


<p>आयुक्त का कार्यालय केंद्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,अहमदाबाद उत्तर, कस्टम हॉउस(तल प्रथम) नवरंगपुरा- अहमदाबाद ,380009</p>		<p>Office of the Commissioner of Central Goods & Services Tax & Central Excise, Ahmedabad North, Custom House(1st Floor) Navrangpura, Ahmedabad-380009</p>
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निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. F.No. V.24/15-15/OA/2015

आदेश की तारीख / Date of Order : 27.12.2019
जारी करने की तारीख / Date of Issue : 27.12.2019

द्वारा पारित/Passed by -

डॉ. बलबीर सिंह / Dr. BALBIR SINGH
आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR-13/2019-20

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति -इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार ,सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,O-20, मेघानीनगर ,न्यु मेन्टल हॉस्पिटल कम्पाउन्ड , अहमदाबाद -380016 को संबोधित होनी चाहिए।

Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, O-20, Meghani Nagar, Mental Hospital Compound, Ahmedabad-380 016.

2.1 इस आदेश के विरुद्ध अपील न्यायाधिकरण में अपील करने से पहले मांगे गये शुल्क के 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है।

An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

(as per amendment in Section 35F of Central Excise Act,1944 dated 06.08.2014)

3. उक्त अपील प्रारूप सं .इ.ए 3.में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 ,के नियम 3 के उप नियम (2)में विनिर्दिष्ट व्यक्तियों द्वारा हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियाँ में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई हो ,उसकी भी उतनी ही प्रतियाँ संलग्न की जाएँ)उनमें से कम से कम

एक प्रति प्रमाणित होनी चाहिए।(1 अपील से संबन्धित सभी दस्तावेज भी चार प्रतियाँ में अग्रेषित किए जाने चाहिए।

The Appeal should be filed in Form No. E.A.3. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

4. अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैं प्रतियों में दाखिल चार , उसकी भी उतनी ही ,की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उनमें से कम से कम) प्रतियाँ संलग्न की जाएंगी। एक प्रमाणित प्रति होगी।(

The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

5. अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के बिना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।

The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

6. अधिनियम की धारा 35बी के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है, वहां के किसी भी राष्ट्रीयकृत बैंक की शाखा से न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर रेखांकित माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।

The prescribed fee under the provisions of Section 35 B of the Act shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. न्यायालय शुल्क अधिनियम 1970 ,की अनुसूची ,1-मद 6 के अंतर्गत निर्धारित किए अनुसार संलग्न किए गए आदेश की प्रति पर 00.1रूपया का न्यायालय शुल्क टिकट लगा होना चाहिए।

The copy of this order attached therein should bear a court fee stamp of Re. 1.00 as prescribed under Schedule 1, Item 6 of the Court Fees Act, 1970.

8. अपील पर भी रु 00.4 .का न्यायालय शुल्क टिकट लगा होना चाहिए।

Appeal should also bear a court fee stamp of Rs. 4.00.

विषय: -कारण बताओ सूचना:

Subject- Proceedings initiated vide Show Cause Notice bearing No. V.24/15-15/OA/2015 dated 19.02.2015 issued to M/s. Hasmukh Tobacco Products, 300, Meldi Estate, Near Gota Railway Crossing, Gota, Ahmedabad.

BRIEF FACTS OF THE CASE

The facts of the case, in brief, are that M/s. Hasmukh Tobacco Products situated at 300, Meldi Estate, Near Gota Railway Crossing, Gota, Ahmedabad [*here-in-after referred as the "said assessee"*] were engaged in the manufacture and packing of OM brand unmanufactured tobacco falling under CTH 24011090 of the Central Excise Tariff Act, 1985; holding Central Excise Registration under ECC No. ACSPP9687QM001; and were paying Central Excise duty under Compounded Levy Scheme provided under Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 [*here-in-after referred as the "said Tobacco Rules", for the sake of brevity*]. Rule 6 of the said Tobacco Rules provides that the assessee should file declaration with their jurisdictional Deputy/Assistant Commissioner of Central Excise in Form-1 regarding the total number of Pouch Packing Machines (PPMs) installed in their factory, the number of PPMs in working condition, and the number of PPMs which are not in working condition, etc. They were required to pay Central Excise duty as per their declaration in Form-2 of Rule 9 of the said Tobacco Rules on the basis of declared working PPMs and declared MRP with prevalent rate of central excise duty at the relevant time. They were also required to file declaration as and when there was any change in their previous declaration. The said assessee had filed their last declaration on 27.12.2012 (with effect from 01.01.2013) with their jurisdictional Deputy Commissioner of Central Excise, Division-V, Ahmedabad-II Commissionerate, wherein they had declared two PPMs installed in their factory, out of which one PPM in working condition. They also declared that the MRP of each pouch to be packed on this working PPM would be Rs. 3/- and accordingly, they were paying the applicable rate of duty prescribed per machine, in terms of Notification No. 11/2010-CE(NT) dated 27.02.2010 (as amended vide Notification No. 14/2012-CE dated 17.03.2012). The other PPM installed in their factory was declared as non-working in their declaration. Therefore, the Central excise Range Superintendent had sealed the said non-working PPM under panchnama dated 31.12.2012 and thus they were paying duty on one PPM every month. They had not filed any further declaration till the date of visit of Central Excise Preventive Officers to their factory on 03.09.2014 and thus the aforesaid declaration dated 27.12.2012 was in force.

2. Based on an intelligence, a team of officers from Central Excise (Preventive), Ahmedabad-II Commissionerate visited the factory premises of the said assessee on 03.09.2014 whereupon it was found that one more undeclared PPM was installed and working in their factory premises. Therefore, a panchnama was recorded in the presence of Shri Hasmukhbhai Ugarchandbhai Patel, Authorized Signatory of the said assessee. During the proceedings, it was found that the factory comprised of two big halls and three small rooms on the left side, and the small rooms were used for packing process. One of the big halls was having one machine where manufacturing process of pouch packing of Rs 4 MRP pouch of OM brand tobacco was going on. On entering the adjacent hall, pile of raw material packed in jute sacks were found, and during the search, another pouch packing machine having packing material roll on which printed price of Rs.

4 MRP was found. On being asked, Shri Hasmukhbhai Patel, authorized signatory informed that they were using the said PPM regularly, as and when required; and that they had not declared the said PPM to the department and not paying central excise duty on the said additional machine. They were manufacturing tobacco products in the name of "Hasmukh Tobacco Products" having the brand name of "OM" on the said additional machine also. During the panchnama proceedings, video recording was also carried out on the activities, pouch packing machines and raw materials lying in the premises. Thereafter, the officers placed the said additional undeclared PPM valued at Rs. 90,000/- under seizure on a reasonable belief that the said machine was used for manufacturing and packing of tobacco pouches without declaring the installation of the machine to the department. The seized machine was handed over to Shri Hasmukhbhai Patel under a supratnama for safe custody. In one of the rooms, one PPM was found sealed by the Range officers as per order dated 31.12.2012. On the opposite side, one big hall and three small rooms were found. In the hall, packing of tobacco in cartons was going on and in three rooms some finished goods and some packing materials were kept. The documents/records found incriminating and relevant for further investigation of the case were withdrawn as per panchnama.

3. Statement of Shri Hasmukhbhai Ugarchand Patel, Authorised Signatory of the said assessee was recorded on 03.09.2014 under Section 14 of Central Excise Act, 1944 wherein he, *inter alia*, stated that he remained present during the panchnama proceedings and agreed with the contents thereof; that the videography of the factory premises was also conducted in his presence; that it is true that there were two tobacco pouch packing machines found installed in their factory premises and were in working condition, while another pouching machine was found in non-working and sealed condition, which was sealed by the central excise officers on 31.12.2012; that OM brand tobacco pouches with MRP printed as Rs. 4 were also found besides, raw tobacco and packing materials; that the factory was registered with central excise and availing compounded levy scheme meant for tobacco manufacturers, according to which they had to file declaration with the central excise division regarding the total number of tobacco PPMs installed in their factory premises and its MRP on pouches; that they had filed the last declaration on 27.12.2012 according to which only one PPM was declared as working; and that they had paid central excise duty on the said one declared machine according to the rate of duty prescribed on the basis of their declared MRP of Rs. 3 per pouch. Shri Hasmukhbhai Patel confirmed that during the panchnama proceedings, the officers found one PPM in sealed condition and two other PPMs were also found installed and in working condition; that they had declared only one PPM to the department and also paid duty on the said one PPM; and that they have not paid any duty on the other PPM which was undeclared. He also confirmed that during the panchnama proceedings, pouches packed with tobacco were found printed with MRP of Rs. 4 per pouch; that they had declared MRP of Rs. 3 to the department and did not declare changing the MRP to Rs. 4 per pouch; that they had purchased the aforesaid undeclared PPM on 01.08.2014 for Rs. 50,000/-; that the machine was assembled by Shri Rajubhai Panchal, Waghjibhai Estate, Rabari Colony, Amraiwadi, Ahmedabad; that they had assembled the machine on his instructions and sold them for Rs. 90,000/- which was paid in cash

and no invoice or any other documentary evidences was with them; that they had not accounted for the same in their ledger account; and that the said assessee was manufacturing with declared PPM daily 20 hrs. and the capacity of this machine was 170 pouch packing per minute.

4. Statement of Shri Maheshbhai Ugarchand Patel, Proprietor of the said assessee firm was recorded on 03.09.2014 under Section 14 of Central Excise Act, 1944 wherein he, *inter alia*, stated that his factory is engaged in manufacture of OM brand tobacco pouch packing for which they hold central excise registration; that all the functions in the factory were looked after by Shri Hasmukhbhai Patel; that he was shown the panchnama dated 03.09.2014 drawn at his factory and agreed with its contents; that he was also shown the statement of Shri Hasmukhbhai Patel recorded on 03.09.2014; they were paying central excised duty as per the installation of PPM; that as per their declaration, only one PPM was working for which they had declared MRP of Rs. 3 per pouch; that there was another PPM installed in their factory which was not declared to the department; that during the panchnama the pouches being packed were having MRP of Rs. 4 per pouch; and that they had not intimated to the department regarding change of MRP from Rs. 3 to Rs. 4. He agreed to pay the central excise duty arising out of undeclared PPM and paid Rs 15 Lakhs through challan No. 80267 dated 03.09.2014 besides submitted two cheques for Rs. 15 Lakhs and Rs. 29 Lakhs, respectively (these cheques were returned after payment made through e-payment portal).

5. Based on the statement dated 03.09.2014 of Shri Hasmukhbhai Patel that the undeclared PPM was purchased by the said assessee from Shri Rajubhai Panchal, Amraiwadi, Ahmedabad, a team of officers visited the factory premises of M/s. Vaibhav Packaging situated at C-5, Waghjibhai Estate, Rabari Colony, Amraiwadi, Ahmedabad on 09.09.2014 and conducted search of the premises under a panchnama. Shri Harish Pravinbhai Kanaria *alias* Rajubhai Panchal was the proprietor of the said factory which was found to be engaged in the manufacture and repairing of pouch packing machines. Two diaries (rojmal) were withdrawn from the said premises under panchnama dated 09.09.2014 which reportedly contained details of repairing and selling of PPMs to various customers including the said assessee.

6. A statement of Shri Harish Pravinbhai Kanaria *alias* Rajubhai Panchal, proprietor of M/s. Vaibhav Packaging was recorded on 09.09.2014 under Section 14 of Central Excise Act, 1944 wherein he, *inter alia*, stated that his factory was engaged in the manufacturing and repairing of PPMs since past five years; that he had assembled one new PPM and delivered to M/s. Hasmukh Tobacco Products, Ahmedabad in the last week of October, 2013 and received Rs. 1,25,000/- in two instalments of Rs. 50,000/- and Rs. 75,000/-; that the said machine was delivered to the said assessee by tempo owned by Shri Santhoshbhai; that the amount received from them was not accounted for in their books of account as the same was received in cash besides, Shri Hasmukhbhai had insisted him not to issue any invoice for this delivery and not to make entry in the official books of account; that after delivering the machine, he had visited to the said factory and made the PPM in operating/working condition; and that he had repaired another PPM of the

said assessee during the previous year. Shri Harish Pravinbhai Kanaria *alias* Rajubhai Panchal confirmed that the diaries recovered from his premises contained some noting regarding delivery of PPM to M/s. Hasmukh Tobacco Products.

7. A statement of Shri Santoshbhai Ishwarbhai Patel, owner-cum-driver of tempo/loading rickshaw Registration No. GJ01BX9106 was recorded on 10.09.2014 wherein he stated that he had made delivery of one PPM in the last week of October, 2013 from M/s. Vaibhav Packaging to M/s. Hasmukh Tobacco Products, Gota, Ahmedabad in his tempo and he received a payment of Rs. 700/- from the said M/s. Hasmukh Tobacco Products on the same day; and that the PPM was unloaded there with the help of 3-4 labourers working in their factory.

8. Another statement of Shri Hasmukhbhai Patel was recorded on 12.09.2014 under Section 14 of Central Excise Act, 1944 wherein he accepted the facts as stated by Shri Harish Pravinbhai Kanaria *alias* Rajubhai Panchal, proprietor of M/s. Vaibhav Packaging and by Shri Santoshbhai Ishwarbhai Patel, owner-cum-driver of the tempo, both of whom confirmed that one PPM was manufactured and delivered at the factory of said assessee during the last week of October, 2013. He also accepted that the said machine was installed in his factory in the last week of October, 2013; that he had paid Rs. 1,25,000/- to Shri Harish Pravinbhai Kanaria and Rs. 700/- to Shri Santoshbhai Patel; that both these payments were made by him in cash for which no entry was made in books of account; and that they have not declared the facts regarding installation of the said machine to the department. Shri Hasmukhbhai Patel confirmed that he had wrongly and out of fear given his earlier statement that the machine was installed on 01.08.2014, and actually the said PPM was installed in the last week of October, 2013.

