during the month.*

6.3 In view of above provisions it is clear the duty is payable on the number of installed machines which are deemed to be operating machines. In the present matter the number of installed machines in the month remained the same before and after replacement of the machines. Therefore, the demand confirmed by the Learned Commissioner in instant case is legally not correct. We also noticed that in case of replacement of machines the Deputy Commissioner on receipts of appellant's declaration and after verification of facts has passed orders dated 10.09.2008, dated 27.02.2009, dated 22.05.2009 and 01.06.2009 fixing the annual capacity of production after considering the replacement of packing machines and in compliance of the said orders of the Deputy Commissioner, fixing the duty on annual capacity of production, duty has been paid by the Appellant.

6.4 Without prejudice to the above, we also find force in argument of Learned Counsel that once the duty liabilities/production capacity are



determined by the jurisdictional Assistant Commissioner/ Deputy Commissioner under the provisions of PMPM Rules the said duty liability /production capacity becomes final and cannot be reviewed without challenging the said assessment order. There is no doubt that the said orders were appealable but the revenue had not filed any appeal challenging the said orders. Thereafter, the Revenue has issued show cause notice demanding duty without challenging the correctness of the said orders fixing the annual capacity of the production of Appellant. Clearly, in the present matter the said orders are not questioned by the revenue and after issuance the show cause notice the impugned matter is reopened in a proceeding which is legally not correct. The Revenue having any issue on the capacity of production and duty determination would need to approach the appellate authority instead of reopening the impugned matter by issuing the show cause notice. We find that Tribunal in the matter of *M/s Forbos Industries (Supra) and Sulekhram Steel Ltd. (Supra)* held that order fixing production capacity based duty is appealable order. In these circumstances also, we find that demand is not sustainable prime facie on this ground also.

6.5 Similarly, in the present matter Revenue cannot demand duty unless the orders of determination of production capacity based duty has been reviewed. In the present case, it is seen that the Appellant after following the proper procedure paid the duty assessed by the Jurisdictional Deputy Commissioner vide Order No. F.No. V/16-10/CTC/08-09/Pt II/228 dated 15.04.2009, Order No. F.No. V/16-10/CTC/08-09/Pt II/1553 dated 16.07.2009 and Order No. F.No. V/16-10/CTC/08-09/Pt II/1183 dated 15.06.2009 and also orders dated 10.09.2008, dated 27.02.2009, dated 22.05.2009 and dated 01.06.2009 fixing annual capacity of production after the replacement of packing machines, however no action was taken by the department to modify these orders by filing review application or appeal. On this ground also demand is prima facie not sustainable.

07. In view of the above discussion, the impugned order is not sustainable, hence the same is set aside. The appeal is allowed with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 22.12.2022)

**(RAMESH NAIR)**  
**MEMBER (JUDICIAL)**

**(RAJU)**  
**MEMBER (TECHNICAL)**