
(2015) 11 SC CK 0012

In the Supreme Court Of India

Case No : Civil Appeal Nos. 999-1001 of 2008

Commissioner of Central Excise, Panchkula

APPELLANT

Vs

Liberty Shoes Ltd.

RESPONDENT

Date of Decision : 19-11-2015

Acts Referred:

Citation : (2015) 326 ELT 422

Hon'ble Judges : A.K. Sikri and Rohinton Fali Nariman, JJ.

Bench : Division Bench

Advocate : S/Shri Krishna Kant and Braj Kishore Mishra, Advocates, for the Respondent; S/Shri K. Radhakrishnan, Senior Advocate, Ms. Shirin Khajuria, V. Balaji, Ritesh Kumar and B. Krishna Prasad, Advocates, for the Appellant

Final Decision : Dismissed

Judgement

1. The respondent herein is engaged in the manufacture of footwear under the brand name of "Liberty" falling under Chapter 64 of the First Schedule to the Central Excise Tariff Act, 1985. They are selling their final product, i.e., footwear to various buyers in retail as well as to various institutional buyers in bulk on contractual price, but are paying Central Excise duty on the basis of MRP after availing abatement of 40% as provided under Section 4A of the Central Excise Act, 1944 (hereinafter referred to as "Act") on both type of transactions irrespective of the fact whether the goods are sold to retail buyers or to institutional buyers on contract price.

2. According to the Revenue, respondent herein, by clearing the footwear (finished goods) to their institutional buyers by assessing their value under Section 4A of the Act, had tried to evade Central Excise duty inasmuch as the words and language of Section 4A unambiguously state that MRP is the basis of valuation under Section 4A whereas, in the case of sale of goods, on the basis of contract price, Section 4A will not apply. In case of sale of goods by manufacturer at the contract price, affixation of MRP has no legal significance so far as valuation of goods is concerned. The valuation of goods for levy of excise

duty, in a case where goods are sold to an institutional buyer under a contracted price, shall be governed by Section 4 of the Act and not under Section 4A.

3. The Revenue further relied upon few provisions under the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 (hereinafter referred to as "Rules") which, according to them, specifies that retail sale price has to be declared only in case the goods are intended for retail sale and not otherwise. The goods sold to institutional buyers at the contract price are not meant for retail sale. Such goods are sold to the institutional buyers and are not intended for sale directly to the consumers. The provisions of Section 4A, therefore, are not attracted as there is no requirement under the Rules to declare retail sale price on the packages meant for such sale. Thus, mere affixing MRP on packages supplied to institutional buyers does not constitute retail sale as MRP is required to be affixed only in the case of retail sale and not in the case of wholesale sale or bulk sale to the institutional buyers.

4. The Revenue also relied upon the C.B.E. & C. Circular dated 31-7-1998 wherein it was stated that in case a manufacturer voluntarily affixes MRP, which is not statutorily required, then the Central Excise duty on goods in such packages shall not be charged on the basis of Section 4A of the Act.

5. Revenue further relied upon another Board's Circular dated 28-8-2002 wherein it was stated that Section 4A of the Act is applicable in respect of those cases only where the manufacturer is legally obliged to print the MRP on the packages of the goods under the provisions of the Standards of Weights and Measures Act, 1976 or the Rules made thereunder or any other law for the time being in force.

6. In view of the above, the respondent herein was served with three show cause notices.

7. The Adjudicating Authority, vide its first Order-in-Original dated 30-12-2005, confirmed the duty of Rs. 22,97,300/- and Rs. 4,71,349/- demanded under two show cause notices and vide second Order-in-Original dated 30-3-2006 confirmed a demand of Rs. 32,39,857/- towards Excise duty paid and ordered for recovery of the balance amount of Rs. 28,46,756/- under Section 11A of the Act, along with interest as applicable under Section 11AB of the Act. Penalty of equal amount was also imposed upon the respondent-assessee under Rule 25 of the Central Excise Rules, 2002, read with Section 11AC of the Act.

8. On appeal, learned Commissioner vide its Order-in-Appeal dated 29-11-2006 and 30-11-2006 set aside the demand proposed by the Adjudicating Authority.

9. Aggrieved, the Revenue filed an appeal before Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "CESTAT"), which vide its judgment and final order dated 20-6-2007 [2007 (216) E.L.T. 692 (Tri.-Del.)] dismissed the appeal and held that the order of the Commissioner (Appeals) is in conformity with the provisions of Section 4A of the Act.

