

CASE NO.:
Appeal (civil) 2597 of 2005

PETITIONER:
Commissioner of Central Excise, Vapi

RESPONDENT:
M/s. Kraftech Products Inc

DATE OF JUDGMENT: 14/03/2008

BENCH:
S.B. Sinha & V.S. Sirpurkar

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 2597 OF 2005
WITH
CIVIL APPEAL NOS. 325-326 OF 2006
CIVIL APPEAL NO. 2575 OF 2005
CIVIL APPEAL NO. 1029 OF 2007
CIVIL APPEAL NO. 1174 OF 2007
CIVIL APPEAL NOS. 2703-2704 OF 2005
CIVIL APPEAL NOS. 5069-5073 OF 2007

S.B. SINHA, J.

1. Interpretation of Rule 34 of the Standards of Weights and Measures (Packaged Commodity) Rules, 1977 is in question in these appeals which arise out of the judgments and orders dated 10th May, 2004 and 23rd March, 2005 passed in Appeal No.E/293/03-MUM and E/182-183/04-NB(A) by the Customs Excise and Service Tax Appellate Tribunal, Mumbai and Customs Excise and Service Tax Appellate Tribunal, New Delhi respectively.

2. We, however, may notice the factual matrix of the matter from C.A. No.2597 of 2005.

3. Respondent manufactures hair dye. It is packed in pouches each containing 3 gms.. 3 pouches (sachets) are sold in one packet. The net weight of each pouch, as also the net weight of the commodity in 3 pouches and the maximum rate is printed on the pouches.

4. Valuation of excisable goods for purposes of charging the duty of excise is laid down in Section 4 of the Central Excise Act, 1944 in the following terms:

"4. Valuation of excisable goods for purposes of charging of duty of excise:

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section, be deemed to be -

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale."

5. Section 4A of the Act provides for mode of valuation envisaged under

Section 4. It reads as under :-

"4A. Valuation of excisable goods with reference to retail sale price:

(1) The Central Government may, by notification in the Official Gazette, specify any goods, in relation to which it is required, under the provisions of the Standards of Weights and Measures Act, 1976 or the Rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such goods, to which the provisions of sub-section (2) shall apply.

(2) Where the goods specified under sub-section (1) are excisable goods and are chargeable to duty of excise with reference to value, then, notwithstanding anything contained in section 4, such value shall be deemed to be the retail sale price declared on such goods less such amount of abatement, if any, from such retail sale price as the Central Government may allow by notification in the Official Gazette.

(3) The Central Government may, for the purpose of allowing any abatement under sub-section (2), take into account the amount of duty of excise, sales tax and other taxes, if any, payable on such goods.

(4) If any manufacturer removes from the place of manufacture any excisable goods specified under sub-section (1) without declaring the retail sale price of such goods on the packages, or declares a retail sale price which does not constitute the sole consideration for such sale, or tampers with, obliterates or alters any such declaration made on the packages after removal, such goods shall be liable to confiscation.

Explanation 1: For the purposes of this section, "retail sale price" means the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement, delivery, packing, forwarding and the like, as the case may be, and the price is the sole consideration for such sale.

Explanation 2:

(a) Where on the package of any excisable goods more than one retail sale price is declared, the maximum of such retail sale price shall be deemed to be the retail sale price for the purposes of this section.

(b) Where different retail sale prices are declared on different packages for the sale of any excisable goods in packaged form in different areas, each such retail sale price shall be the retail sale price for the purposes of valuation of the excisable goods intended to be sold in the area to which the retail sale price relates."

6. Indisputably, the commodity in question is governed under the Standards of Weights and Measures (Packaged Commodity) Act, 1976. Indisputably again the Central Government in exercise of the powers conferred upon it by Section 83 of the Act framed Rules known as the Standards of Weights and Measures (Packaged Commodity) Rules, 1977 (the Rules).

7. Rule 2 contains the interpretation section. A distinction is made in regard to "combination package", "group package" and "multi-piece package".