9. The facts and evidences as discussed above revealed that Shri Maheshbhai Ugarchand Patel, Proprietor and Shri Hasmukhbhai Ugarchand Patel, Authorized Signatory of M/s. Hasmukh Tobacco Products have committed huge economic offence as they were knowingly involved in the manufacturing, acquiring possession of, concerned themselves in transporting, depositing, keeping, concealing, selling and dealing with the excisable goods, viz. unmanufactured tobacco and keeping undeclared PPM for manufacturing and packing of excisable goods, which they knew that the same were liable for confiscation under the provisions of Rule 25 of Central Excise Rules, 2002 and thus had rendered themselves liable for penal action under the provisions of Section 9 of the Central Excise Act, 1944. Therefore, in terms of the provisions contained in the Central Excise Act, 1944 and the Rules made thereunder read with the instructions under Board's Circular No. 974/08/2013-CX dated 17.09.2013, both Shri Maheshbhai Ugarchand Patel and Shri Hasmukhbhai Ugarchand Patel were arrested on 21.10.2014 and were produced before the Hon'ble Court of Metropolitan Magistrate, Ahmedabad on the same day. The accused persons had moved applications on 21.10.2014 before the Hon'ble Metropolitan Magistrate seeking regular bail. After hearing both the sides, Hon'ble Metropolitan Magistrate rejected the bail applications vide order dated 22.10.2014. Against the said order dated 22.10.2014 of Hon'ble Metropolitan Magistrate,

the accused moved before the Hon'ble Court of Ahmedabad City Sessions Judge, Ahmedabad. The case was heard on 25.10.2014 and the Hon'ble Court of Ahmedabad City Sessions Judge also rejected their bail applications vide order dated 29.10.2014 passed in Criminal Misc. Application No. 4246/2014 and No. 4247/2014. Being aggrieved, the accused moved before the Hon'ble High Court of Gujarat. Hon'ble High Court considered their bail applications and passed order dated 05.11.2014 releasing them subject to the conditions specified in the said order. As per the said order of Hon'ble High Court, the accused paid further Rs. 25 Lakhs each on 08.11.2014 and 04.12.2014 vide challan No. 80059 and 80234.

10. In order to examine whether the said assessee had paid central excise duty correctly on the declared MRP of Rs. 3 or if they were required to pay central excise duty on the MRP of Rs. 4 as found on 03.09.2014, summons were issued to different persons. Accordingly, a statement of Shri Pravinbhai Jayrambhai Patel, Proprietor of M/s. Prashil Pack, Plot No. 261, Phase-I, Naroda, Ahmedabad and engaged in printing pouches, was recorded on 25.11.2014 under Section 14 of the Central Excise Act, 1944 wherein he, *inter alia*, stated that he print pouches as per the details such as MRP and other details provided by the clients; that the customers were supplying them electronically engraved MS copper plated roll, i.e. printing cylinder with their orders and such cylinders are having all relevant details of the products; that M/s. Hasmukh Tobacco Products had supplied them printing cylinders with all details which were to be printed on their tobacco pouches and accordingly, he printed tobacco pouches and supplied them the quantity as required by them; that M/s. Hasmukh Tobacco Products had supplied three printing cylinders in May/June, 2011 with details including MRP of Rs. 3 and accordingly, he had supplied tobacco pouches duly printed with MRP of Rs. 3 till August, 2014; that the said assessee had supplied further new six cylinders with details including MRP of Rs. 4, delivered directly from M/s. Sulekh Gravures, Naroda, Ahmeabad on 19.08.2014 and accordingly, he had supplied printed pouches showing MRP of Rs. 4 before two-three days in September, 2014; and that they supplied printed pouches with MRP of Rs. 3 till August, 2014. During the statement, he was shown one invoice No. 394 dated 19.08.2014 issued by M/s. Sulekh Gravures, Naroda, Ahmedabad under which they had supplied them 6 electronics engraved MS copper plated roll, i.e. printing cylinder, OM brand tobacco of Rs. 4 on 19.08.2014. He stated that by using these six cylinders he supplied tobacco pouches to the said assessee and charged/billed Rs. 1,19,754/- for supply of 651.720 kgs of tobacco printed pouches and issued bill No. 17/14-15 dated 17.09.2014; and that these pouches were supplied before two three days of September, 2014.

11. Statement of Shri Dineshbhai Bholabhai Patel, Partner of M/s. Sulekh Gravuresa, Naroda, Ahmedabad was recorded on 27.11.2014 under Section 14 of Central Excise Act, 1944 wherein he *inter alia*, stated that his firm was engaged in the manufacturing of printing cylinder of various sizes as per customer requirement; and that they had supplied six printing cylinders of OM brand tobacco with Rs. 4 MRP to M/s. Hasmukh Tobacco Products vide Invoice No. 0394 dated 19.08.2014 amounting to Rs. 55,591/- with central excise duty and they delivered these

goods to M/s. Prashil Pack, Naroda on 19.08.2014 for printing pouches for M/s. Hasmukh Tobacco Products as per instructions by the said assessee.

12. A statement of Shri Mayankbhai Sureshbhai Patel, Partner of M/s. Soro Industries & Trading Co., Kadi was recorded on 26.11.2014 under Section 14 of Central Excise Act, 1944 wherein he *inter alia*, stated that they manufacture non-woven bags of various sizes as per customer requirements, which they were also supplying to M/s. Hasmukh Tobacco Products to be used by them to pack 25 tobacco pouches; that as per requirements by M/s. Hasmukh Tobacco Products, they were printing details on these non-woven bags like their brand name 'OM', their photo, name of their company with address, maximum retail price, MRP per pouch, total quantity i.e. 5 gms x 25 pouches = 125 gms net weight, Lot number & packed month/year, central excise registration number, etc.; that they were supplying such bags every month to them with lot number and packing dates changed; that until August, 2014, they mentioned MRP as Rs. 3 and Maximum retail price Rs 75 on those non-woven bags (outer bags); and that for the supply of bags for September 2014, M/s. Hasmukh Tobacco Products had instructed them to change MRP from Rs. 3 to Rs. 4 and maximum retail price from Rs. 75 to Rs. 100 and accordingly, they supplied the goods. On being shown the samples of non-woven bags for April-2014 to September-2014, he agreed that the same were supplied by him; and that from September-2014, the bags were supplied with printed MRP of Rs. 4 and maximum retail price as Rs. 100.

13. The aforesaid facts revealed that the said assessee had cleared tobacco with MRP of Rs. 3 per pouch till August, 2014 and thereafter changed the MRP to Rs. 4 with effect from September, 2014. They have also paid increased amount of central excise duty of Rs. 36,82,000/- on their declared PPM for the month of September, 2014 through e-payment on 01.09.2014. Although they were required to file advance intimation to the department regarding change of such MRP, it appeared that the intimation could not reach the department in time. However, they had discharged the correct amount of duty on the declared PPM for the month of September, 2014 and started clearances accordingly.

14. Statements of Shri Maheshbhai Patel, Proprietor and Shri Hasmukhbhai Patel, Authorized Signatory of the said assessee were recorded on 02.01.2015 under Section 14 of the Central Excise Act, 1944 wherein they confessed that the one tobacco pouch packing machine found undeclared with the central excise department and installed in their factory was actually purchased from M/s. Vaibhav Packaging, Amraiwadi, Ahmedabad for Rs. 90,000/- in the last week of October, 2013; that they kept this machine in a separate place and when they needed or when their declared machine was not working, they were utilizing the second machine; that they never utilized both the pouch packing machines together; that when the central excise officers visited their factory on 03.09.2014, there was only one machine in working/functioning out of the two machines; and that they purchased raw tobacco, packing materials, labourers and electricity consumption, keeps sufficient for one pouch packing machine only.

15. As regards the central excise duty evasion on one PPM which was found undeclared during the surprise visit to the factory on 03.09.2014, evidences available on records in the form of statements of the supplier of machine, the transporter/tempo driver as well as the authorized signatory of the said assessee recorded on 09.09.2014 and 02.01.2015 and statement of the proprietor of the said assessee recorded on 02.01.2015 revealed that the undeclared PPM was purchased in the last week of October, 2013. Therefore, it appeared that central excise duty was required to be charged from November, 2013 onwards. These facts were confirmed by Shri Hasmukhbhai Patel, Authorised Signatory of the said assessee and Shri Maheshbhai Patel, Proprietor of the said assessee in their statement recorded on 12.09.2014 and 02.01.2015. Thus, it appeared that central excise duty evasion by the said assessee is required to be worked out on the one undeclared PPM by considering the MRP as Rs. 3 for the period from November-2013 to August-2014 and the MRP as Rs. 4 for the month of Septem-2014. Accordingly, the total duty evasion was worked out to be Rs. 300.02 Lakhs during the period from November-2013 to September-2014.

16. Therefore, a Show Cause Notice No. V.24/15-15/OA/2015 dated 19.02.2015 was issued to the said assessee calling upon them to show cause to the Commissioner of Central Excise, Ahmedabad-II as to why: -

- (i) Total duty of Rs. 300.02 Lakhs on manufacture and clearance of unmanufactured branded chewing tobacco without lime tube during the period from 01.11.2013 to 30.09.2014, should not be demanded and recovered from them under Section 11A(4) of the Central Excise Act, 1944; and the amount of Rs. 1,39,60,836/- already paid by them should not be adjusted and confirmed against the total central excise duty demanded against them;
- (ii) Interest on amount (i) above should not be recovered from them under Section 11AA of the Central Excise Act, 1944;
- (iii) Penalty should not be imposed on them under Section 11AC(1)(a) of Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002; and
- (iv) The seized PPM valued at Rs. 1,25,000/- should not be confiscated under the provisions of Rule 25 and 26 of the Central Excise Rules, 2002.

17. Shri Maheshbhai Ugarchand Patel, Proprietor and Shri Hasmukhbhai Ugarchand Patel, Authorised Signatory of M/s. Hasmukh Tobacco Products were also called upon to show cause to the said Commissioner of Central Excise, Ahmedabad-II as to why penalty should not be imposed upon them under Rule 26 of the Central Excise Rules, 2002.

PROCEEDINGS BEFORE HON'BLE SETTLEMENT COMMISSION

18. The said assessee, vide letter dated 16.06.2015, informed that they proposed to file an application before the Hon'ble Settlement Commission seeking settlement of the case. Thereafter, vide another letter dated 03.08.2015, they submitted copy of acknowledgement by Hon'ble Settlement Commission, Additional Bench, Mumbai in token of receipt of their application filed under Section 32E of the Central Excise Act, 1944. After hearing the applicant and the department, Hon'ble Settlement Commission, Mumbai issued Order No. 121/FINAL ORDER/CEX/WDN/2016 dated 29.07.2016 for settlement of the case as follows: -

- (i) Central Excise duty: Central Excise duty payable is Rs. 300.02 Lakhs. The applicant has paid only Rs. 1,39,60,836/-. The remaining duty of Rs. 1,60,39,166/- should be paid by the applicant within 30 days from the receipt of the order;
- (ii) Interest: The interest on the above duty of Rs. 300.02 Lakhs as per the rates under Section 11AA of the Central Excise Act should be calculated and communicated by the Revenue (Commissioner of Central Excise, Ahmedabad-II) to the applicant within 15 days of receipt of the order. The applicant has paid only part amount of interest of Rs. 1,35,000/- . The remaining interest should be paid by the applicant within 15 days of receipt of communication from the Revenue, i.e. Commissioner of Central Excise, Ahmedabad-II.
- (iii) Penalty: The Bench imposed a penalty of Rs. 25,00,000/- on the applicant M/s. Hasmukh Tobacco Products and grants them immunity from payment of penalty in excess of the said amount.
- (iv) The seized PPM valued at Rs. 1,25,000/- is ordered to be confiscated to Government. However, Bench gave the applicant an option to redeem the same on payment of fine or Rs. 10,000/- in lieu of confiscation.
- (v) Prosecution: Subject to payment of above penalty, the Bench grants the applicant immunity from prosecution under Section 9 of the Central Excise Act, 1944 so far as this case is concerned.

19. While issuing the above Final Order, Hon'ble Settlement Commission observed *inter alia*, that the scheme of the said Tobacco Rules provides that the duty liability is dependent on the number of PPMs installed and working in the factory and the duty varies depending on the maximum speed of PPM, MRP of the notified goods and other parameters for which the assessee have to submit to the department the exact declaration of the number of PPM installed by him; that no provisions have been made to go into the quantity of raw materials or quantity used or quantity of finished goods manufactured during a particular period or other factors like electricity

consumption to determine the duty liability under the said Tobacco Rules; that there is no dispute on any other factors of the subject case except the date of installation of one extra undeclared PPM in the factory of the said assessee; that the department alleged that the extra PPM was installed and started working from November, 2013 whereas the said assessee pleaded that it was installed in August, 2014 and alternatively, the said assessee was ready to pay duty treating the deeming operation of machinery with effect from 01.04.2014; that although Shri Hasmukh Patel and Shri Mahesh Patel of the said assessee had earlier stated that the undeclared machine was purchased on 01.08.2014, they subsequently accepted its purchase in October, 2013 when confronted with the evidences gathered from the supplier of the said PPM, transporter, etc.; that the strong evidence coming out from the statements of various persons, it was obvious that the extra PPM was purchased, delivered, installed and made operational in the last week of October, 2013 and hence the demand of duty from November, 2013 as proposed in the SCN was correct as the same was not paid by the applicant; that there were no retraction of the statements except in case of the tempo owner where the said assessee had furnished retraction after almost two years of recording the statement and that too the retraction has been given to the Settlement Commission on first instance; that such belated retraction is to be considered as an afterthought; and that the retraction after several months will only reinforce the conclusion that the confession was voluntary for which the case of *Pradip KR Dutta Vs CC – 2003 (152) ELT 84(T)* having the same effect so also the decision of Hon'ble High Court of Madras in *ACC Vs. Govindaswamy Ragupathy – 1998 (98) ELT 50 (Madras)* and that of Hon'ble Supreme Court in case of *Naresh J Sukhawani Vs UOI – 1996 (83) ELT 258 (SC)*.

20. Hon'ble Settlement Commission had also observed that the submission made by the said assessee that they had used the undeclared PPM only intermittently, has no legal sanctity as it was immaterial whether they used it for 24 hours or for 30 days, etc.; that Rule 18(2) is applicable for the goods cleared from the unit which is not registered with Central Excise whereas in the present case the assessee is registered; that as per the provisions of Rule 18(2) duty could be demanded since inception of the said Tobacco Rules or applying more rationally, since the factory started manufacturing i.e. 01.01.2013 and the said rule provides that this can be done unless evidence to the contrary is provided to the satisfaction of the Central Excise Officer; and that in the present case, it has been established by evidence that extra PPM was installed and has been functioning since November, 2013, the duty can be demanded only from November, 2013 onwards and not before that. Accordingly, it was held that the duty of Rs. 300.02 Lakhs short paid by the applicant is liable to be recovered from him under section 11A(4) of the Central Excise Act, 1944 along with interest on the said amount in terms of section 11AA of the Central Excise Act. Since the applicant evaded duty by reason of fraud, suppression of facts from the department and contravention of the said Tobacco Rules with intent to evade duty, he is also liable for penalty in terms of Section 11AC(1)(a) of Central Excise Act, 1944 and the seized PPM valued at Rs. 1,25,000/- is liable to be confiscated under provisions of Rule 25 of the Central Excise Rules, 2002.