10. A perusal of the order of the CESTAT shows that the Commissioner (Appeals), while allowing the appeal of the respondent-assessee, had recorded specific findings to the effect that the shoes in question which were supplied in packages to the aforesaid customers had MRP affixed on them. It was further found that clearances were not under Rule 34 of the Rules which exempts supplies of materials in bulk from the operation of Weights and Measures Act, meaning thereby it was obligatory and essential on the part of the respondent to affix MRP on the goods supplied.

11. It is also a matter of record that footwear is an item which is specified under Section 4A of the Act.

12. Once we find that the footwear is an item which is specified under Section 4A, which is covered by Weights and Measures Act and Rules, and MRP was affixed on the products supplied, which were not exempted under Rule 34 of the Rules, the provision of Section 4A of the Act shall stand attracted.

13. The issue is no more res integra and has been elaborately dealt with by this Court in "Jayanti Food Processing (P) Ltd. v. Commissioner of Central Excise, Rajasthan" [2007 (8) SCC 34 = 2007 (215) E.L.T. 327 (S.C.)] in the following terms :-

"32. It is true that if the unamended section is to be made applicable, the ice cream pack of four litres would certainly be covered under Section 2-A. However, Rule 3 explains that provisions of Chapter II would apply to packages intended for "retail sale" and expression "package" wherever it occurs in the Chapter shall be construed accordingly. It is, therefore, clear that the "package" which was sold by the assessee could not be termed as "retail package" nor the sale thereof be termed as a "retail sale" and as such there was no requirement of mentioning the "retail sale price" on that package. All this has been completely missed in the order of the Tribunal.

33. On the other hand the package in question would certainly come within the definition of "wholesale package" as defined in Rule 2(x)(ii) as it contained the commodity (ice cream) and was sold to intermediary (hotel) for selling the same to the consumer in small quantities. Then Rule 29 would apply to such package which does not require the price to be displayed on the package. What is required to be stated in (a) name and address of the manufacturer, (b) identity of commodity, and (c) total number of retail packages or net quantity. Shri Ravinder Narain is quite justified in relying on Rule 2(x) and Rule 2(q) (sic 29). The Tribunal does not refer to these vital Rules.

34. There is one more substantial reason supporting the appellant. Shri Ravinder Narain invited our attention to Rule 34 in Chapter V of the SWM (PC) Rules which provides for exemptions. We have quoted Rule 34 earlier. The Rule has now been amended. However, under the unamended Rule there is a specific declaration that the SWM (PC) Rules shall not apply to any "package" containing a commodity if the marking on the package unambiguously indicates that it has

been specially packed for the exclusive use of any industry as a raw material or for the purpose of "servicing any industry, mine or quarry". Learned counsel points out that the "package" which is sold by the assessee mentions that it is specially packed for the exclusive use of the catering industry.

35. Learned counsel further argues that such "package" was for the purposes of "servicing the hotel industry or catering industry" as the case may be. Learned counsel is undoubtedly right when he seeks to rely on Rule 34 which provides for exemption of the "packages" which are specially packed for the exclusive use of any industry for the purposes of "servicing that industry". Shri Subba Rao supported the view expressed by the Tribunal that the words "servicing any industry" could not cover the present case and he further suggested that ice cream cannot be a "raw material" for any industry. He is undoubtedly right that ice cream cannot be termed as "raw material" for any industry. However, the words "or for the purposes of servicing any industry" are broad enough to include the transaction in question i.e., the sale of a pack of ice cream to the hotel industry. Hotel does not manufacture the ice cream and is dependent entirely upon the sale of ice cream to it by the assessee for ultimately catering the commodity in the package i.e., ice cream to the ultimate consumer. In our view this can be squarely covered in the term "servicing any industry". The word "service" is a noun of the verb "to serve". This Court in *Coal Mines Provident Fund Commr. v. Ramesh Chander Jha* in a different context, observed as under : (SCC p.592, para 7)

"7. The word "service" in Section 2(17)(h) must necessarily mean something more than being merely subject to the order of the Government or control of the Government. To serve means "to perform function; do what is required for"."

(emphasis supplied)

14. We, thus, do not find any error in the judgment of the CESTAT. The instant appeals are, accordingly, dismissed.