Multi-piece package is defined in Rule 2(j) to mean :-

(j) "multi-piece package means a package containing two or more individually packaged or labeled pieces of the same commodities of identical quantity, intended for retail sale, either in individual pieces or the package as a whole;

Illustration.- A package containing "5 toilet soap cake, net weight 20 g each, total net weight 100 g" is a multi-piece package."

8. Rule 6 provides for declarations to be made on every package, which reads as under :-

"6. Declaration to be made on every package.-

(1) Every package shall bear thereon or on a label securely affixed thereto a definite, plain and conspicuous declaration, made in accordance with the provisions of this chapter as to-

(a) the name and address of the manufacturer, or where the manufacturer is not the packer, of the packer or with the written consent of the manufacturer, of the manufacturer;

(b) the common or generic names of the commodity contained in the package.

Explanation.- Generic name in relation to a commodity means the name of the genus of the commodity, for example, in the case of common salt, sodium chloride is the generic name;

(c) the net quantity, in terms of the standard unit of weight or measure of the commodity contained in the package or where the commodity is packed or sold by number, the number of the commodity contained in the package;

(d) the month and year in which the commodity is manufactured or pre-packed;

[(e) * * *] (omitted by GSR 521 (E) dt. 26-6-1995)

(f) the [retail sale price] of the package;

(g) where the sizes of the commodity contained in the package are relevant, the dimensions of the commodity, contained in the package and if the dimensions of the different pieces are different, the dimensions of each such different piece;

(h) such other matters as are specified in these rules:"

Rule 12 provides for the manner in which the declaration of quantity shall be expressed, sub-rule (2) whereof reads as under :-

"12. Manner in which declaration of quantity shall be expressed. \026

(1) \005 \005.

(2) Except in the cases of commodities specified in the Fifth Schedule, the declaration of quantity shall be in terms of the unit of \026

(a) mass, if the commodity is solid, semi-viscous or mixture of solid and liquid;

(b) length, if the commodity is sold by linear measure;

(c) area, if the commodity is sold by area measure;

(d) volume, if the commodity is liquid or is sold by cubic measure; or

(e) number, if the commodity is sold by number:

Provided that in the case of solid commodity contained in a free-flowing liquid which is sold as such, the declaration of quantity shall be in terms of the drained weight of such solid commodity."

Schedule V appended to the Rules specifies the commodity in packaged form which may be sold by weight, measures or numbers as shown against the commodity, item No.25 whereof reads as under :-

"25.	Cosmetics including creams, shampoo, lotions and perfumes.	Weight or measure	"
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Rule 17 of the Rules mandates additional declarations to be made on multi-piece packages.

9. Admittedly the valuation of the commodity for the purpose of payment of excise duty was carried out in terms of Section 4 of the Act. Respondent, however, was served with eight show cause notices dated 29th August, 2001, 26th March, 2001, 4th July, 2001, 3rd September, 2001, 30th October, 2001, 8th January, 2002, 27th March, 2002 and 16th May, 2002 in terms of Section 11A of the Act asking it as to why :-

(i) Differential Central Excise duty should not be demanded and recovered under the provisions of Section 11A(1) of the Central Excise Act, 1944.

(ii) Penalty should not be imposed under Rule 173Q of Central Excise Rules 1944/nor Rule 25 of the Central Excise (No.2) Rules, 2001.

(iii) Interest due under Section 11AA/11AB of the Act, should not be charged/recovered from them."

Cause was shown to the said notices.

10. The Deputy Commissioner, Central Excise, Division-II, Vapi by two separate orders dated 25th October, 2001 and 12th July, 2002 rejected the contention of the respondent that it was entitled to exemption by operation of the Rules in respect of their product and confirmed the demand of Central Excise duty and imposed a penalty of equal amount as proposed in the show cause notices.

