
(2020) 12 CESTAT CK 0005

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 52652 Of 2019

M/s Viwa Drymix Pvt. Ltd.

APPELLANT

Vs

Principal Commissioner, CGST, Central Excise & Customs,
Jabalpur

RESPONDENT

Date of Decision : 09-12-2020

Acts Referred:

Central Excise Act, 1944 — Section 4, 4(A)
Legal Metrology Act, 2009 — Section 2(1), 2(2)
Legal Metrology (Packaged Commodities) Rules, 2011 — Rule 2(A), 2A(a), 2A(b),
2(bb), 2(bc), 2(k), 2(l), 3, 3(a), 3(b), 6, 6(1)(e)
Constitution Of India, 1950 — Article 22(7)(a)

Citation : (2020) 12 CESTAT CK 0005

Hon'ble Judges : Dilip Gupta, J;P. Anjani Kumar, Technical Member

Bench : Division Bench

Advocate : B L Narasimhan, Dhruv Tiwar, R. K. Mishra

Final Decision : Allowed

Judgement

1. This appeal has been filed to assail the order dated July 26, 2019 passed by the Principal Commissioner, Central G.S.T, Central Excise and

Customs, Jabalpur the Principal Commissioner confirming the demand of Central Excise duty for the period April 2014 to June 2017 with interest and penalty.

2. The appellant manufactures wall putty of different brands and different package sizes depending upon purchase orders placed by the customers.

During period of dispute, the appellant manufactured wall putty and cleared it in packages of 20kg, 40kg and 50kg, after affixing Maximum Retail

Price the MRP on all the packages and on the payment of central excise duty.

3. The issue involved in the present appeal is as to whether the valuation of wall

putty in packages of 40kg should be determined under section 4 of the Central Excise Act, 1944, the Excise Act as was determined by the appellant or under section 4A of the Excise Act as contended by the Department.

4. It would, therefore, be relevant to examine the provisions of sections 4 and 4A of the Excise Act. They are reproduced below:

â??Section 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 their value, then, on each removal of the goods, such value shall-

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are

not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

Section 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 Legal Metrology Act, 2009 (1 of 2010) 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.â??

5. Section 4 of the Excise Act deals with valuation of excisable goods for purposes of charging of duty of excise. It provides that the duty of excise

would be chargeable on the transaction value of the excisable goods, if the assessee and the buyer of goods are not related and the price is the sole

consideration for the sale.

6. Section 4A deals with valuation of excisable goods with reference to retail sale price. Sub-section (1) provides that 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 Legal Metrology Act, 2009, the

Metrology Act to declare on the package thereof the retail sale price of such goods, to which the provisions of sub-section (2) shall apply. Sub-section

(2) provides that 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.

7. The appellant claims that in respect of packages of 20kg, the valuation was done as per section 4A of the Excise Act under the MRP based

assessment but for packages of 40kg and 50 kg, the valuation was done in accordance with section 4 of the Excise Act under transaction value based

assessment.

8. It needs to be noted that in exercise of the powers conferred by section 4A of the Excise Act, the Central Government made the Legal Metrology

(Packaged Commodities) Rules, 2011, the Rule. Chapter II of the Rules deals with "Provisions Applicable to Packages Intended for Retail Sale".

Rule 3, which is relevant for the purpose of this appeal, is reproduced below:

Chapter-II

Provisions Applicable to packages intended for retail sale Rule 3. Applicability of the Chapter.-The provisions of this Chapter shall not

apply to,-

(a) packages of commodities containing quantity of more than 25 kg or 25 litre excluding cement and fertilizer sold in bags up to 50kg; and

(b) packaged commodities meant for industrial consumers or institutional consumers.

9. A show cause notice dated May 1, 2009 for the period from April 2014 to June 2017 was issued to the appellant proposing to demand central excise

duty by invoking the extended period of limitation. The appellant was required to pay duty under section 4A of the Excise Act in respect of packages

of 40kg instead of under section 4 of the Excise Act.

10. The appellant submitted a detailed reply contending that wall putty was cleared in packages of 40kg and so in view of the provisions of rule 3 of

the Rules, section 4A of the Excise Act would not be applicable since there is no statutory requirement of mentioning the MRP on the packages. The

appellant also contended that the extended period of limitation, in the facts and circumstances of the case, would not be applicable.