PROCEEDINGS BEFORE HON'BLE HIGH COURT OF GUJARAT

21. The said assessee filed a Special Civil Application No. 16871 of 2016 before the Hon'ble High Court of Gujarat against the aforesaid Order dated 29.07.2016 of Hon'ble Settlement Commission. Hon'ble High Court issued an interim Order dated 04.10.2016 directing the said assessee to deposit the duty amount. As per letter F.No. CCE-II/Div-V/Adj-Misc/12-13 dated 29.11.2016 issued by the Assistant Commissioner of Central Excise, Division-V, Ahmedabad-II and further letter of even number dated 24.10.2017 issued by the Deputy Commissioner, GST Division-VII, Ahmedabad-North, copies of which are available on record, the said assessee has paid up the entire amount of duty of Rs.300.02 Lakhs and Redemption Fine of Rs. 10,000/- imposed by the Hon'ble Settlement Commission.

22. Hon'ble High Court of Gujarat had passed Order dated 12.10.2017 in the aforesaid SCA No. 16871 of 2016 wherein it was observed that: -

"35. In light of the submissions qua the Settlement Commission coming to the conclusion on a premise that as per Tobacco machine, Commission is not examining the aspect of consumption of electricity, raw material etc., would paid into insignificance is not borne out by close perusal of the Rules, more specifically Rule 6(iii), who has by way of employment of language i.e. 'operating machine', the said would presupposes that there is merely an existence of machine in the factory would in own strength is not making authority entitled to count the machine capacity for slapping the duty and word 'operating machine' would receive to take into consideration only the operating machine and even there is a specific plea that machine was not operating, it was bounden duty casted upon to clarify and examine the material placed on record and said material are available or not in that regard, the commission has to give its findings.

36. We are of the view that matter is required to be remanded back to the Settlement Commission for its reconsideration and accordingly, it is ordered that matter is required to be remanded back to the Settlement Commission for the purpose of its decision on the aspect of 'operating machine'. The machine, which was said to have been there in a factory is operative or not is required to be decided and for that purpose, we are remanding the matter back to the Settlement Commission. It would be open to the authority to come to the its own conclusion. The money, which is paid by way of interim arrangement, was remain with the authority and will be subject to final outcome after remanding the matter.

37. In the result, the petition is allowed to aforesaid extent. Rule is made absolute to aforesaid extent. There shall be no order as to costs."

REMAND PROCEEDINGS BEFORE HON'BLE SETTLEMENT COMMISSION

23. In pursuance of the aforesaid order dated 12.10.2017 passed by Hon'ble High Court, Hon'ble Settlement Commission, Mumbai re-examined the matter and passed Order No. 31/FINAL ORDER/CEX/KNA/2018 dated 25.07.2018 by sending back the application filed by M/s. Hasmukh Tobacco Products under Section 32-L of the Central Excise Act, 1944 to the proper officer (Commissioner of GST & Central Excise, Ahmedabad-North) with directions to dispose of the case in accordance with the provisions of the Central Excise Act, 1944 as if no application under Section 32E had been made.

24. While passing the above Final Order dated 25.07.2018, Hon'ble Settlement Commission observed *inter alia*, that although the applicant had initially in their application dated 28.07.2015 accepted a duty of Rs. 66,41,000/-, however in the aftermath of Hon'ble High Court of Gujarat order dated 12.10.2017 the applicant filed revised application for settlement on 15.05.2018 in which they revised their accepted duty as Rs. 29.59 Lakhs; that the applicant stated that in the earlier order No. 121/Final Order/CEX/WDN/.2016 dated 29.07.2016 the Commission had failed to deal with the submissions made by the applicant.; that duty under the compounded levy scheme can only be levied under the said Rules on installation of machines; that installation is of primary and fundamental importance; and that the question of recovering double duty can only arise if it is established that two machines were installed and working for a given period and burden of proving the same lies on the department. The applicant also stated that the entire case is based on statements recorded by the Central Excise officers and there is no physical or substantial evidence with the department other than the statements against the applicant. They have also furnished the gist of all statements recorded in the case, and stated that there are inconsistencies in recording the same such as the statements of Shri Harish Kanadia and Shri Santosh Patel were shown only to their Authorised Signatory Shri Hasmukh Patel and not shown to the Proprietor Shri Mahesh Patel; that their submissions regarding raw material and electricity consumption, manpower supply etc. were not considered by the officers; that the diaries seized from Shri Harish Kanadia did not have any specific entry for sale of PPM to the applicant during 2013; and that the diary contained details regarding repairing of PPMs. They have also submitted that the third party statements cannot be considered valid under Section 9D unless corroborated by them; that the Central Excise EA-Audit was conducted for the period from June, 2013 to May, 2014 wherein the officers undertook tour of the manufacturing process, but no undeclared machine was found by them; that they had increased the MRP of pouches from Rs. 3 to Rs. 4 only with effect from 01.09.2014; that the said Tobacco Rules provides for duty liability only on installed machine and not from the date of purchasing the machine; that they accepted the duty liability for the month of August, 2014 only as the duty for September, 2014 was paid by them in normal course; that Section 32F impose a duty upon the Commission to examine all the evidences placed before them; that they have already deposited duty of Rs. 300.02 Lakhs under protest along with interest of Rs. 1.45

Lakhs; and that since they already deposited excess duty than what is actually payable by them, they may be granted refund of the remaining amount.

25. While passing the said order, Hon'ble Settlement Commission has examined the entire provisions of the said Tobacco Rules and observed that the crucial question that needs to be determined is when was the impugned additional machine which was found in the factory during search on 03.09.2014 was actually installed in the factory; that the Revenue alleged that the machine was installed in the factory sometime in the last week of October, 2013 and hence demanded duty from November, 2013 onwards whereas the applicant claimed that the machine was installed only from August, 2014; and that there has been subsequent flip flop in the statements of Shri Hasmukh Patel. Hon'ble Settlement Commission further observed that the applicant in their submission dated 15.07.2016 had made an alternate submission that: "*Alternatively we would like to say that, in light of the above and our earlier submissions the department has failed to discharge its onus of proving that the installation of machine was done in October 2013 and its evidences in the form of statements are not reliable and complete hence Rule 18(2) of Chewing Tobacco and Unmanufactured Tobacco Machines (Capacity Determination and Collection of Duty) Rules, 2010 may be invoked and demand be confirmed from April 2014 only and not before that*"; and that the applicant was thus open even open to accepting duty liability from April 2014 in spite of their claim of the additional machine being operational from August, 2014. Settlement Commission also observed that the applicant has submitted raw materials and electricity consumption to substantiate their claim of not running the machine till August, 2014, so also the Audit Report FAR No. 45/2014 dated 11.08.2014 which did not mention any additional PPM operating in their premises for the audit period; that the statements and affidavits which were relied upon by the Revenue as well as by the applicant were having many flip flops and inconsistencies; that these facts show that the case involves vastly different and contesting claims made by both the parties; that there are no documentary evidences available on record to show sale, purchase, transport, payment, installation etc. of the additional machine and all the transactions of sale purchase, transportation, installation and repair charges were all entered into between the concerned parties only in cash without rejecting these transactions in their books of accounts; that the case rests solely on statements of concerned persons which, as mentioned above, have been brought into question by the applicant; that all these statements will be required to be tested and verified through the rigorous process of cross-examinations; and that similarly, the affidavits of the employees and the transporter will also have to be examined individually as to their veracity, tenability etc. for which fair opportunities to all concerned persons will have to be afforded to arrive at a conclusion. It is also observed that during the said *de-novo* proceedings, the said assessee had pleaded that the installation of the additional PPM was in August, 2014 and as a consequence they have accepted the Central Excise duty liability of Rs. 29.59 Lakhs for the said month along with interest of Rs. 1.35 Lakhs; and that for the month of September, 2014 they have stated that the duty liability of Rs. 36.82 Lakhs has been paid in the normal course and that they had submitted Form-1 & Form-2 for the said month along with Challan for the payment of duty for two machines

to the jurisdictional Central Excise office. In addition to the disputed date of installation, the Hon'ble Settlement Commission further noticed that the applicant had been making differing claims on "duty accepted" by them; and that initially they accepted a duty of Rs. 66.41 Lakhs which later, they offered to accept the duty from April, 2014 which would work out to Rs. 176.47 Lakhs and in the aftermath of the High Court's order dated 12.10.2017, an amount of Rs. 29.69 Lakhs only, thus reflecting their varying position for settlement of the case which is under the provisions of law requires full and true disclosure of duty liability. Accordingly, it was held that since the case would necessarily involve proper appreciation of facts and circumstances based on documents and records available with the applicant and the Revenue and correct interpretation of law, in particular, the provisions of the said Tobacco Rules and Notification No. 16/2010-CE dated 27.02.2010 as amended by Notification No. 14/2012-CE dated 17.03.2012 and Notification No. 17/2014-CE dated 11.07.2014, the Bench was of the considered view that the case should go through the rigor of adjudication proceedings before the appropriate Revenue authority, for determination of the disputed facts, and hence the case did not merit order for settlement in terms of Section 32F of the Central Excise Act, 1944.

DEFENCE REPLY DURING ADJUDICATION PROCEEDINGS

26. The said assessee, vide letter dated 24.06.2019 filed their defence reply in pursuance of the Order No. 31/Final Order/CEX/KNA/2018 dated 25.07.2018 passed by the Hon'ble Settlement Commission, referred supra. In their reply, they have *inter alia*, stated that the allegations contained in the SCN were contrary to the provisions made for the compounded duty leviable on notified goods, i.e. unmanufactured tobacco under Section 3A of the Central Excise Act, 1944 and the said Tobacco Rules; that the duty can only be levied under the said Rules on installation of machines for which the burden of proof lies with the department; that the entire case is based on the statements recorded from various persons with no physical or substantial evidences available with the department; that there are contradictions in this regard as the third party statements were not shown to Shri Maheshbhai Patel, Proprietor of the said assessee; that their submissions with regard to consumption of raw materials or electricity were never considered by the department; that the diaries referred to in the statement dated 09.09.2014 of Shri Haresh Kanodia were not having any entries regarding sale of PPM as alleged in the SCN, but it shows details of repairing carried out on other PPMs; that Section 9-D of the Act provides that third-party statements cannot be held valid unless the same is accepted by them and hence they would require cross-examination of nineteen (19) different persons including the officers and panch witnesses who conducted the panchnama proceedings.

27. The said assessee relied on the decision of Tribunal *in re Goyal Tobacco Co. Pvt. Ltd. Vs. Commissioner of Central Excise & Service Tax, Jaipur-I* cited at 2017 (348) ELT 720 (Tri.Del) to support their case from the purview of installation of PPM. They also cited the judgment of Hon'ble Supreme Court in *Vinod Solanki Vs. UOI* in Civil Appeal No. 7407 of 2008

decided on 18.12.2009 and reported in 2009 (233) ELT 157 (SC) which speaks about the admissibility of retracted statements etc. Further, they contended that no stock taking of raw materials, packing materials or finished goods were done during the panchnama proceedings; that they had brought the additional PPM on 01.08.2014 and installed it only in the middle of August, 2014 and prior to that there was only one PPM in working condition as is evident from the consumption data for raw materials, electricity, etc. They also relied upon the order No. A/11207-11219/2013 dated 26.09.2013 passed by the Hon'ble CESTAT, Ahmedabad in the case of *Nova Petrochemicals Vs. CCE, Ahmedabad-II* which is relied upon by the Tribunal in the case of *Mahesh Silk Mills Vs. CCE, Mumbai reported at 2014 (304) ELT 703 (Tri.Ahd)* in which the departmental tax appeal was dismissed by Hon'ble High Court of Gujarat reported at *Commissioner Vs. Mahesh Silk Mills - 2015 (319) ELT A52 (Guj)* to argue that clandestine clearances should be proved by the department through tangible evidences. They also submitted that Hon'ble High Court of Rajasthan had examined the duty liability with reference to another compounded levy scheme in the case of *Jupiter Industries and Another in Tax Reference Case No. 28 of 2004, decided on 07.04.2006 cited at 2006 (206) ELT 1195 (Raj)* holding that the manufacture of goods is a condition precedent for charging excise duty without which no levy can be made. The said assessee has reiterated their submissions regarding the consumption of raw material and electricity, Audit Report FAR No. 45/2014 dated 11.08.2014 which mentioned no presence of any additional PPM, etc. to present their case. They also contended that when they filed appeal before Hon'ble High Court, they had deposited Central Excise duty of Rs. 3,00,02,002/- along with interest of Rs. 1,45,000/-. Since they had admitted duty liability of only Rs. 29.59 Lakhs, they requested for grant of refund of Rs. 2,71,88,002/- along with applicable interest amounts as per the Act.

PERSONAL HEARING AND CROSS-EXAMINATION

28. The said assessee was offered personal hearing in the matter on 19.08.2019 which was rescheduled to 18.09.2019 on their request. On 18.09.2019, Shri Lilesh Sawant, Advocate along with Shri PP Jadeja and Shri GB Patel, both Authorised Representatives, Shri Hasmukh Patel, Authorised Signatory and Shri Maheshbhai Patel, Proprietor appeared on behalf of the said assessee. They reiterated their earlier submissions dated 24.06.2019 besides highlighted that the adjudication is in pursuance of order dated 12.10.2017 passed by the Hon'ble High Court of Gujarat and order dated 25.07.2018 passed by the Hon'ble Settlement Commission; that in the order of Hon'ble Settlement Commission, it is mentioned at Para 7.15 that the case involves vastly different and contesting claims by both the sides; and that the case rests solely on statements of the concerned persons and all these statements will be required to be tested and verified through rigorous process of cross-examination including affidavit of the employees of the firm. The representatives have requested for the cross-examination of Shri Hasmukhbhai Patel, Authorised Signatory of the said assessee; Shri Harish Kanadia @ Rajubhai, Proprietor of M/s. Vaibhav

Packaging; Shri Santoshbhai Patel, resident of Amraiwadi, Ahmedabad and S/Shri Bhikaji Thakur, Jayantibhai Khant and Shailesh Thakor, all employees of Hasmukh Tobacco Products.