11. Appeals preferred thereagainst by the assessee/respondent to the Commissioner (Appeals) were allowed by an order dated 24th October, 2002. Appeal preferred by the appellant before the Customs Excise and Service Tax Appellate Tribunal, Mumbai was dismissed by reason of the impugned

judgment dated 10th May, 2004 stating :-

"2. The main ground of the Departmental appeal is that the exemption under the said Rule 34 does not apply to a case where several units are packaged together. We have perused the relevant provisions under the Rule 34. The exemption under the same clearly applies to any package containing a commodity if the net weight of the commodity is 20 gms. or less. The language of the rule does not warrant the interpretation sought to be placed by the department that since the package contains 3 units, the exemption under the rule is not available. We are of the view that since the combined weight of the 3 units of the impugned goods is less than the prescribed weight of 20 gms. the Commissioner (Appeals) has rightly concluded in his impugned order that the respondents are eligible for exemption under the said Rule 34 and consequently they are entitled to assessment under Section 4 of the Central Excise Act, 1944 instead of under Section 4A of the said Act."

12. The judgment of the appellate authority as also the Tribunal have been questioned by the department contending that as admittedly the commodity is sold in 3 sachets, each one of them can be sold separately, Rule 34 of the Rules will have no application. How the product, according to the learned counsel for the appellant, is known in the market, should be the test to find out as to how it is sold whether in unit or by weight or measure. Strong reliance in this behalf has been placed on a decision of this Madras High Court in *Varnica Herbs vs. C.B.E.&C., New Delhi* : 2004 (163) E..L.T. 160 (Mad.)

13. Mr. Ravinder Narain and Mr. Monish Panda, learned counsel appearing on behalf of the respondents, on the other hand, would submit that keeping in view the provisions of Rule 12(2) of the Rules, the commodity can be sold by weight or measure. It was so intended to be done as the weight of each sachet has been notified on the packet. It was submitted that the decision of the Madras High Court in *Varnica Herbs (supra)* was rendered per incuriam as has been held by a larger Bench of the Tribunal in *Commissioner of Central Excise, Mumbai vs. Uirson Cosmetics Ltd.* : 2006 (198) E.L.T. 508 (Tri.-LB).

It was furthermore submitted that the notices under Section 11A of the Act having been issued beyond the period of six months, the same were barred by limitation.

14. The commodity is in powder form. It is sold in a multi piece package. Admittedly the product is packed in small packets each containing three sachets. Each sachet discloses the weight of its contents. The packet containing the three sachets also disclose the total weight and the number of sachets. The weight of the product in each sachet is admittedly below 3 gms.

15. It is beyond any doubt or dispute that the commodity in question is being sold in 'multi piece package'. Identical quantity of commodity is packed in each sachet. Yet again admittedly three sachets are packed in one packet. The weight of three sachets is 9 gms, that is, less than the prescribed weight of 10 gms.

16. Rule 12, as noticed hereinbefore, provides for the manner in which declaration of quantity shall be expressed. Sub-rule (2) of Rule 12 would not apply to the commodities mentioned in Schedule V. Item No.25 of Schedule V provides for a declaration to be expressed in terms of weight or measure. The packet describes the commodity in question. It discloses also

the weight. It not only discloses the weight contained in each sachet but also discloses the weight contained in the packet of three sachets. In view of Schedule V appended to the Rules, therefore, the intention of the manufacturer to sell the commodity by weight is explicit.

17. Rule 17 provides for additional declarations to be made on multi-piece packages. It envisages declaration of the quantity and the sale price thereof on each of the packets when the quantity is sold in the multi-piece package. Requirements of Rule 17 have been complied with. Section 4A of the Act would apply only when it is statutorily required to apply the provisions of the Rules.

18. Rule 34 contains an exemption clause. The exemption clause would apply if the commodity is sold by weight or measure, subject of course to the condition that the net weight of the commodity is 10 gms. or less. This legal requirement in this case also stands complied with. Once it is held that the Rules have no application in respect of the commodity as marketed and sold by the respondent, Section 4A of the Act will have no application. The appellate authority as also the Tribunal, in our opinion, therefore, were right in their decisions.

