

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH : COURT NO - 3

Excise Appeal No. 10929 of 2019-DB

(Arising out of OIA No. VAD-EXCUS-001-APP-608-2018-19 dated 26.02.2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I)

Contemporary Target Pvt. Ltd.

...Appellant

20-21, Gandhi Oil Mill Compound, Gorwa

Vadodara

Gujarat

-Versus-

C.C.E. & S.T.-Vadodara-i

...Respondent

1st Floor...Central Excise Building,

Race Course Circle,

Vadodara,

Gujarat

390007

AND

Excise Appeal No. 11737 of 2017-DB

(Arising out of OIA No. VAD-EXCUS-001-APP-600-2016-17 dated 28.02.2017 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I)

Contemporary Target Pvt. Ltd.

...Appellant

20-21, Gandhi Oil Mill Compound, Gorwa

Vadodara

Gujarat

-Versus-

C.C.E. & S.T.-Vadodara-i

...Respondent

1st Floor...Central Excise Building,

Race Course Circle,

Vadodara,

Gujarat

390007

WITH

Excise Appeal No. 12113 of 2016-DB

(Arising out of OIA No. VAD-EXCUS-001-APP-210-2016-17 dated 07.07.2016 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I)

Contemporary Target Pvt. Ltd.

...Appellant

20-21, Gandhi Oil Mill Compound, Gorwa

Vadodara

Gujarat

-Versus-

C.C.E. & S.T.-Vadodara-i

...Respondent

1st Floor...Central Excise Building,

Race Course Circle,

Vadodara,

Gujarat

390007

Present For the Appellant : Shri Jitu Motwani, Adv.

Present For the Respondent : Shri Sameer Chitkara, Addl., Commr. (AR)

CORAM:

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

FINAL ORDER NO. A/11912-11914/2019

Date Of Hearing: 17/09/2019

Date of Decision: 15/10/2019

RAMESH NAIR

The brief facts of the case are that the appellant are engaged in manufacture of Tooth Brushes falling under chapter 96 of the First Schedule to Central Excise Tariff Act, 1985. It was noticed that they had cleared the tooth brushes in combo pack/bulk/naked condition to manufacturer of Toothpaste for free distribution by inserting the brush in the tooth paste pack. The tooth brushes classified under Chapter sub-heading No. 9603 2100 of Central Excise Tariff Act, 1985 were assessed by the appellant on transaction value based on contract price under Section 4 of the Central Excise Act, 1944. The tooth brushes mainly cleared to M/s Colgate Palmolive (India) Limited or M/s Advance Oral Care and Professional and Oral Care Product Pvt. Ltd. The case of the department is that the tooth brushes so cleared were required to be assessed under Section 4A of the Central Excise Act, 1944. i.e. on MRP basis instead of transaction value, on the basis that the toothbrushes manufactured by the appellant for their customer were also packed in the blister packing in 1/2/3/4 prices in pack printed with MRP at it, as per Standards of Weights and Measures Act and were assessed as per section 4A of the Central Excise Act, 1944 and duty was discharged on MRP basis as notified by the Government under MRP price assessment. Accordingly, the differential duty demand was confirmed by the adjudicating authority, therefore, the present appeal.

2. Shri Jitu Motwani, Ld. Counsel appearing on behalf of the appellant submits that that these three appeals are for the period February 2013-June 2017. The same issue, in the appellant's own case for the previous period has been decided by this Tribunal in the order no. A/10837/2019 dated 13/05/2019. Therefore, the present appeal, deserves to be disposed of following the Tribunal's decision in their own case.

3. Shri Sameer Chitkara, Ld. Addl. Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. We have heard both sides and perused the records. We find that the very same issue in the appellant's own case for the previous period has been decided by

vide this Tribunal's order dated 13/05/2019. The relevant part of the order is reproduced below:

4. We have considered the submission made by both the sides and perused the records. We find that the facts is not under dispute that the tooth brushes manufactured and supplied by the appellant were cleared either in bulk form or combo pack or in naked condition that means without any retail packing. Goods were supplied to tooth paste manufacturer who in turn used these tooth brushes for making a combo pack with tooth paste for free supply, therefore, the tooth brushes cleared by the appellant was neither sold as such in retail either by the appellant or the buyers i.e. M/s Colgate Palmolive (India) Limited, Oral care etc. In this identical fact the issue was considered by the Hon'ble Supreme Court in the case of Jayanti food processing (P) Ltd. Vs Commissioner o Central Ex., Rajasthan- 2007 (215) ELT 327 (SC) wherein different appeals on the identical issue has been decided as under:-