29. The representatives of the said assessee pointed out that in the statements of their proprietor and authorized signatory there are variations and the same is also pointed out while recording statements of these persons on 21.10.2014 which are relied upon in the SCN; that the statements of Shri Hasmukhbhai Patel and Shri Maheshbhai Patel, recorded on crucial days of investigation on 03.09.2014 (date of search) and 21.10.2014 (date of arrest) mentioned the date of purchase of additional PPM as 01.08.2014, whereas investigation laid emphasis on the statements recorded on 12.09.2014 and 02.01.2015 wherein these persons were forced to state the date of purchase as 'November, 2013'; that similarly, the cost of renovating additional PPM was also earlier correctly stated as Rs. 90,000/- which was subsequently wrongly mentioned as Rs. 1,25,000/-; that the diaries seized from the premises of M/s. Vaibhav Packaging have been relied upon in the SCN to mention the date of purchase as 'last week of October, 2013', however, the said seized diaries do not carry any mention about the purchase date of PPM; that the details of charging Rs. 21,460/- mentioned on one page of the said diary under their name 'Hasmukh Tobacco' in fact indicated the details of a '*dhana dal* packing machine' and not tobacco PPM and hence the proprietor of M/s. Vaibhav Packaging required to be cross-examined to prove veracity of the dairy entries; and that the SCN itself was not clear about the actual number of PPM found in the factory as there are contradictions in Page 19, 21 and 31 thereof. The representatives also relied upon the judgment of *Nova Petrochemicals Vs CCE, Ahmedabad-II* wherein it was held that clandestine clearances have to be proved by tangible evidences. They also brought on record the data of electricity consumption during the period from November, 2013 to November, 2014 which indicates average consumption of approx. 4000 units per month except during September, 2014 where the consumption was 10000 units. They reiterated that on 10.06.2014 the central excise officers had conducted audit of their factory wherein no additional PPM was found by them. They also argued that the SCN proposed penalty against the noticee firm under Rule 25 of Central Excise Rules, 2002 which is not applicable in the present case as Rule 18 and Rule 19 of the said Tobacco Rules provide specific penalty provisions for violations. They also requested for cross-examination of persons and opportunity for filing final submissions.

30. The said assessee was offered another personal hearing on 09.10.2019 which was attended on their behalf by Shri Lilesh Sawant, Advocate, Shri P.P. Jadeja and Shri G.B. Patel, both Authorised Representatives, Shri Hasmukhbhai Patel, Authorised Signatory and Shri Maheshbhai Patel, Proprietor. They requested to call for the original relied upon documents including the diaries seized from the premises of M/s. Vaibhav Packaging, Ahmedabad. During the proceedings, following persons were cross-examined: -

- (i) Shri Patel Santoshbhai Ishwarbhai, Driver of Tempo No. GJ-01-BX-9106
- (ii) Shri Haresh Pravinbhai Kanadia, Proprietor of M/s. Vaibhav Packaging

- (iii) Shri Jayantibhai Manaji Khat, Labourer of M/s. Hasmukh Tobacco Products
- (iv) Shri Bhikhaji Poonaji Thakore, Labourer of M/s. Hasmukh Tobacco Products
- (v) Shri Shaileshbhai Manubhai Thakore, Labourer of M/s. Hasmukh Tobacco Products.

31. **Cross-examination of Shri Santoshbhai Ishwarbhai Patel, Driver of Tempo No. GJ-01-BX-9106:** During his cross-examination, Shri Patel Santoshbhai Ishwarbhai stated that he is the owner-cum-driver of Tempo No. GJ-01-BX-9106 and does not maintain any records for his daily business; that he knew Shri Harish Pravinbhai Kanadia @ Rajubhai, owner of M/s. Vaibhav Packaging engaged in manufacturing, repairing and servicing machinery; and that he did not know about the panchnama dated 09.09.2014 recorded by the central excise officers. During the proceedings he was shown his own statement dated 10.09.2014 and after reading the same, he stated that the same was given as per directions from Shri Rajubhai, according to which he had loaded one pouch packing machine on his tempo from the factory of Shri Rajubhai somewhere during the last week of October, 2013 and had delivered the same at the factory of M/s. Hasmukh Tobacco Products, Gota, Ahmedabad at around 08.00 pm on the same day; that the said statement dated 10.09.2014 was not correct; that he was not maintaining any records and he was not remembering the actual facts; that however, he wanted to state that the said machine was loaded in his tempo No. GJ-01-BX-9106 on 01.08.2014 and was delivered by him at the factory of M/s. Hasmukh Tobacco Products, Gota, Ahmedabad; that in token of these truthful facts, he had filed an affidavit on 12.07.2015 which he submitted during the proceedings. During the cross-examination, he was shown the statement of Shri Maheshbhai Patel, Proprietor of M/s. Hasmukh Tobacco Products. After reading the same, he stated that the date of delivery of PPM was correctly mentioned by Shri Maheshbhai Patel as 01.08.2014.

32. **Cross-examination of Shri Hareshbhai Pravinbhai Kanadia alias Rajubhai, Proprietor of M/s. Vaibhav Packaging:** During his cross-examination, Shri Harish Kanadia stated that his factory is engaged in servicing, repairing and manufacturing of PPMs; that he knew both Shri Hasmukhbhai Patel and Shri Maheshbhai Patel who are having factories for packing *dana dal* and tobacco products; that he had supplied tobacco pouch packing machine to them; that he had given a statement before Central Excise officers in connection with two diaries recovered from his factory during their search and panchnama proceedings conducted on 09.09.2014; that the said diaries contained details of his repairing and service of PPMs; and that he was using the diaries only as notebooks and was not maintaining the same as diaries for day-to-day events and hence the dates printed on the diary would not match with the details written by him on such pages. He further stated that Shri Maheshbhai Patel had brought an old PPM to his factory which was not in running condition; that he had repaired the same with new spare parts so as to make it in running condition; that the repaired PPM was sent by him to M/s. Hasmukh Tobacco Products on 01.08.2014 through one tempo owned by Shri Santosh Patel; and that he had spent Rs. 40,000/- on the said PPM which included cost of spare parts amounting to Rs. 21,460/- details of which are

written on the said diary. He also explained the contents on other pages of the seized diaries, none of which pertained to the said assessee. On being shown his earlier statement recorded on 09.09.2014, Shri Harish Kanadia stated that the same was not truthful; that he had wrongly stated earlier that he had supplied one PPM to M/s. Hasmukh Tobacco Products during October, 2013 which was valued at Rs. 1,25,000/- and that the said amount was taken by him in cash; and that his present statement is true and correct as the said PPM was actually supplied after carrying out repair works for Rs. 40,000/- and that the same was delivered on 01.08.2014. He also submitted one affidavit dated 10.07.2015 retracting his earlier statement dated 09.09.2014 as above. He also stated that the second PPM was started functioning during the second week of September, 2014.

33. **Cross-examination of Shri Jayantibhai Manaji Khant, Labourer of M/s. Hasmukh Tobacco Products:** - He stated that due to frequent breakdown of the only PPM which was installed in the factory of M/s. Hasmukh Tobacco Products, they had received another PPM which was brought to the factory on 01.08.2014; that the said additional PPM was brought in one loading tempo and was unloaded by himself along with two other labourers, Shri Shaileshbhai Thakor and Shri Bhikhaji Thakor. He also submitted an affidavit dated 11.07.2015 to substantiate his statement. He also stated that the second PPM was started functioning during the second week of September, 2014.

34. **Cross-examination of Shri Bhikhaji Poonaji Thakor, Labourer of M/s. Hasmukh Tobacco Products:** - He also stated on the aforesaid same lines that that due to the frequent breakdown of the only PPM which was installed in the factory of M/s. Hasmukh Tobacco Products, they had received another PPM which was brought to the factory on 01.08.2014; that the said additional PPM was brought in one loading tempo and was unloaded by himself along with two other labourers, Shri Shaileshbhai Thakor and Shri Jayantibhai Khant. He also submitted an affidavit dated 11.07.2015 to substantiate his statement. He also stated that the second PPM was started functioning during the second week of September, 2014.

35. **Cross-examination of Shri Shaileshbhai Manubhai Thakore, Labourer of M/s. Hasmukh Tobacco Products:** - During his cross-examination, Shri Shaileshbhai Thakore stated that earlier there was only one PPM installed in the factory of M/s. Hasmukh Tobacco Products; that they had received another PPM which was brought to the factory on 01.08.2014; that the said additional PPM was brought in one loading tempo and was unloaded by himself along with two other labourers, Shri Bhikhabhai Thakor and Shri Jayantibhai Khant. He also submitted an affidavit dated 11.07.2015 to substantiate his statement. He also stated that the second PPM was started functioning during the second week of September, 2014.

36. During the aforesaid personal hearing on 09.10.2019, Shri Lilesh Sawant, Advocate stated that the cross-examination, as detailed above, substantiated their submission that the initial statement recorded by the department were not fully correct and cannot be considered evidences

for slapping duty evasion against the noticee party. He also requested to drop the proceedings. Alternatively, Shri Sawant also requested that in case of any duty, penalty or interest would be determined as payable by them in this case, the same may be appropriated from the payments/deposits which they have already made during the proceedings of the case. The representatives also assured that they will file a final submission in the matter within two weeks. They had nothing more to say in the matter.

37. Subsequently, Shri Maheshbhai Patel, Proprietor of the said assessee met the adjudicating authority in his office on 17.10.2019 and submitted a letter stating that the subject case rests solely on the statement of Shri Hasmukhbhai Patel, authorised signatory of the said factory and since his statements are crucial in the case, he is required to be cross-examined. He therefore, requested to allow cross-examination of Shri Hasmukhbhai Patel on 21.10.2019 which was also allowed. Accordingly, Shri P.P. Jadeja and Shri G.B. Patel, both Authorised Representatives and Shri Maheshbhai Patel, Proprietor appeared on 21.10.2019 on behalf of the said assessee during which Shri Hasmukhbhai Patel was cross-examined.

38. **Cross-examination of Shri Hasmukhbhai Patel, Authorised Signatory of M/s. Hasmukh Tobacco Products:** - During his cross-examination, Shri Hasmukhbhai Patel stated *inter alia* that the officers of Central Excise had conducted search at their factory on 03.09.2014 and had subsequently recorded his statements on 03.09.2014, 12.09.2014, 21.10.2014 and 02.01.2015; that the statement of Shri Mahesh Patel, Proprietor of the said firm was also recorded on 21.10.2014 and 02.01.2015; that both of them were arrested on 21.10.2014 on the ground that they had intent to evade duty of Central Excise; and that they had been granted bail by Hon'ble High Court in this case. He further stated that only one PPM was functional during the day of search and another PPM was not functional; and that he had given his statement on 03.09.2014 that the said additional non-functional PPM was purchased by them for Rs. 50,000/- and got repaired by Shri Rajubhai (Shri Harish Kanadia) on payment of Rs. 40,000/- and the same was brought to his factory by a loading tempo on 01.08.2014, the facts of which were correct. He also stated that the said additional PPM was to make operational from the second week of September, 2014; that they had already advised their accountant to file necessary declarations in the department for starting the said additional PPM and for increasing their MRP from Rs. 3 to Rs. 4 per pouch, but he forgot to file the same; that he had reiterated these facts again on 21.10.2014; and that they had no intention to evade central excise duty. Shri Hasmukh Patel was shown his own statements dated 12.09.2014 and 02.01.2015, panchnama dated 09.09.2014 recorded at M/s. Vaibhav Packaging, statement of Shri Harish Kanadia recorded on 09.09.2014 and a statement of Shri Santosh Patel, Tempo Driver recorded on 10.09.2014, and in this regard, he stated that he was shown only the statement of Shri Harish Kanadia dated 09.09.2014 and not shown the diaries seized from him; that Shri Harish Kanadia had wrongly stated that he had supplied one PPM to our factory during the month of October, 2013; that his own statement dated 12.09.2014 was also recorded under threat of arrest and was not correct; that however, the subsequent statements given

by both he as well as his brother Shri Mahesh Patel on 21.10.2014 were correct that the PPM was brought to their factory on 01.08.2014; that the statement of Shri Santosh Patel, Tempo Driver recorded on 10.09.2014 was also not correct; that he was never shown the diary seized from the factory of M/s. Vaibhav Packaging wherein it was written on page 375 about the '*repairing and servicing of Sureshbhai's machine*'; that on being shown the said details, he stated that he had purchased one old machine from one Sureshbhai for Rs. 50,000/- which was got repaired at the factory of Shri Harishbhai Kanadia for Rs. 40,000/- and thus he had paid total Rs. 90,000/- in this regard; and that he was using the said diary only as a notebook and not as a date-wise diary. Shri Hasmukhbhai further mentioned about an affidavit which he had submitted during the proceedings dated 09.10.2019 which contained his statement that the subject PPM was actually purchased on 01.08.2014. During the proceedings, he has gone through the statements of Shri Maheshbhai Patel, Proprietor of the said assessee recorded on 03.09.2014, 21.10.2014 and 02.01.2015 and stated that the additional PPM was not operative as on the date of panchnama dated 03.09.2014; that they had already made duty payment of Rs. 15,00,000/- on 03.09.2014, Rs. 21,00,000/- on 08.09.2014 and Rs. 3,60,836/- on 11.09.2014 totalling Rs. 39,60,836/- and had declared the details to the department in Form-2; that they are ready to pay the duty involved for the month of August, 2014; and that Shri Maheshbhai Patel was not shown all documents and statements while recording his statements, due to which he could not bring out the entire facts on records earlier.

39. During the personal hearing, the Representatives of the said assessee assured that a final submission in the matter would be filed in the matter within ten days, and stated that they have nothing more to say in the matter.

FINAL SUBMISSION

40. The said assessee filed their final submission vide letter dated 15.11.2019 wherein they reiterated their written and oral submissions, besides *inter alia* stated that they are not liable to pay differential duty for seized PPM except for the month of August 2014 which would be Rs. 29.59 Lakhs, as they had already paid duty for the month of September 2014 in normal course; that the proposal to impose penalty against firm under Rule 25 of Central Excise Rules, 2002 is not legal as Rule 18 and Rule 19 of the said Tobacco Rules 2010 specifically provides for confiscation and penalty; that all the witnesses who were cross-examined during the proceedings, have categorically stated that the additional PPM was brought to their factory on 01.08.2014 and the subject SCN was not issued after considering the statement of Shri Maheshbhai Patel and Shri Hasmukhbhai Patel who had also mentioned the same date; that the SCN also did not consider evidences such as statement of electricity consumption, raw material consumption, audit report, etc.; that in view of their submissions, the SCN is required to be dropped *ab initio*; and that alternatively, assuming but not accepting, duty liability may be considered for the month of August, 2014 as Rs. 29.59 Lakhs since the PPM was brought on 01.08.2014 and the same along

with 25% penalty may be appropriated from the amounts which they have already deposited, besides interest may also be adjusted from the balance amount of their deposit.