19. Our attention, however, has been drawn to a Circular Letter dated 2nd November, 1999 issued by the Central Board of Excise & Customs wherein purportedly for the purpose of clarification of doubt in regard to the claim made by certain manufacturers that there were no statutory requirements for declaration of retail sale price on such packages under the Standards of Weights and Measures Act, 1976 and the Rules framed thereunder, it was stated :-

"Rule 6 of the aforesaid rules requires declarations of certain particulars to be made on every package intended for retail sale. Retail sale price of the package is one such detail to be declared by a manufacturer/ packer. Further rule 17 (1) provides for declaration of certain additional details in respect of multi-piece packages such as sale price of the multi-piece package and the number of individual pieces of the commodity contained in such packages. However under rule 34, exemption in respect of certain packages have been provided. In particular sub rule (b) to rule 34 provides that the MRP provisions do not apply to a package containing a commodity if the net weight or measure of a Commodity is 10 grams or 10ml or less, if sold by weight or measure. Some manufacturers have claimed that the multi-piece package containing individual pieces of less than 10 grams or 10ml or less, even though the net quantity of such multi-piece package exceeds 10 grams or 10ml would be covered by the above exemption. Hence they would not be required to be assessed to excise duty on the MRP prices under section 4A of Central Excise Act, 1994

3. The matter has been examined in consultation with the Law Ministry. The Law Ministry has given the opinion that the exemption under rule 34(b) is applicable to a package containing a commodity and this exemption does not appear to be applicable to multi piece packages.

4. Based on the above opinion of the Law Ministry, it is clarified that the declaration of retail sale price of multi-piece packages and individual pieces contained in such multi-piece package (if such individual pieces are capable of being sold separately) is statutorily required under rule 17 (1) of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977.

5. In view of the above statutory requirements for declaration of retail sale price under the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 for multi-piece packages, it is clarified that in respect of multi-piece packages of a commodity intended for retail sale and which are notified under section 4A, they shall be assessed to excise duty under the provisions of section 4A of Central Excise Act, 1944."

20. The opinion of the Law Ministry is not based on any legal principle. Evidently in so doing it did not take into consideration the effect of Rule 12. It proceeded on the premise that Rule 34(b) would be applicable to a package containing a commodity and as such the exemption would not be applicable to "multi piece package". "Multi piece package" in terms of Rule 2(j) is also a package containing a common commodity. To hold it otherwise would be violating the plain language of the statutory Rules.

21. Rule 34(b) provides for exemption from the application of the Rules. The expression contained therein "that nothing contained in these rules shall apply to any package containing a commodity" is of wide amplitude. There cannot be any doubt whatsoever that Rule 34 would apply in a case of this nature if it is sold by weight or measure. The respondents not only do so, they are permitted to do in terms of Schedule V read with sub-rule (2) of Rule 12 of the Rules.

22. In Jayanti Food Processing (P) Ltd. v. Commissioner of C.Ex., Rajasthan [2007 (215) E.L.T. 327 (S.C.)], wherein one of us (Sirpurkar, J.) was a member, this Court stated the law, thus:

"\005We have already explained earlier that the nature of sale is of no consequence. The material consideration is that such sale should be in a 'package' and there should be a requirement in the SWM Act or the Rules made thereunder or any other law for displaying the MRP on such package. We find the requirement to be only under Rule 6(1)(f) which applies to 'retail package' meant for 'retail sale'. What is required to be printed under Rule 6(1)(f) is the 'retail sale price' of the package. 'Retail sale price' is defined under Rule 2(r) and it suggests that the 'retail sale price' means the maximum price at which the commodity in packaged form may be sold to the ultimate consumer. The Rule further suggests the manner in which the 'retail sale price' shall be mentioned on the package. It is the case of the appellant that the four litres pack was not meant to be sold as the package to the ultimate consumer and the sale was only to the intermediary or as the case may be, to the hotel. If that was so, then there is no necessity much less under Rule 6(1)(f) to mention the 'retail sale price' on the package."