Civil Appeal No. 1738 of 2004 "

"20. This takes us to the next appeal which is filed by Nestle India Ltd. The appellant M/s. Nestle India Ltd., are engaged in the manufacture of wafers covered with milk chocolate under the brand name „KITKAT“ falling under Chapter 19 of Central Excise Tariff Act, 1985. This product is a specified product under the provisions of Section 4A and is included in the notification and accordingly the duty was being paid on the said chocolate in terms of Section 4A based upon the „retail sale price“ after claiming the deductions on account of abatements. M/s. Nestle India entered into a contract with M/s. Pepsico India Holdings Ltd., where the agreed price of the KITKAT packet was Rs. 4.80 and the chocolate so purchased at that price by M/s. Pepsico was meant for free supply of the same along with one bottle of Pepsi of 1.5 litres in pursuance of their Sales Promotion Scheme. The appellant cleared the disputed goods after payment of duty at Rs. 4.80 per chocolate in terms of Section 4 of the Act after filing the due declaration on the premise that since the chocolates were being sold to M/s. Pepsico, this was not a „retail sale“ and on such chocolates supply there was no requirement to display the maximum retail price and as such the chocolates could not be covered under Section 4A and would eventually be assessable under Section 4 of the Act. However, the Department did not accept this and it issued a show cause notice dated 14-8- 2001 raising a demand of Rs. 48,95,370/- along with the proposal to impose penalty upon the appellant with interest. This proposal was contested by the assessee on the aforementioned plea that it was not required to print the MRP under the provisions of SWM Act and the Rules made thereunder. The Commissioner did not accept this and confirmed the demand. The appellant having failed in its appeal before the Tribunal has now approached this Court by way of this appeal.

21. The Tribunal came to the conclusion that the duty was rightly demanded in terms of Section 4A of the Act.

22. At the outset the learned Counsel Shri Lakshmi Kumaranan accepted the position that when such chocolates are sold in the market, they would undoubtedly be required to print the MRP on each chocolate as the SWM (PC) Rules and more particular Rule 6(1)(f) would be applicable to them. Learned Counsel, however, says that his contention is restricted only to the supply made by the assessee to Pepsico. He points out that the said chocolates were not being sold by the manufacturer in retail but were supplied to another company

under a contract and the purchaser company was not to sell the said chocolates as the chocolates but to offer as a free gift along with its product, namely, a 1.5 litres bottle of Pepsi. Learned Counsel also criticized the order of the Tribunal. Learned Counsel also relied on the aforementioned Board Circular dated 28-2-2002.

23. The Tribunal formulated a question as to whether the package of KITKAT sold by the appellant to M/s. Pepsico India Holdings Ltd., under a contract of Rs. 4.80 per KITKAT are required to be assessed at that price in terms of Section 4 of the Act or the assessable value of the same is required to be arrived at in terms of Section 4A of the Act. The Tribunal while accepting the case of the Revenue simply went on to hold that once the goods are specified items under Section 4A(1) of the Act and are excisable goods, the chargeable duty would be required to be assessed on the MRP. The Tribunal also recorded that the only exception where a manufacturer can deviate from the general rule of printing MRP on the package would be Rule 34 of SWM (PC) Rules. It further held that the said Rule did not apply to the case of the assessee. The Tribunal also relied upon the first Explanation to Section 4A of the Act and came to the conclusion that even if a portion of goods is sold at a lower rate than the MRP affixed thereon, the assessable value in respect of such percentage of goods will not be lowered on that ground. The Tribunal also referred to the advertisements issued by Pepsico wherein it was displayed that KITKAT worth Rs. 12 will be given free with one 1.5 litres bottle of Pepsi. The Tribunal also held that the circular dated 28-2- 2002 did not apply to the case of the assessee. Holding thus, the Tribunal dismissed the appeal.

24. Shri Lakshmi Kumaran firstly pointed out that the KITKAT chocolate sold to Pepsico was for free distribution along with 1.5 litre bottle of Pepsi and, therefore, there is no MRP affixed on the chocolate which accompanied the bottle. He further submits, relying on Section 2(v) of the SWM Act that there is no „sale“ of the chocolate to the consumers as it is offered free as a gift by Pepsi, which purchased the same from the assessee on contract basis.