41. Shri Hasmukhbhai Ugarchand Patel, Authorized Signatory of M/s. Hasmukh Tobacco also tendered his final submission vide letter dated 15.11.2019 wherein he also reiterated the earlier contentions, besides *inter alia* stated that the replies filed by his firm may also be considered for his defense and as such, he was not responsible for the activities of his firm and hence not liable for any penalty; that they have inadvertently missed to inform the department about the receipt of another PPM in their factory on 01.08.2014; and that no penalty can be imposed upon him under Rule 26 of the Central Excise Rules, 2002 for the alleged contraventions committed under the said Tobacco Rules, as these rules otherwise specifically provide for penalty and confiscation.

42. Shri Maheshbhai Ugarchand Patel, Proprietor also furnished his final submission vide letter dated 15.11.2019 reiterating the submissions made by the said assessee besides *inter alia*, stating that the entire SCN is erroneously issued without considering the facts available on records and since he has not suppressed any facts with intent to evade duty, no demand of duty could be made nor any penalty can be imposed upon him; that proprietary concerns are not different from the proprietor and hence separate penalty cannot be proposed or imposed on him in the present case; that he was not shown crucial documents such as statements of various persons and the seized diaries etc. on the basis of which the department has made out the case; and that the proposal to impose penalty against firm under Rule 26 of Central Excise Rules, 2002 is not legal as Rule 18 and Rule 19 of the said Tobacco Rules 2010 specifically provides for confiscation and penalty for contraventions of the said rules.

DISCUSSION AND FINDINGS

43. I have carefully gone through the records of the case including the show-cause-notice dated 19.02.2015, original and *de-novo* proceedings before the Hon'ble Settlement Commission which terminated under Final Order dated 25.07.2018, Order dated 12.10.2017 passed by the Hon'ble High Court of Gujarat in SCA No. 16871/2016, written and oral submissions made by the said assessee at various stages of the proceedings, and records of personal hearings and cross-examinations of different persons referred supra. Accordingly, I find that the limited issue which requires determination in this case is the dutiability of one additional pouch packing machine (PPM) which was found within the factory premises of M/s. Hasmukh Tobacco Products during the course of a search operation conducted by the Central Excise Officers under panchnama dated 03.09.2014. Although initially there were some doubts about the actual MRP of Rs. 4/- per pouch charged by the said assessee vis-à-vis their declared MRP of Rs. 3/- that would have caused higher amount of duty, subsequent investigation revealed that such higher MRP was not charged previously and that the said assessee had declared the increase of MRP for the month

of September, 2014. Therefore, the SCN did not contain any allegations of contravention on declaring the MRP.

44. I find that the present case has come up for adjudication after exhausting proceedings before the Hon'ble Settlement Commission and Hon'ble High Court of Gujarat. Based on the show-cause-notice dated 19.02.2015, the said assessee had initially filed an application dated 28.07.2015 before the Hon'ble Settlement Commission, Mumbai seeking settlement of the case under Section 32-E of the Central Excise Act, 1944 [*the 'said Act', for brevity*]. As against the total demand of Rs. 300.02 Lakhs involving the period from November-2013 to September-2014, they had admitted liability of only Rs. 66.41 Lakhs being duty payable for August-2014 (Rs. 29.59 Lakhs) and September-2014 (Rs. 36.82 Lakhs). The case was ordered for settlement vide Final Order No. 121/CEX/WDN/2016 dated 29.07.2016 on payment of the entire duty of Rs. 300.02 Lakhs along with applicable interest, penalty of Rs. 25 Lakhs and a redemption fine of Rs. 10,000/- in lieu of confiscation of the seized PPM. The Bench granted immunity from prosecution subject to payment of the penalty.

45. However, the said assessee preferred an SCA No. 16871/2016 before Hon'ble High Court of Gujarat seeking to set aside the aforesaid Final Order passed by Settlement Commission, claiming that they are entitled for settlement of the case for Rs. 66 Lakhs as originally accepted by them. While considering the SCA, Hon'ble High Court discussed at length the provisions of law that guide settlement of cases under Section 32-E of the said Act, besides observed that it was the bounden duty casted upon to clarify and examine the materials placed on record and the said materials are available or not in that regard, the Commission has to give its findings; and that merely an existence of a machine in the factory would in own strength is not making authority entitled to count the machine capacity for slapping the duty and the word 'operating machine' would receive to take into consideration only the operating machine. Accordingly, Hon'ble High Court remanded the case back to the Settlement Commission for the purpose of its decision on the aspect of 'operating machine', i.e. the machine which was said to have been there in a factory was operative or not.

46. During the remand proceedings, Hon'ble Settlement Commission examined the contours of the said Tobacco Rules, and observed that since the case would necessarily involve proper appreciation of facts and circumstances based on documents and records available with the applicant and the Revenue and correct interpretation of law, in particular, the provisions of the said Tobacco Rules and Notification No. 16/2010-CE dated 27.02.2010 as amended by Notification No. 14/2012-CE dated 17.03.2012 and Notification No. 17/2014-CE dated 11.07.2014, the case should go through the rigor of adjudication proceedings before the appropriate Revenue authority for determination of the disputed facts, and hence the case did not merit an order for settlement in terms of Section 32-F of the said Act. Therefore, Settlement Commission passed Final Order No. 31/CEX/KNA/2018 dated 25.07.2018 by sending back the application filed by the said assessee

under Section 32-L of the said Act with directions to dispose of the case in accordance with the provisions of the said Act as if no application under Section 32-E had been made. Accordingly, I find that the issue regarding the dutiability of the additional PPM under question, is required to be determined by considering both the legality of the issue in view of the existing provisions of statute, as well as the existence and admissibility of evidences in support of the demand of duty under the subject show-cause-notice as directed by both the Hon'ble High Court as well as Settlement Commission in their respective orders referred supra. First, I will discuss the legal provisions under which the said assessee operates for the purpose of discharging their central excise duty liability.

47. The said assessee is engaged in the manufacturing and packing of unmanufactured tobacco. Section 3 of the Central Excise Act, 1944 empowers the Central Government to levy and collect duty of excise on all excisable goods except in the case of the goods manufactured or produced in the special economic zones. Under the said Section 3 of the Act, taxable event is manufacture of excisable goods. However, Section 3-A of the said Act and Rule 15 of Central Excise Rules, 2002 [hereinafter referred to as CER, 2002] confer special power on the Central Government to levy duty on the basis of production capacity which is commonly known as Compounded Levy Scheme. In compounded levy scheme the duty is levied on the basis of production capacity while in normal process duty is levied on the basis of actual production. Production capacity is determined on the basis of the factors relevant to the production e.g. if a manufacturer operates one machine, it shall be deemed that the machine will produce a particular quantity of goods in a month as notified by the Government. Accordingly, Government can fix a particular amount of duty payable for operating one machine.

48. Presently, the mandatory compounded levy scheme is applicable to Pan Masala, Gutkha and chewing tobacco manufactured with the aid of packing machine and packed in pouches. The factor relevant to the production on which excise duty is leviable has been notified to be the number of packing machines in the factory of the manufacturer under the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 and the Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 read with section 3A (2) and (3) of the Central Excise Act, 1944. The monthly deemed production per operating machine per month is prescribed on the basis of the average speed of packing machines and average working hours of a factory. Central Excise duty is chargeable at the rates notified on the basis of Retail Sale Price (RSP) slabs on per machine basis [Notification No. 42/2008-CE dated 01.07.2008 and notification No. 16/2010-CE, dated 27.02.2010 refer]. In order to minimize the element of subjectivity and to ensure certainty and objectivity, the number of packing machines installed in the factory has been notified to be the only factor relevant to the production of the notified goods under the said rules. Board has also issued Circular No. 980/04/2014-CX dated 24.01.2014 clarifying that the duty payable under notification No. 42/2008-CE dated 01.07.2008 and notification No.16/2010-CE dated 27.02.2010

should be determined based on “*deemed production*” with respect to the number of operating packing machines in the factory during the month and the Retail Sale Price printed on the pouches, and not on the basis of actual production by a unit. In other words, dutiability of goods manufactured by the said assessee is required to be determined not on the actual quantity of goods manufactured and cleared from the registered premises, but on the deemed production determined in accordance of the prescribed parameters, i.e. the number of operating packing machines in the factory during the month and the RSP printed on the pouches.

49. Rule 5 of the Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 specifies the quantity of notified goods deemed to be produced by use of one “*operating packing machine*” per month and such deemed quantity varies as per the RSP charged by the manufacturer per pouch. Rule 6(4) of the said Tobacco Rules provides that 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. Further, Rule 8 of the said Tobacco Rules specifies that in case of addition or installation or removal or uninstallation of a packing machine in the factory during the month, the number of operating packing machines for the month shall be taken as the maximum number of packing machines installed on any day during the month, provided that in case of non-working of any installed packing machine during the month, for any reason whatsoever, the same shall be deemed to be an operating packing machine for the month. Again, an Explanation given at the end of the said Tobacco Rules reads as under:-

“Explanation. - 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 a 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.”

50. Thus the law unambiguously specifies that, for the purpose of compounded levy scheme under the said Tobacco Rules, what is important for determining dutiability is the “*number of packing machines installed within a factory*” during a given month, and such number of installed machines is deemed to be the “*number of operating machine*” during that month. In other words, the statute provides that under compounded levy, a manufacturer has to pay duty on the number of packing machines installed within his factory irrespective of whether it is actually in operation or otherwise. If Central Excise duty were levied under Section 3 of the said Act, then definitely the actual operationality of the plant and machinery, actual quantity of goods manufactured and cleared from the factory, etc. would have been of paramount importance. On the other hand, under Section 3A of the said Act, if a factory has an installed machine, it is deemed to be operational and deemed to have been used for manufacture of deemed quantity of notified goods. If the manufacturer does not want to effectively operate any machine and thereby to avoid duty liability *bona fide*, there are provisions under Rule 6 of the said Tobacco Rules for him to approach the

jurisdictional central excise officer and to get such machines sealed by them which will also safeguard him from penal provisions. Here, I find that the directions of Hon'ble High Court of Gujarat as per order dated 12.10.2017 (supra) are important, the operative part of which I reproduce below: -

"35. In light of the submissions qua the Settlement Commission coming to the conclusion on a premise that as per Tobacco machine, Commission is not examining the aspect of consumption of electricity, raw material etc., would paid into insignificance is not borne out by close perusal of the Rules, more specifically Rule 6(iii), who has by way of employment of language i.e. 'operating machine', the said would presupposes that there is merely an existence of machine in the factory would in own strength is not making authority entitled to count the machine capacity for slapping the duty and word 'operating machine' would receive to take into consideration only the operating machine and even there is a specific plea that machine was not operating, it was bounden duty casted upon to clarify and examine the material placed on record and said material are available or not in that regard, the commission has to give its findings.

36. We are of the view that matter is required to be remanded back to the Settlement Commission for its reconsideration and accordingly, it is ordered that matter is required to be remanded back to the Settlement Commission for the purpose of its decision on the aspect of 'operating machine'. The machine, which was said to have been there in a factory is operative or not is required to be decided and for that purpose, we are remanding the matter back to the Settlement Commission. It would be open to the authority to come to the its own conclusion. The money, which is paid by way of interim arrangement, was remain with the authority and will be subject to final outcome after remanding the matter.

37. In the result, the petition is allowed to aforesaid extent. Rule is made absolute to aforesaid extent. There shall be no order as to costs."

51. Since the above statute itself interprets the term "operating machine" to make it identical with the term "installed machine", as specified under Rule 6(4) of the said Tobacco Rules and again repeated under the Explanation given under Rule 19 at the end of the said Tobacco Rules, I find that the answer to the question raised by Hon'ble High Court is affirmative, i.e. the additional PPM which was admittedly found installed in the factory of the said assessee on 03.09.2014 is deemed to be operative for the purpose of levy of Central Excise duty under Section 3A of the Central Excise Act, 1944 read with the said Tobacco Rules. It is in the context of safeguarding the manufacturer from this deeming provisions of operationality of installed machines that Rule 6(ii) mandates declaration on total number of installed machines and Rule 6(iii) mandates to declare the number of machines which the manufacturer intends to operate, so that

the remaining machines can be sealed by the proper officer in the manner as provided under Rule 6(5) of the said Tobacco Rules. Accordingly, I find that the number of installed machine in the factory of the said Assessee as on the date of search operation on 03.09.2014 shall be the number of operating machine for the purpose of Section 3A of the said Act read with the said Tobacco Rules.