In Varnica Herbs (supra) whereupon reliance has been placed by the learned counsel for the appellant, the Madras High Court opined :-

"13. The next contention of the learned counsel for the petitioner is that the effect of the circular is to whittle down the exemption contemplated under Rule 34(1)(b) of the Rules. Relying upon the said rule, it is the contention of the petitioner that since the weight of the individual package is 8 grams, which is less than 10 grams, the petitioner is not expected to declare MRP or the net weight of the individual package. It is also the contention of the petitioner that merely because sachets are placed in a mono-carton that would not make the pack a multi-piece package and Rule 17 is not applicable."

Construing Rule 2(j) read with Rule 6 the learned Judge opined :-

"15. A perusal of these provisions makes it clear that articles kept in separate pouches by the petitioner can be termed as multi piece package and such pouches can be sold individually in single piece or together in a mono-carton of six pouches. The contention of the petitioner that exemption under Rule 34 would be applicable is not acceptable. Even though the net weight is less than 10 grams, it is evident that article is not intended to be sold either by weight or by measure as contemplated under Rule 34(b). The contention that clarification issued by the respondent No.1 has the effect of whittling down the exemption granted under Section 34 is not at all acceptable."

23. We have noticed hereinbefore that each package offered to sell to the customer contains three sachets. Net weight of all the three sachets are stated thereon. It is a "multi piece package" which is capable of being offered to sell as such only because a package is a "multi piece package", the same cannot be taken out of the umbrage of exemption clause contained in Rule 34 of the Rules. Why the commodity cannot independently be sold either by weight or measure is beyond our comprehension particularly when Rule 12(2) permits the same. The illustration appended to Rule 2(j) bring out a clearer picture. It states that the combined net weight shall be taken into consideration for the purposes mentioned therein. After combined weight is taken into consideration for the purpose of applicability of the Rules, there is no reason as to why the said purpose shall not be considered to be a relevant factor for applying the exemption provision. Assuming Rule 2(j) was otherwise vague or unambiguous, illustration appended thereto brings out the true meaning and purport thereof. The reasoning adopted by the Madras High Court in Varnica Herbs (supra) does not appeal to us.

It was rendered per incuriam. It was held to be so in Urison Cosmetics Ltd. (supra) by a Larger Bench of the Customs Excise and Service Tax Appellate Tribunal. We agree with the said opinion of the Tribunal.

24. For the reasons abovementioned the impugned judgment does not warrant any interference. The Civil Appeal Nos. 2597, 2575, 2703-2704 of 2005, 325-326 of 2006 fail and are dismissed with costs. Counsel's fees assessed at Rs. 25,000/- in each case.

Civil Appeal Nos. 1029, 5069-5073 of 2007 [Re: M/s. Aero Pharma (Silvassa) Inc.]

25. The assessee manufactures Lip Smoother. Each unit contains 4.3 ml. They make a package of 72 pieces of lip smoother. The Revenue proceeded on the basis that a package containing 72 pieces of lip smoother would be a multi-piece package.

Civil Appeal No. 1174 of 2007 [Re: M/s. Alfa Packaging]

26. The assessee manufactures Shampoo which is packed in sachets. Each sachet contains shampoo below 10 ml. It is packed in a carton containing more than 500 pieces. Such carton, according to the Revenue, is a multi-piece package.

When a lip smoother or a shampoo is packed in a carton keeping in

view the quantity contained therein, the same cannot be said to be for retail sale. No person would ordinarily purchase for one's own use 72 lip smoothers or 500 pieces of shampoo.

Thus, it is not a case where the goods are being sold in multi-piece package. Each sachet or each lip smoother must be sold as a unit.

27. Civil Appeal Nos. 1029, 5069-5073 of 2007 and Civil Appeal No. 1174 of 2007 are allowed with costs. Counsel's fees assessed at Rs. 25,000/- in each case.

JUDIS