25. As against this the learned Counsel Shri Subba Rao supported the order of the Tribunal and pointed out that this could be viewed as a „retail sale“. He adopted the reasoning given by the Tribunal on the definition of „retail sale“ holding that the transaction in the present case amounting to „retail sale“ since the chocolates were meant for distribution for consumption by, an individual or group of individuals by retails sale“ and therefore, covered in SWM (PC) Rules.

26. At the outset Shri Lakshmi Kumaran invited our attention to the notification dated 28-2-2002 bearing No. 625/16/2002-CX. He pointed out that by that notification clarification was issued regarding various queries raised expressing the doubts about the assessability of the commodities under Section 4A or Section 4 of the Act. A reference is made to Para 1, Entry 4 of which is as under :

"Items supplied free with another consumer items as marketing strategy. Example, one Lux soap free with on box of surf."

Para 6 of the notification is as under :

"It is, therefore, clarified that, in respect of all goods (whether notified u/s. 4A or not) which are not statutorily required to print/declare the retail sale price on the packages under the provisions of the Standards of Weight & Measures Act, 1976, or the Rules made thereunder or any other law for the time being in force, valuation will be done u/s. 4 of

the C.E. Act, 1944 (or under Section 3(2) of the Central Excise Act, 1944, if tariff values have been fixed for the commodity). Thus, there could be instances where the same notified commodity would be partly assessed on the basis of MRP u/s. 4A and partly on the basis of normal price (prior to 1-7-2000) or transaction value (from 1- 7- 2000), u/s. 4 of the C.E. Act, 1944."

Learned Counsel very heavily relied on the last sentence of Para 6 of the notification and pointed out that the KITKAT chocolate though a notified commodity, need not, in all cases be assessed under Section 4A. According to the learned Counsel stated that this had a direct reference to Entry 4 in Para 1 of the Circular which we have extracted above. Our attention was also invited to a ruling of the Tribunal reported in Commissioner of Central Excise, Ludhiana v. Pepsi Foods Ltd. - 2005 (186) E.L.T. 603 wherein a view has been taken, relying on the aforementioned circular, that the packet of Lays (Potato Chips) which was to be supplied free along with Pepsi of 1.5 litre was bound to be assessed under Section 4 and not under Section 4A of the Act. Learned Counsel points out that this judgment is not challenged by the Revenue and has become final. He further suggests that in keeping with the law laid down by this Court in CCE, Vadodara v. Dhiren Chemical Industries - 2002 (139) E.L.T. 3 the Department cannot now turn back and take a contrary stand. There is no doubt that the judgment of the Tribunal cited supra was attempted to be distinguished in the impugned judgment of the Tribunal on the ground that there appeared a price printed on labels affixed on Pepsi bottle and sold by M/s. Varun Beverages indicating that KITKAT worth Rs. 12 is given free with the said Pepsi Bottle. In our view this printing of the price on the labels of Pepsi would be of no consequence for the simple reason that it is clearly meant for the advertisement of Pepsi and the MRP is not printed on the chocolate. It may be a move on the part of the Pepsi for advertising its product but that cannot be said to be binding vis-a-vis Nestle. What is required is the requirement under the Rules of printing the price. Therefore, the true test is not as to whether the price is printed on the labels of the accompanying product like Pepsi but whether there was a requirement under the SWM Act or the Rules made thereunder to print the MRP on the wrappers of KITKAT chocolates. The reason given by the Tribunal in Para 10 for distinguishing the earlier judgment in Pepsi Food's case, therefore, has to be ignored as not relevant to the controversy. Once that position is clear, we are left with the notification alone and the aforementioned ruling in Pepsi's case. If the ruling has not been challenged by the Department, the same becomes binding as against the Department. Similar is the situation of the circular. The circular becomes binding as held in the case of Dhiren Chemical Industries (supra).