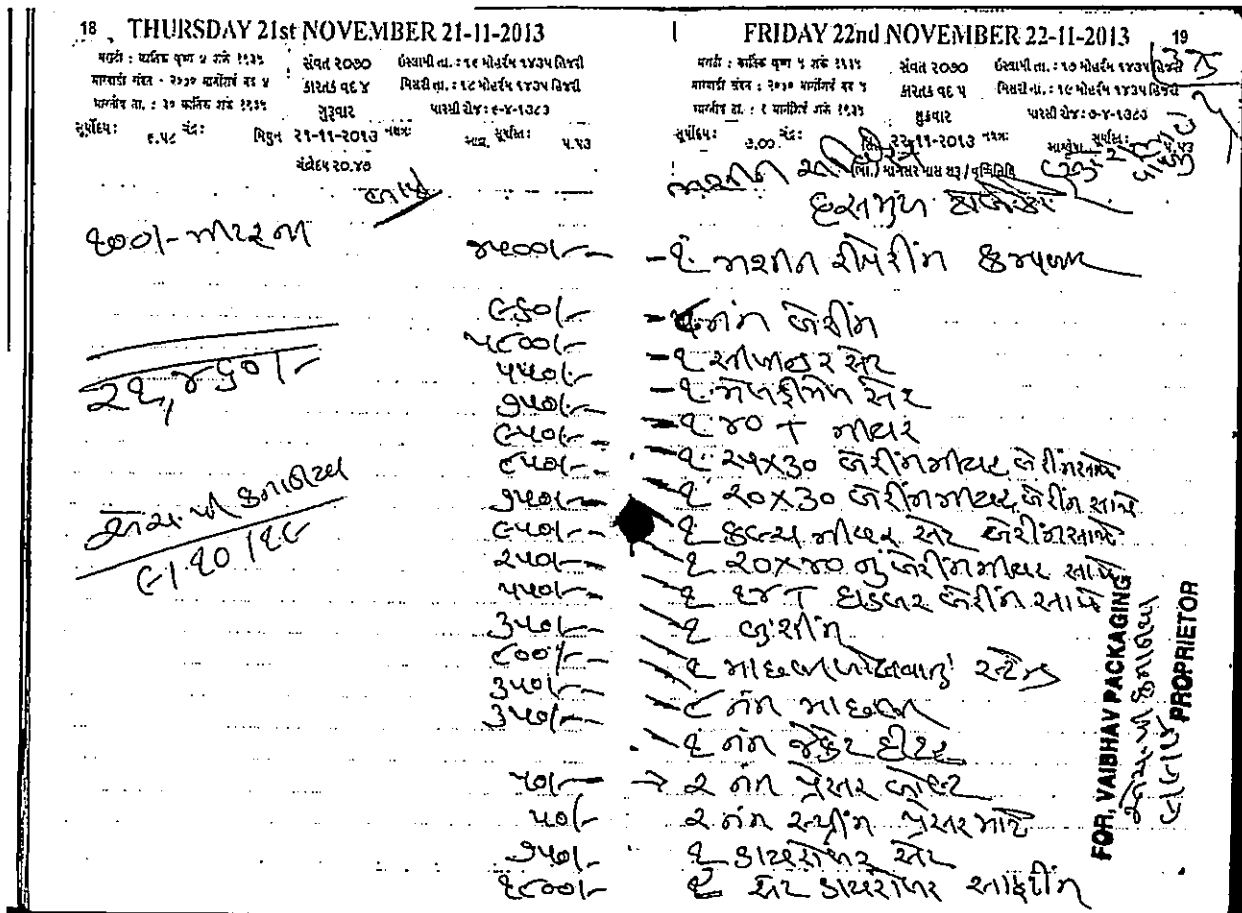
52. I would now discuss the evidences available on records regarding the period of installation of the additional PPM in the factory of the said assessee and its admissibility for the purpose of determining dutiability. The undisputed facts of this case are: that there were total three PPMs found installed in the factory of the said assessee on the day of search operation on 03.09.2014; that they had declared only two PPMs in their declaration dated 27.12.2012 filed before the Deputy Commissioner of Central Excise; that out of the said two declared PPMs, one machine was found to be in working condition, while the other PPM was found properly sealed by the jurisdictional Central Excise officers on 31.12.2012; that no declaration or intimation was filed by the said assessee in respect of the third PPM which was found installed within the factory as on the day of search; and that all the transactions of sale, purchase, transport and installation and repair charges of the said undeclared PPM were entered into between the concerned parties only in cash without reflecting these transactions in their books of accounts. With the undeclared, unsealed PPM which was admittedly found installed in the factory is deemed to be an 'operating machine', as discussed supra, now the dispute is only with regard to the period of installation of the said undeclared machine.

53. The SCN proposes to recover Central Excise duty on the said additional machine involving the period from November, 2013 to September, 2014 on the ground that the machine was brought to the factory somewhere during the last week of October, 2013 and made operational during the first week of November, 2013. The demand was based on a diary seized from the manufacturer of such machine, M/s. Vaibhav Packaging under a panchnama dated 09.09.2014 and the statements of Shri Harish Kanadia *alias* Rajubhai, owner of the said factory and one Shri Santosh Patel, Tempo driver who had allegedly transported and delivered the machine to the factory of the said assessee. Confessional statements recorded from the authorised persons of the said assessee were also cited as admissible evidence by the department. On the other hand, the said assessee claims that the additional PPM was bought by them only on 01.08.2014; that the seized diaries do not contain any details of sale of such machine to them during October, 2013 as alleged in the SCN; and that the statements recorded from the above persons were retracted, hence cannot be considered evidence. While refuting the demand of duty proposed from November, 2013 the said assessee argued that they are liable to pay duty only from the month of August, 2014.

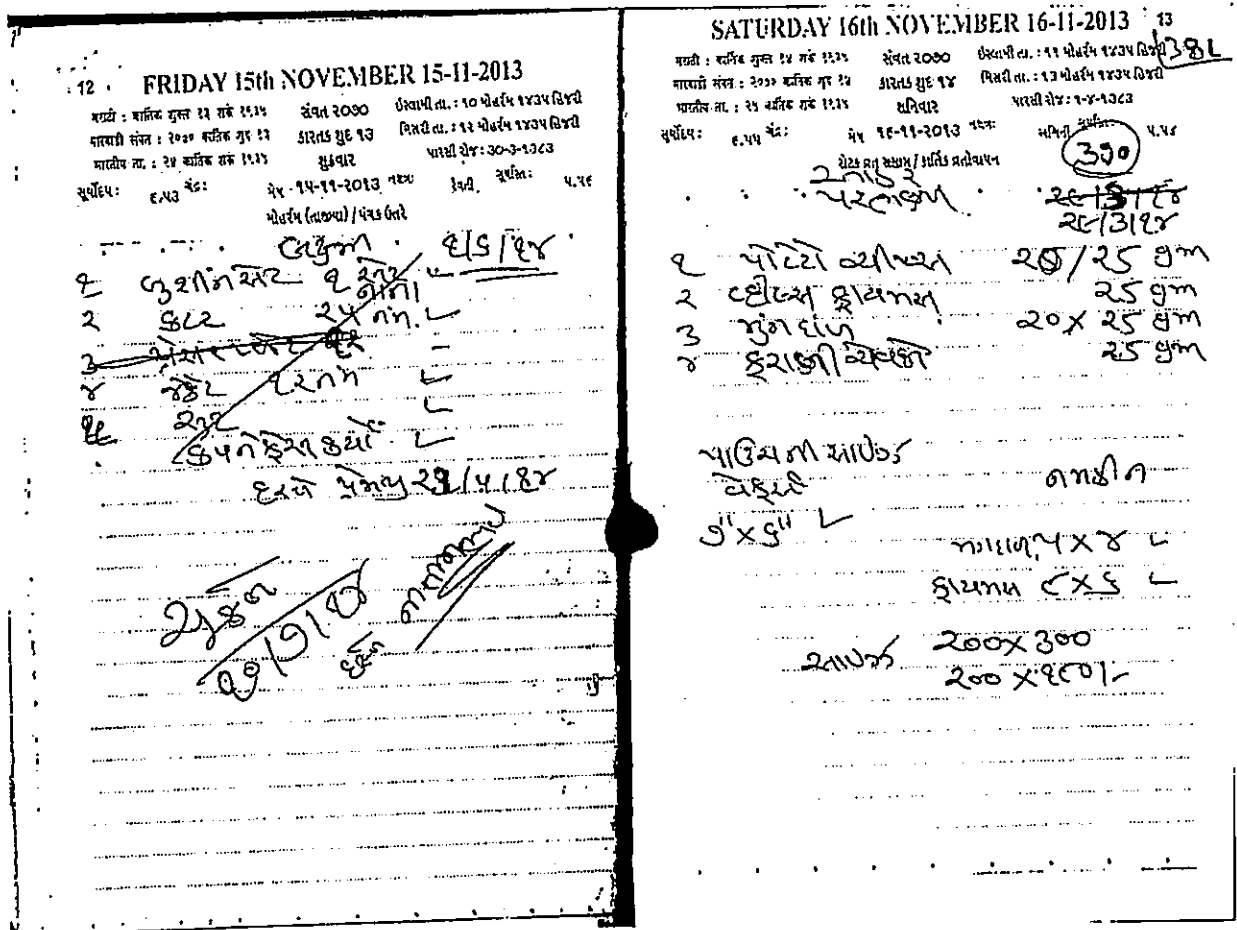
54. I find that the only documentary evidences cited in support of the Department's case that the additional PPM was purchased in October, 2013 and installed in the factory of said assessee during the first week of November, 2013 are the two diaries seized from the premises of

Shri Haresh Kanadia *alias* Rajubhai, owner of M/s. Vaibhav Packaging under a panchnama dated 09.09.2014. The SCN does not specify the page number of the seized diaries where the details are written regarding date/month of repair or sale of PPM allegedly made by M/s. Vaibhav Packaging to the said assessee. Para-5 of the SCN which mentions about the panchnama makes a general statement that during the search of the factory premises, two diaries were found in which there was some noting for repairing and sale of pouch packing machines with various customers along with the dealing with M/s. Hasmukh Tobacco Products, Gota, Ahmedabad during 2013-14. Similarly, Para-6 of the SCN which discuss the statement of Shri Haresh Kanadia merely states that he has accepted that in two diaries, which were withdrawn by the officers during the search, some noting was made regarding delivery of pouch packing machine made to M/s. Hasmukh Tobacco Products, Gota, Ahmedabad for the purpose of outstanding payment, etc. I have examined both these panchnama and statement and found that it speaks nothing more than what is mentioned in the SCN as above. Meanwhile, the said assessee had argued that these diaries did not contain any details regarding supply of any PPM during the month of October, 2013. In order to ascertain the facts, I have examined the said two seized diaries which are described in the panchnama as: (1) Green Colour Dr Reddy's Diary, Page 1 to 197 and (2) Red Colour Dhanlaxmi Super Table Diary, Page 1 to 395.

55. What is mentioned as Green colour diary is actually a notebook with green thick bounden cover. Except Sl. Nos. 15 and 16 on Page 70 which show the name "*Om Brand Tobacco, Gota*" as buyer of two machines, this notebook carries no mention of the said assessee. Even these two entries do not indicate any date, year, value, item description, etc. which are crucial for any evidentiary value. The Red diary has written pages only from Page Nos. 1 to 21 and from 360 to 395, with the remaining pages blank. Only Page No. 375 of the said diary carries a mention about the said assessee written as: "*Machine Service – Hasmukh Tobacco {Sureshbhaiwala}*". In order to better comprehend the contents, written in the vernacular, a scanned image of the said page is reproduced below: -



56. In the absence of any specific indication in the SCN about any particular page of the diaries where details regarding manufacture and sale of the additional PPM are available, and in the absence of any other details written in this regard anywhere in the two seized diaries, as discussed above, I presume that the reference made in the SCN about the so-called documentary evidence for supply of PPM could only be about this particular page. Shri Harish Kanadia who maintained the diary has deposed during his cross-examination that the seized diaries contain no other details regarding the said assessee, except the aforesaid Page No. 375. Even this page does not carry any date, month or year written by those who maintained the same, so as to substantiate the SCN that the PPM was delivered in the last week of October, 2013 and installed or started operation in the first week of November, 2013. The printed date of the diary page, i.e. 22.11.2013 as the date of delivery of the PPM, would also not support the theory that the machine was delivered in October, 2013 and started production in the first week of November, 2013. On the other hand, Shri Harish Kanadia had also deposed during the cross-examination that he was not keeping the same as a daily diary as per the dates printed thereon, but as a general notebook. He has also pointed out some other pages from the same diary where different dates, other than the printed dates, are written with similar details regarding other clients. I have examined and found this fact correct. For ease of understanding, a scanned image of one such specimen page is reproduced below: -



57. In this case, the printed dates of the diary are 15.11.2013 and 16.11.2013 whereas the details appearing on these pages are mentioned with dates 01.06.2014, 23.05.2014, 10.07.2014, 29.03.2014, etc. Therefore, I find no reason to disprove the aforesaid claim made by the person during his cross-examination. Further, since the details written in the above page as “machine servicing” with a total cost of Rs. 21,460/- which included repairing charges of Rs. 4500/-, as against the cost of machine mentioned as Rs. 90,000/- in the panchnama and noticed as Rs. 1,25,000/- during further investigation, I am also unable to accept that these details pertain to manufacture and sale of the said additional PPM. On the other hand, these details corroborate the statement dated 09.09.2014 of Shri Harish Kanadia wherein he stated that he had repaired one PPM of the said assessee during the previous year. Therefore, I hold that the two diaries seized from the premises of M/s. Vaibhav Packaging under panchnama dated 09.09.2014 cannot be considered as evidence to sustain the duty demand made in the subject SCN.

58. Meanwhile, I find from Para 5.0(d) of the Final Order No. 31/CEX/KNA/2018 dated 25.07.2018 of the Hon’ble Settlement Commission that the Revenue had submitted a report dated 11.06.2018 wherein it was stated that: “In these diaries, there were two types of entries. One for new assembled machine, which was assembled, dispatched and installed in the factory of Hasmukh Tobacco Products in the last week of October, 2013 and another entry was for repairing of working PPM...”. As already discussed above, I have personally examined the two diaries in question but could not find any such specific entries regarding assembly, dispatch and installation of machine in the factory of the said assessee in the last week of October, 2013.

59. With no evidentiary value attached to the said two diaries seized during the search operation, I find that the entire case has been built up solely on the basis of the statements recorded by the department from various persons, especially Shri Hasmukh Patel and Shri Mahesh Patel, both of M/s Hasmukh Tobacco Products, Shri Hareesh Kanadia, owner of M/s. Vaibhav Packaging and Shri Santosh Patel, Tempo Driver. In fact, Hon'ble Settlement Commission has also observed under Para 7.15 of Order dated 25.07.2018 supra that: "*There are no documentary evidences on record to show sale, purchase, transport, payment, installation etc. of the additional machine. All the transactions of sale, purchase, transport and installation and repair charges are all entered into between the concerned parties only in cash without reflecting these transactions in their books of accounts. This case rests solely on statements of concerned persons which, as mentioned above, have now been brought into question by the applicant. All these statements will be required to be tested and verified through the rigorous process of cross-examinations. Similarly, the affidavits of the employees and the transporter will also have to be examined individually as to their veracity, tenability, etc. for which fair opportunities to all concerned persons will have to be afforded to arrive at a conclusion.*" Settlement Commission has also observed under Para 7.13 of the said order dated 25.07.2018 that there are on record many flip-flops and inconsistencies with regard to the statements of the concerned persons relied upon by the Revenue for demand of compounded levy from November, 2013 to September, 2014. During the cross-examination, these persons have again changed their versions and contended that the PPM was actually purchased on 01.08.2014. A few of such discrepancies are mentioned below:-

(i) Shri Hasmukh Patel, Authorised Signatory, had stated on 03.09.2014 that the undeclared PPM was purchased on 01.08.2014 for Rs. 50,000/- and that two PPMs were installed and in working condition. However, on 12.09.2014, when confronted with the statements of Shri Harish Kanadia of M/s. Vaibhav Packaging and of Shri Santosh Patel, the transporter, he stated that the additional PPM was received in last week of October, 2013. Again on 21.10.2014 he reiterated his previous statement that the undeclared PPM was brought to the factory on 01.08.2014. Then again on 02.01.2015, he stated that the PPM was purchased for Rs. 90,000/- in the last week of October, 2013. Further, during the cross-examination, he once again took a U-turn to state that the PPM was purchased on 01.08.2014.