27. The Tribunal in Para 8 of its judgment has observed :

"Once the goods are specified items under Section 4A(1) and are excisable goods chargeable duty (sic) with reference value, then such value shall be deemed to be the retail sale price declared on such goods, less amounts of abatements etc. As we have already observed that Weights & Measures Act requires chocolate manufactured by the appellant to be printed with MRP on the same, we are of the view that the duty of excise on such goods is required to be assessed in terms of the MRP. The only exception where a manufacturer can deviate from the general rule of printing of MRP on the package is Rule 34 of Standards of Weights & Measures (Packaged Commodities) Rules, 1977." We are afraid the law is too broadly stated here. It may be that chocolates manufactured by the appellant are required to bear the declaration of MRP but that cannot be true of all the chocolates. In this

the Tribunal has ignored Para 6 of the aforementioned circular dated 28-2-2002 wherein it is specifically provided that there would be instances where the same notified commodity would be partly assessed on the basis of MRP under Section 4A and partly on the basis of normal price prior to 1-7-2000 or transaction value from 1-7-2000. Again merely because the goods are specified items under Section 4A(1), that by itself will not be a be all and end all of the matter (sic) as before such goods are brought in the arena of Section 4A(1), there would have to be the satisfaction of a particular condition that the packages of such goods are „required“ under the SWM Act and the Rules made thereunder to declare the MRP. The Tribunal has even erred in holding that the circular dated 28-2-2002 is not applicable to the present case. A cursory glance at the circular would suggest that it is applicable to the present case where two commodities have been sold as a market strategy.

28. Shri Subba Rao also heavily relied on Para 9 of the impugned judgment and further relied on the first Explanation of Section 4A and suggested that the „retail sale price“ would be the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumers and includes all taxes, local or otherwise. The Tribunal has held, relying on the expression „may be“ in contradistinction to the expression „shall be“ that even if a portion of the goods are sold at a lower rate than the MRP affixed therein, the assessable value in respect of such percentage of goods will not be lowered on the ground that they have actually been sold at a lower rate. In our opinion the thrust of the Explanation I is not as the Tribunal has shown but is more on as to what retail price should be. The explanation provides that the „retail price“, i.e., the maximum price would include all taxes, local or otherwise, freight, transport charges, commission payable to dealers and all charges towards advertisements, delivery, packing, forwarding and the like. The further thrust of the explanation is on the notion that the price is the sole consideration of such sale. The Tribunal has mixed up Explanation I with Explanation II which is not permissible. This was not a case under Section 4A, Explanation 11(b) because we do not find different sale prices declared on the different packages of the chocolates. The case of the assessee has been consistent from the beginning that these chocolates were sold to Pepsi under a contract for a particular value and the said chocolates were to be offered as a free gift to the one who purchased a particular bottle of Pepsi (1.5 litres). The Tribunal has further expressed that the argument that the bar of KITKAT was not to be sold by Pepsi in the retail market but was to be given as a free gift, would be of no consequence as even if the appellant itself intended to give the bar of KITKAT as a free gift to its customers along with other item, the appellant would not be in a position to claim that there is no assessable value of the goods and as such no duty of excise shall be charged on the same. The logic is clearly faulty. In the given circumstances, the appellant would undoubtedly be assessable to duty under Section 4 of the Act. It is not as if the appellant would be totally exempt from paying „any“ duty on such goods. It was rightly contended before the Tribunal that the thrust of Section 4A is on the packages and not on the commodity and it is only where the goods are sold in the packages that the section would be attracted. The submission was undoubtedly right. The Tribunal, while rejecting this submission, has clearly ignored the language of Section 4A(1) of the Act.

29. It was then suggested that the free gift by Pepsi to its customers would amount to distribution and would, therefore, be amounting to „retail sale“ and the package of KITKAT would be „retail package“.

However, what is material is the definition of „retail sale price“. The requirement of Rule 6(1)(f) is specific. It requires the retail sale price of the package be printed or displayed on the package. If there is no sale involved of the package, there would be no question of Rule 6(1)(f) being attracted. There is a clear indication in the definition of „retail sale price“ as provided in Rule 2(r) which clearly explains that the MRP means the maximum price at which the commodity in packaged form „may be sold“ to the ultimate consumer. Thus, the definition of „sale“ in Section 2(v) of the SWM Act becomes relevant. Therefore, unless there is an element of sale, as contemplated in Section 2(v), Rule 6(1)(f) will not be attracted and thus such package would not be governed under the provisions of SWM (PC) Rules which would clearly take such package out of the restricted arena of Section 4A(1) of the Act and would put it in the broader arena of Section 4 of the Act.