(ii) Shri Mahesh Patel, Proprietor stated in his statement dated 03.09.2014 that the additional PPM installed in his factory was not declared to the Central Excise Department and agreed to pay applicable Central Excise duty thereon. On 21.10.2014 he stated that additional PPM was brought to their factory on 01.08.2014. Then on 02.01.2015 he stated that the additional PPM was purchased from M/s. Vaibhav Packaging in the last week of October, 2013 for Rs. 90,000/-. Further, during the cross-examination, he once again took a U-turn to state that the PPM was purchased on 01.08.2014.

(iii) Shri Harish Kanadia of M/s. Vaibhav Packaging stated that he had supplied the machine to the said assessee during the last week of October, 2013 and charged Rs. 1,25,000/-. However, during the cross-examination, he stated that the machine was delivered on 01.08.2014 for Rs. 40,000/-.

(iv) Shri Santosh Patel, the transporter have stated on 10.09.2014 that he had transported and delivered the machine to the said assessee during the last week of October, 2013. However, during the cross-examination, he stated that the machine was transported and delivered on 01.08.2014.

60. During the adjudication proceedings, the said assessee vehemently claimed that the actual date of installation of the PPM was 01.08.2014 and disowned the statements recorded from various persons earlier which stated that the machine was delivered and installed in October, 2013. They claimed that Section 9-D of the Central Excise Act, 1944 provides for examination of the persons who had given statements and therefore, they have sought for cross-examination of various persons, viz. Shri Hasmukh Patel, Authorised Signatory of the said assessee, Shri Shri Harish Kanadia *alias* Rajubhai of M/s. Vaibhav Packaging who supplied the machine in question, Shri, Santosh Patel who had transported the machine, and three labourers who had reportedly unloaded the machine in the factory of the said assessee namely, Shri Jayantibhai Manaji Khat, Shri Bhikaji Poonaji Thakore and Shri Shaileshbhai Manubhai Thakore. During such cross-examination which was allowed in the interest of natural justice on 09.10.2019 and 21.10.2019, all the above persons have stated that the actual date of delivery of the subject PPM was 01.08.2014. Shri Harish Kanadia and Shri Santosh Patel have also filed affidavits for retraction of their previous statements which indicated delivery during October, 2013. Similarly, all the aforesaid three labourers have also filed separate affidavits to state that they had unloaded the machine on 01.08.2014.

61. Section 9-D of the said Act reads as under:-

"SECTION 9D. Relevancy of statements under certain circumstances. — (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

62. The said assessee has relied upon the above provisions of law to argue that third party statements cannot be considered valid if they are refuted by the concerned persons during cross-examination. They wanted to consider the final date of purchase of the additional PPM as

01.08.2014 as stated by such persons during the cross-examination. However, I find that even the statements wherein these persons themselves had mentioned the date of purchase as 01.08.2014 suffer many other infirmities and self-contradictions. For example, Shri Hasmukh Patel had stated the date of purchase as 01.08.2014 in his statements dated 03.09.2014 and 21.10.2014 which they claimed to be true. However, this statement of 03.09.2014 mentions that the machine was purchased by him on 01.08.2014 for Rs. 50,000/- from the scrap and got assembled by Shri Rajubhai for Rs. 90,000/-. Thus the total value of the machine should have been Rs. 1,40,000/- whereas during the panchnama he had stated the total value of the machine as Rs. 90,000/-. Similarly, during the statement dated 21.10.2014, he confirmed to have understood his previous statement dated 12.09.2014 which in turn, stated the actual supply as October, 2013. Similarly, Shri Harish Kanadia's statement dated 09.09.2014 indicated the supply in October, 2013 and the cost of machine as Rs. 1,25,000/- which was paid in two instalments of Rs. 75,000/- and Rs. 50,000/-. While cross-examination, he stated the value as Rs. 40,000/- including the cost of spare parts, whereas the seized diary which he relied upon to prove his transaction showed the value as Rs. 21,460/- including the value of spare parts. Again, Shri Santosh Patel had stated on 10.09.2014 that he had transported the machine during October, 2013 by charging Rs. 700/-. However, during cross-examination, he stated that no records were being maintained by him. He has not explained as to how he recollected the dates as October, 2013 and later as 01.08.2014 or on what basis he had specified the transportation cost of Rs. 700/-. Further, all these statements were written by the concerned persons in their own handwriting. I also find it relevant to mention that all these persons were located at different places and carrying out totally different business activities. When their statements were independently recorded at separate places without they knowing to each other's version, they had all stated that the delivery was made in October, 2013 whereas, when gathered together during the adjudication proceedings they all mentioned the same date in unison as 01.08.2014.

63. During the cross-examination, the above persons have produced notarised affidavits to state that the actual date of purchase of machine was 01.08.2014 and not October, 2013. A simple perusal of these documents would reveal that the sanctity of these affidavits are doubtful as the date of purchase of stamp paper, date of signature by the deponent before the notary, and the date of notarisation of the document, etc. do not match in any of them. Similarly, affidavits filed by three labourers are also on identical language and suffer from the same aforesaid infirmities. Department had not recorded statements of these three labourers during the investigation and their depositions during the personal hearing has no independent evidentiary value.

64. Shri Hasmukh Patel, Authorised Signatory had also not filed any retraction regarding his statements recorded on 12.09.2014 and 02.01.2015 except his deposition during the cross-examination. Similarly, no retraction has been filed by Shri Mahesh Patel, Proprietor who had also stated the date of purchase as October, 2013 while recording his statement dated

12.09.2014 and 02.01.2015. The statements of these responsible persons recorded on 03.09.2014 in their own handwriting appear to have factually wrong details as both of them had stated that their factory was clearing their pouches at the MRP of Rs. 3/- and that they have not filed any declaration to the department regarding increase of MRP to Rs. 4/-, whereas the said assessee had already declared such increase in MRP on 01.09.2014 and had even paid higher amount of central excise duty through e-pay system on 01.09.2014. These infirmities gives reasons to presume that the statements available on records are not sacrosanct and cannot be considered evidence to determine the issues involved in the present case.

65. I also find that while disputing the installation/operation of the PPM in October, 2013, the said assessee, on the other hand, have also not submitted any documentary evidences to the effect that the PPM was installed in August, 2014 as claimed by them. It is seen from Para 7.14 of Settlement Commission's order dated 25.07.2018 that during the oral proceedings when asked to submit evidences to show the date of installation of additional PPM, their representative submitted that the transactions relating to the sale, purchase, transportation, installation, payment etc. were all conducted in cash and that they were in no position to submit documentary evidences in support of the claim that the machine was installed in August, 2014. It is also observed from Para 18 of Hon'ble High Court's order dated 12.10.2017 that the petitioner (the said assessee) had no evidence to substantiate their claim that they had installed the third machine in August, 2014. Considering all the aforesaid facts and in the absence of any supporting evidences, I am of the view that the statements and depositions of various persons claiming the date of purchase of PPM as 01.08.2014 are as vitiated as their earlier statements mentioning the purchase of PPM during October, 2013 and therefore, none of such statements recorded during the course of investigation or depositions made during the personal hearing or cross-examinations can be considered evidence for the purpose of determining actual date of purchase, installation or operationalization of the additional PPM in question. Due to the same reasons, I hold that the statements and cross-examinations could not bring out any facts which would help to decide the case in either ways.

66. With the seized documents, recorded statements and cross-examinations could not provide any evidences in the present case, I would now examine any other documents or evidences cited by both the sides in their support, to ascertain if they could throw some light to resolve the issue. I find this exercise important especially in the light of the directions from Hon'ble High Court of Gujarat which are subsequently guided to this authority by the Hon'ble Settlement Commission. While filing their defence reply dated 24.06.2019 and final submission dated 15.11.2019, the said assessee submitted that the Department ought to have examined their electricity consumption details which would prove that they had not operated the additional PPM during the period prior to August, 2014. They have also submitted the following bi-monthly details collected from their electricity supplier company, M/s. Torrent Power Limited: -

Month & Year	Units consumed
November, 2013	4525
January, 2014	3878
March, 2014	4283
May, 2014	4214
July, 2014	4074
September, 2014	10063
November, 2014	4484

67. It is their case that the bi-monthly electricity consumption was increased only during the period covering August-September, 2014 which supported their argument that the additional PPM was operated only from 01.08.2014. However, I am unable to accept this solitary data to finally determine the crucial aspect of 'operationality of machine' due to the reasons: that the said assessee has not furnished the electrical specification of the subject machine or the average electricity units required for running the machine during a given period of time; that the actual number of hours or shifts for running the machine is directly linked with the total units consumed in any given month which is not ascertainable in the present case; that there is nothing on record to verify if the said assessee had owned or rented any electric generator during the respective periods which would not have been included in the reading of electricity units, etc. Even the bi-monthly consumption of 10,000 units (5000 units per month) during August-September, 2013 is not proportionate with the average monthly reading of 2000 units per machine per month during the remaining period, and the said assessee has not produced any explanation for this 50% spurt in one month. Notwithstanding these facts, it is a settled principle of law that electricity consumption alone cannot be considered evidence for determining dutiability.

68. Another evidence brought up by the said assessee is an Audit Report No. FAR/45/2014-15 dated 11.08.2014 issued after the central excise audit officers visiting their factory on 10.06.2014 and conducting audit of their factory covering the period from June, 2013 to May, 2014. It is their case that the said Audit Report is silent about the presence of any third machine within their factory; and that if the additional PPM was actually installed since October, 2013 as alleged by the department, it would not have been missed by the audit party as the process of audit involved visit to the plant by the officers. I do not find any substance in this argument as the department's case is all about surreptitious installation, operation and manufacture of excisable goods by the said assessee. As per the SOP for conducting audit, an assessee is required to be informed in writing well in advance about the dates of audit, etc. and hence I find no reason for them to keep the additional PPM within their factory during such visit of audit officers, even if such a machine was actually operating by them during this period without declaring to the department.

69. The aforesaid evidences of electricity consumption and audit report relied upon by the said assessee could not help them to substantiate their claims. Meanwhile, I find that no

investigation has been done by the department nor any supporting data produced by the said assessee showing the actual quantities of packing materials supplied by M/s. Prashil Pack, Naroda who had supplied packing pouches and M/s. Soro Industries & Trading Co., Kadi who supplied HDPE packing bags during the respective months, especially since their statements were already recorded in connection with the investigation on actual MRP declared by the said assessee whereupon the manner and method of supplying such packing materials were also discussed.

70. The facts and circumstances as discussed in the foregoing paras reveal that no evidences are available on records to ascertain the actual date or month when the additional PPM was purchased, installed or operationalized within the factory of the said assessee. Therefore, the matter is required to be determined in accordance with the statute. Penal provisions for contravention of the provisions of the said Tobacco Rules are provided under Rule 18 *ibid* which reads as under: -

“Rule 18. Penalty for contraventions, etc.-

(1) Subject to the provisions of rule 16 and section 11AC of the Act, if any manufacturer produces or removes notified goods in contravention of any provision of these rules, then, all such goods shall be liable to confiscation, and the manufacturer shall be liable to a penalty not exceeding the duty leviable on the notified goods in respect of which aforesaid contravention has been committed.

(2) If it is found that goods have been manufactured in or cleared from a unit which is not registered with the jurisdictional Central Excise Office, then, the duty liability of such unit shall be determined on the basis of number of packing machines found available in the premises of the unit and the retail sale price of the pouches manufactured with the aid of such packing machines and unless evidence to the contrary is provided to the satisfaction of the Central Excise Officer, such machines shall be deemed to have been in operation, in case of financial year 2009-10, since the 8th March, 2010, and for subsequent financial years, since the 1st day of April of respective financial year, and shall be construed as operating packing machines for the purposes of rule 7 and dealt with accordingly.”

71. Rule 18(1) provides for penalty in respect of clandestine manufacture and removal of goods under the said Tobacco Rules. Rule 18(2) *ibid* prescribes the manner in which the duty liability is to be fixed on a manufacturer if any packing machine is found installed in his factory which are not declared and got sealed by the jurisdictional central excise officer in the manner as provided under Rule 6. The provisions of Rule 18(2) completely put the onus upon the manufacturer to submit evidence and to prove to the satisfaction of the Central Excise Officer in case if any packing machine is found installed within his factory premises without having declared to the department under Rule 6(ii) and 6(iii) or without the same getting sealed in the manner as provided under Rule 6(5). I have no doubt that such ‘evidence’ and the burden to ‘prove to the satisfaction of the officer’ would necessarily include the actual date of purchase, installation and operationalization of the packing machine. The statute also provides that, if the manufacturer is unable to prove such factors with necessary evidence, then such machines found installed within the factory will be construed as “operating packing machines” for the purposes of Rule 7 and dealt

with accordingly. The said Rules also specify that if such installed PPM was found on any dates during 2009-10, then the same "*would deemed to have been in operation*" from 08.03.2010 and if such machine was found in the subsequent financial years, then it would '*deemed to have been in operation*' from first day of April of that financial year. In the present case, the said assessee has admitted that they did not have any evidence to prove the actual date of installation of the additional PPM in question as all transactions were done in cash without recording in the books of account. It is also observed that none of the so-called evidences available on records could indicate the actual date of purchase, installation or operationalization of the said additional PPM. Thus, the hypothetical dates of installation as 01.08.2014 as claimed by the said assessee and November, 2013 as alleged by the Department have no evidence in support. Meanwhile, there is also no dispute that the said PPM was found installed in the factory on the date of search operation on 03.09.2014. In view of the statutory provisions of compounded levy scheme given under Section 3-A of the Central Excise Rules, 1944 mandating levy of central excise duty on the basis of annual production capacity on deemed quantity of goods manufactured by specified machines, and in the light of deeming provisions of the said Tobacco Rules which construes an installed machine as operational machines for such levy of central excise duty, as discussed earlier above, I hold that the actual operability or duration of operation of such machine is inconsequential in the present case. Therefore, I am of the view that in accordance with the provisions of Rule 18(2) of the said Tobacco Rules, the said additional PPM is deemed to be considered as in operation from the first day of April, 2014.

72. I have also examined the case laws cited by the said assessee to support their argument. I find that these judgments were issued in the light of Section 3 of the Central Excise Act, 1944 where central excise duty is leviable on manufacture and clearance of excisable goods. None of these decisions are applicable in the present case which is covered under Section 3A of the said Act, which mandates levy of central excise duty on the basis of annual production capacity of specified machines installed within the factory on deemed manufacture of excisable goods. As per the statute given under the said Tobacco Rules, every installed machine is deemed to be operational and hence actual manufacture and clearance of goods is not consequential.

73. In fact, I find that the said assessee was fully aware of these provisions and had even submitted their willingness before the Hon'ble Settlement Commission and the Hon'ble High Court of Gujarat to pay duty from 01.04.2014. I have also examined the said Rules to find its applicability in the present case, especially in view of the use of "*unit which is not registered with the jurisdictional Central Excise Office*" as appearing in the first part of Rule 18(2). I find that the SCN has correctly discussed in Para 31 on Page 23 that since the party had not declared the extra PPM to the department, it is deemed to have been not registered with the department in view of that machine. Although Settlement Commission has stated in Para 29 of its earlier order dated 29.07.2016 that the said rule is applicable for non-registered units, the said assessee had argued before Hon'ble High Court that the said rule would cover non-declared PPM. Para 11 of the High

Court's order dated 12.10.2017 speaks about the submissions made by the said assessee which reads: -

"11. Learned counsel for petitioners further submitted that the Commission failed to consider the provisions of Rule 18 of the Chewing Tobacco Rules which provide that if date of installation cannot be provided, the same must taken to be first day of April of the relevant financial year. It is submitted that the Commission has clearly misread and misinterpreted the said provisions. The petitioners have also tried to settle the matter based upon the installation dated as 01.04.2014, the Commission has even disallowed the same."

74. Again Para 15 of the aforesaid order dated 12.10.2017 of Hon'ble High Court further explains the argument of the said assessee as: -

"15. In the alternative, learned counsel appearing for petitioners submitted that as per Rule 18(2), if the date of installation cannot be ascertained, then, as per the said rule, machine must be deemed to have been installed from the first of April of the year in which the same found operational. The petitioners were prepared even for this additional liability. The Commission has not duly dealt with this submission and has gone by the very linguistic approach that the rule only applied if the unit is registered. This would mean that if a person who is not registered himself for years on end, this liability would only remain in the year in which he is visited. As against that, a person who is actually registered will not get advantage of the said rule. It is submitted that this rule is clearly applicable in all cases where the date of installation cannot be ascertained. It is prayed that even on this count, the matter may be remanded to the Commission."

75. Similarly, Para 7.11 of Settlement Commission's Final Order dated 25.07.2018 further makes their submission clear as follows: -

"7.11. Bench notes that the applicant in their submission dated 15.07.2016 had made an alternate submission that -

"Alternatively we would like to say that, in light of the above and our earlier submissions the department has failed to discharge its onus of proving that the installation of machine was done in October, 2013 and its evidences in the form of statements are not reliable and complete hence Rule 18(2) of Chewing Tobacco and Unmanufactured Tobacco Machines (Capacity Determination and Collection of Duty) Rules, 2010 may be invoked and demand be confirmed from April 2014 only and not before that"

Thus, the applicant was even open to accepting duty liability from April 2014 in spite of their claim that the additional machine being operational from August, 2014."

76. In view of the facts and evidences as discussed above, I hold that the additional PPM found installed in the factory of the said assessee during the search operation conducted on 03.09.2014 is to be construed as operational in terms of the provisions of section 3-A of the Central Excise Act, 1944 read with Rule 6(4) and Rule 8 of the Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 and the and the Explanation given under Rule 19 at the end of the said Tobacco Rules. The acts of omission and commission on the part of the said assessee as discussed in the foregoing paras reveal that the said PPM was installed by them with deliberate intent to evade Central Excise duty leviable thereon. Accordingly, duty payable by the said assessee is to be calculated as per Rule 7 *ibid* with effect from first day of April, 2014 in terms of the provisions of Rule 18(2) of the said Tobacco Rules, and to be confirmed under Section 11A(10) of the said Central Excise Act, 1944 along with recovery of interest under Section 11AA and the mandatory penalty under Section 11AC of the said Act.

77. The said assessee has argued that they had paid the duty on the said additional PPM for the month of September, 2014 in normal way, and hence they are not liable to pay penalty for the amount involved for September, 2014. I do not find merit in this argument as I am convinced that the said assessee had discharged their duty liability on the additional PPM only as a result of the search operation conducted on 03.09.2014. Furthermore, I find a letter dated 11.09.2014 of the said assessee addressed to the Assistant Commissioner, Central Excise, Range-V, Division-V, Ahmedabad-II which is available on records as Annexure-J to their defence reply dated 24.06.2019, wherein they had submitted Form-1 and Form-2 to their jurisdictional officers on 12.09.2014 along with copies of duty payment challans. The letter reads as under:-

"Please find enclosed herewith duly filled Form 1 & Form 2 for the month of September-14. The Four copies of challan for Rs. 36,82,000/- dtd 01.09.2014, Rs. 15,00,000/- dtd 03.09.2014, Rs. 21,00,000/- dtd 08.09.2014 and Rs. 3,60,836/- dtd 11.09.2014 for payment of Two machines. The officers of Central Excise (Prev) has conducted the search on 03.09.2014 and directed to pay the duty for two machines, hence we paid the duty Rs. 39,60,836/-."

78. Therefore, I hold that the said assessee is liable to pay applicable penalty on the duty leviable for the period from April, 2014 to September, 2014.

79. The SCN also proposes confiscation of the Pouch Packing Machine valued at Rs. 1,25,000/- which was seized under panchnama dated 03.09.2014. The facts and circumstances of the case reveal that the said assessee had purchased, transported, installed and operationalized the said seized PPM with deliberate intent to manufacture and remove excisable goods without involving their liability to pay duty on the annual production capacity of the said machine as provided under Section 3A of the said Act read with the provisions of the said Tobacco Rules, and

therefore, I hold that the seized machine is liable for confiscation under Rule 18(1) of the said Tobacco Rules read with Rule 25 of the Central Excise Rules, 2002.

80. The SCN also proposes to impose penalty on Shri Maheshbhai Ugarchand Patel and Shri Hasmukhbhai Ugarchand Patel, Proprietor and Authorised Signatory of M/s. Hasmukh Tobacco Products, respectively. I find that it is a settled principle of law that separate penalty cannot be imposed upon the proprietor when penalty has already been imposed upon his proprietary firm. These persons have also raised this point vide their final submission dated 15.11.2019 which I agree. However, in case of Shri Hasmukhbhai Ugarchand Patel, Authorized Signatory, I find that he is the responsible person who was managing the daily affairs of the factory. He was admittedly aware and concerned of the entire transactions relating to the purchase, transportation, installation and operationalization of the additional PPM in question, besides manufacture and clearance of goods. Shri Maheshbhai Patel, Proprietor as well as the other witnesses have stated that they were dealing with Shri Hasmukh Patel for manufacture, transportation and delivery of PPM. His acts of omission and commission as discussed above have rendered him liable for appropriate penalty under Rule 26 of the Central Excise Rules, 2002. I do not find merit in the argument made by them that Rule 26 of the Central Excise Rules, 2002 is not applicable in the present case as there are specific penal provisions given under Rule 18(1) of the said Tobacco Rules for contraventions committed thereunder, as Rule 19 of the said Tobacco Rules categorically specifies that except as provided therein, all provisions of the Central Excise Act, 1944 and the Central Excise Rules, 2002, including those relating to maintenance of daily stock account, removal of goods on invoice, filing of returns and recovery of dues shall apply *mutatis mutandis*.

81. As per the SCN, duty payable by the said assessee on the said additional PPM for the period from April, 2014 to September, 2014 is as under: -

Sl No.	RSP per pouch	Period	Rate of duty per PPM	Relevant notification in force
1	Rs. 3/-	01.04.2014 to 30.04.2014	Rs. 27,09,000	Notfn No. 11/2010-CE(NT) dt 27.02.2010 as amended by Notfn No. 18/2010-CE(NT) dt 13.04.2010 & Notfn No. 16/2010-CE dt 27.02.2010 amended by Notfn No. 19/2010-CE dt 13.04.2010 & 14/2012-CE dt 17.03.2012 as amended by Notfn No. 2/2014-CE dt 24.01.2014
2	Rs. 3/-	01.05.2014 to 31.05.2014	Rs. 27,09,000	
3	Rs. 3/-	01.06.2014 to 31.06.2014	Rs. 27,09,000	
4	Rs. 3/-	01.07.2014 to 10.07.2014	Rs. 8,74,000	
5	Rs. 3/-	11.07.2014 to 31.07.2014	Rs. 20,05,000	
6	Rs. 3/-	01.08.2014 to 31.08.2014	Rs. 29,59,000	
7	Rs. 4/-	01.09.2014 to 30.09.2014	Rs. 36,82,000	
TOTAL			Rs. 1,76,47,000	

82. As against the above demand, it is noticed from the documents available on records that the said assessee has made following payments/deposits: -

Month	Duty payable	Due date	Date of payment	Duty paid	Challan No.
April, 2014	2709000	05.04.2014	03.09.2014	1500000	80267
May, 2014	2709000	05.05.2014	08.09.2014	2100000	80048
June, 2014	2709000	05.06.2014	15.09.2014	360836	80013
July, 2014	2879000	05.07.2014	08.11.2014	2500000	80026
August, 2014	2959000	05.08.2014	04.12.2014	2500000	80059
September, 2014	3682000	05.09.2014	02.01.2015	2500000	80234
			02.02.2015	2500000	80003
			25.09.2016	2500000	80010
			06.10.2016	13539166	80352
			11.10.2016	2000	80039
Total duty	17647000			30002002	
Interest paid			04.07.2015	135000	80594
RF paid			11.10.2016	10000	80040

83. As per order dated 12.10.2017 of the Hon'ble High Court, the money which is paid by way of interim arrangement was to remain with the authority and will be subject to final outcome after remanding the matter. Further, during the personal hearing dated 09.10.2019, the advocate for the said assessee had also requested that in case of any duty, penalty or interest would be determined as payable by them in this case, the same may be appropriated from the deposits/payments which they have already done during the proceedings of this case. They have also made a similar request while filing final submission dated 15.11.2019. It appears that the said assessee has made this request to avail the benefits of reduced penalty as per Section 11AC(1)(e) of the Central Excise Act, 1944, out of the amounts they have already deposited as above. I therefore hold that the payments/deposits made by the said assessee during the pendency of proceedings as discussed above, shall be appropriated towards the duty, interest, fine and reduced penalty arising out of this order and the remaining amount, if any, shall be paid/refunded by/to the said assessee, as applicable. The above chart indicates that they have already deposited Rs. 1,35,000/- towards interest. The jurisdictional Deputy Commissioner is required to calculate the actual interest chargeable in the case and communicate the same to the said assessee within fifteen (15) days as part of appropriating the payments as above.

84. In the light of foregoing discussions, I pass the following order:-

ORDER

- (i) I confirm demand of Central Excise duty of Rs. 1,76,47,000/- [*Rupees One Crore Seventy Six Lakhs and Forty Seven Thousands only*] from M/s. Hasmukh Tobacco Products, Gota, Ahmedabad under Section 11A(10) of the Central Excise Act, 1944

read with Rule 7 and Rule 18(2) of the Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 towards duty leviable on one undeclared packing machine which was found installed in their factory on 03.09.2014 and deemed to have been in operation from the first day of April, 2014 to September, 2014;

- (ii) I order that the said M/s. Hasmukh Tobacco Products, Ahmedabad should pay interest as applicable under Section 11AA of the Central Excise Act, 1944 on the above confirmed demand of Central Excise duty of Rs. 1,76,47,000/-;
- (iii) I order confiscation of the seized pouch packing machine valued at Rs. 1,25,000/- under Rule 25 of the Central Excise Rules, 2002 read with Rule 18(1) of Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 which was seized under panchnama dated 03.09.2014 at the factory of M/s. Hasmukh Tobacco Products, Ahmedabad. However, I give an option to the said assessee to redeem the seized goods on payment of fine of Rs. 10,000/- [*Rupees Ten Thousands only*] in lieu of confiscation;
- (iv) I impose penalty of Rs. 1,76,47,000/- [*Rupees One Crore Seventy Six Lakhs and Forty Seven Thousands only*] on M/s. Hasmukh Tobacco Products, Gota, Ahmedabad under Section 11AC(1)(c) of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002;
- (v) I also impose penalty of Rs. 2,00,000/- [*Rupees Two Lakhs only*] on Shri Hasmukhbhai Ugarchand Patel, Authorized Signatory of M/s. Hasmukh Tobacco Products, Ahmedabad under Rule 26 of Central Excise Rules, 2002;
- (vi) I refrain from imposing any separate penalty on Shri Maheshbhai Ugarchand Patel, Proprietor of M/s. Hasmukh Tobacco Products under Rule 26 of Central Excise Rules, 2002;
- (vii) I order appropriation of the confirmed demand of Central Excise duty of Rs. 1,76,47,000/-; interest at the applicable rate as per Section 11AA of the said Act; 25% of the Penalty of Rs. 1,76,47,000/- imposed on M/s. Hasmukh Tobacco Products, in terms of Section 11AC(1)(e) of the said Act; and redemption fine of Rs. 10,000/-, from the amounts which the said assessee has deposited during the pendency of this proceedings as discussed above. The jurisdictional Deputy Commissioner is directed to calculate the actual interest amount and communicate the same to the said assessee within fifteen (15) days as part of appropriating the payments;

(viii) Show Cause Notice No. V.24/15-15/OA/2015 dated 19.02.2015 issued to M/s. Hasmukh Tobacco Products is accordingly disposed of.



(DR. BALBIR SINGH)
COMMISSIONER
CGST & CEX, AHMEDABAD NORTH

F.NO. V.24/15-15/OA/2015

Date: 22.12.2019

BY REGD POST AD

To

- (1) M/s. Hasmukh Tobacco Products,
300, Meldi Estate, Near Gota Railway Crossing,
Gota, Ahmedabad.
- (2) Shri Maheshbhai Ugarchand Patel,
Proprietor of M/s. Hasmukh Tobacco Products,
Res: 31, Madhuvrundan Society,
Opp: Swami AkhandAnand Society,
Ghatlodiya, Ahmedabad.
- (3) Shri Hasmukhbhai Ugarchand Patel,
Authorized Signatory of M/s. Hasmukh Tobacco Products,
Res: 31, Madhuvrundan Society,
Opp: Swami AkhandAnand Society,
Ghatlodiya, Ahmedabad.

Copy to:-

1. The Principal Chief Commissioner, CGST & C. Excise, Ahmedabad Zone, Ahmedabad
2. The Deputy/Assistant Commissioner, CGST & C. Excise, Division-VII, Ahmedabad-North.
3. The Superintendent of CGST & C. Excise, Range-III, Division-VII, Ahmedabad-North.
- ✓ 4. Guard file.

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