30. Shri Lakshmi Kumaran lastly relied on Rule 34(a) of the SWM (PC) Rules and pointed out that the case was completely covered under that Rule since firstly the package in this case specifically declared that „it was specially packed for Pepsi“. The thrust of the argument was that there appears such declaration on the package of KITKAT and secondly it was for the purpose of servicing Pepsi thereby satisfying both the conditions for applicability of Rule 34(a). The Tribunal has rejected this argument in a very casual manner by observing : "Admittedly, the situation in the present case is not covered by any of the conditions noticed in the said Rule." Learned Counsel Shri Laxmi Kumaran pointed out that there was no question of the application of SWM (PC) Rules apart from any other reasons, because of the applicability of Rule 34. We accept the argument. After all if the contract of the chocolates was for the purpose of advertising of a particular product of the particular industry, it would be covered within the expression „servicing any industry“. We have already dilated upon the expression servicing any industry in the earlier part of our judgment. Those observations would similarly apply to the present appeal also. With the result this appeal has to be allowed by setting aside the order of the Tribunal. We accordingly allow this appeal without any order as to costs.

Civil Appeal No. 2877/2005

Civil Appeal No. 6168/2005

Civil Appeal No. 5840/2006

35. These appeals filed by the Revenue Department are against the Electrolux Kelvinator Ltd., and Electrolux India Ltd. These cases pertain to the valuation of the Refrigerators manufactured by the assessees. It is a common plea that after the manufacture of these Refrigerators, they are sold to the Bottling Companies like Pepsi, Coca Cola and other soft drink manufacturers under the contract. It is further admitted position that all the Refrigerators which are sold are packed in a package declaring the MRP on them. The MRP and the contract price are different. It was the claim of the assessees that they have paid the duty under Section 4A(1) of the Act on the MRP. The goods are specified goods under Section 4A(1) of the Act. However, because of the abatements they have to bear lesser duty which abatements are not available to the contract price. Therefore, if the duty is assessed on the basis of the contract price under Section 4 of the Act, the duty would be more than the duty paid under Section 4A(1) of the Act. The Tribunal, in all the three cases, has held in favour of the assessees holding that these cases would be governed by the decision of the Tribunal in 35. ITEL Industries Pvt. Ltd. v. CCE

reported in 2004 (163) E.L.T. 219 in which case the sale of telephones by the telephone manufacturing companies to DoT, MTNL & BSNL was considered and it was held that the duty will be under Section 4A of the Act and not under Section 4. Relying on that decision, the Tribunal in Civil Appeal No. 2877/2005 has held in favour of the assesseees. It is also held by the Tribunal that Rule 34(a) of SWM (PC) Rules would not be attracted in these cases. In short the Tribunal has held that these cases are identical with the cases involving the sale of telephone. We have already approved the judgment of the Tribunal pertaining to the sale of telephones in the earlier part of this judgment. We do not see any reason to take a different view in case of the Refrigerators. It was feebly stated by Shri Subba Rao that the assesseees have paid the duty based on contract price and not on the MRP. We do not think so as there is material placed before us by the learned Counsel appearing for the assesseees that the duty has been paid not on the contract price but on the MRP. However, we leave it open to the Department to take an action in accordance with law if it is found that the duty is paid on the contract price and not on MRP. Needless to mention that reasonable opportunity would be given to the assesseees to put their say in case the Department decides to proceed against the assesseees on this ground. However, the appeals filed by the Revenue would have to be dismissed and are accordingly dismissed. In the facts and circumstances of the case there will be no order as to costs.

5. Though the Hon'ble Supreme Court disposed of various appeals under common order, however, the appeal No. 1738/2004 is on the similar fact of the present case. Relying on the Hon'ble Supreme Court judgment the Mumbai Bench of the Tribunal in the case of Nestle India Limited (Supra) also held that promotional pack of maggi noodles supplied free with Packet of Tata Tea and such packs of maggi noodles were not bearing MRP with declaration "free with Tata Tea". Therefore, provisions of Standards of Weights and Measures Act, 1976 and Rules made there under would not apply on such supplies. As such valuation of such goods cannot be done under Section 4A of Central Excise Act, 1944 and the appeal of the assessee was allowed. It can be seen that from the above Hon'ble Supreme Court judgment in the case of Jayanti food processing (P) Ltd. (Supra) and Nestle India Limited (Supra) the issue is no longer res integra as the identical facts are involved in the present case, therefore, the tooth brushes supplied by the appellant which is not for retail sale but for free supply by the tooth paste manufacturer will not be valued under Section 4A in the hands of the appellant. Accordingly, the value adopted by the appellant under Section 4 is correct and legal which does not need any interference.

6. In view of above judgment, the issue is no longer res integra. Therefore, the impugned order is set aside and appeals are allowed.

(Pronounced in the open court on 15/10/2019)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

Diksha