11. The Principal Commissioner, however, by order dated July 26, 2019 confirmed the demand proposed in the show cause notice with interest and penalty. The findings are as follows:

The above provisions stipulate that only those packages of commodities which are containing quantity of more than 25 kgs. or 25 Ltrs.,

(except cement, fertilizer and agricultural farm produce sold in bags above 50 kgs.) and which are meant for "industrial consumers"

or "institutional consumers" are outside the scope of the provisions of this Chapter. In ordinary sense, it indicates that weight of the

packaged commodities should be more than 25 kgs. or 25 ltrs. and it should have meant for industrial consumers or institutional consumers,

exclusively for use in that unit and with declaration/markings on these packages "not for retail sale".

Further, in the instant case, primarily the Certificate from the Legal Metrology Department adduced by the Noticee in support of their

contention is not required when rule 3 of PC Rules, 2011 is itself very explicit and secondly, the said Certificate cannot be accepted as it is

unexplained therein as to what facts and documents were disclosed to them by the Noticee, what and how they have examined and on what

basis the same has been issued to the Noticee.

12. Shri B. L. Narasimhan learned counsel for the appellant made the following submissions:

(i) The appellant has correctly paid duty on wall putty cleared in packages of 40kg under section 4 of the Excise Act and section 4A of the Excise Act

has no application in the present case;

(ii) Valuation under section 4A of the Excise Act cannot be done on wall putty cleared in 40kg packages since there is no statutory requirement of

affixing MRP on such packages;

(iii) Rule 6 deals with declaration to be made on every package. It provides that every package shall have a conspicuous declaration, including a

declaration as to the retail sale price of the package. This provision is contained in Chapter II of the Rules and rule 3 contains conditions under which

the provisions of the said Chapter shall not apply. A perusal of rule 3 indicates that the provisions of Chapter II shall not apply to, - (a) packages of

commodities cleared in quantity of more than 25kg; and (b) packaged commodities meant for industrial consumers or institutional consumers;

(iv) Both the clauses of rule 3 envisage independent and unconnected situations. Thus, if the packages are covered under rule 3(a), the rules will have

no application even if rule 3(b) is not satisfied. This is for the reason that both clauses (a) and (b) of rule 3 are joined with a semi-colon(;). The word

“and” appearing in between such clauses (a) and (b) has to be read disjunctively and not conjunctively. In support of this contention, reliance has

been placed on the decision of the Tribunal in Heidelberg Cement (India) Ltd. vs. Commr. of C. Ex., Nagpur & Raigad 2015 (315) E.L.T. 53 (Tri.-

Mumbai). This decision of the Tribunal was subsequently followed by the Tribunal in ACC Ltd. vs. Commissioner of C. Ex., Coimbatore 2018 (359)

E.L.T. 572 (Tri.-Chennai) and C.C.E. & S.T.- Jaipur-I vs. Ultra Tech Cement Ltd. (Unit Kotputli Cement) Appeal No. E/51506/2018-DB decided on

2.1.2019;

(v) This position is also clear from the clarification given by the Legal Metrology Department by the letter dated June 29, 2019 and it is the Legal

Metrology Department which is the best judge to decide whether a product is required to be affixed with MRP;

(vi) Voluntary affixation of MRP does not attract section 4A of the Customs Act, in the absence of any statutory requirement; and

(vii) Penalty could not have been imposed upon the appellant nor interest could have been recovered.

13. Shri R. K. Mishra learned Authorized Representative of the Department has, however, supported the impugned order and has made the following

submissions:

(i) A combined reading of rule 2(k) and 2(l) of the Rules leaves no manner of doubt that for availing exemption from the provisions of the Rules, both

the conditions stipulated in rule (a) and (b) of rule 3 have to be complied with, otherwise the packages are required to be assessed on MRP.

(ii) It is on record that packages of 40 kg did not bear the description “not for retail sale”, which itself indicates that they were meant for retail

sale in a ready to market condition to the ultimate consumer and not for

industrial/institutional consumers. The appellant has also failed to give evidence that the customers have used these packages in industrial/institutional use. In this connection, reliance has been placed on the decision of the Tribunal in H&R Johnson (India) Ltd. vs CCE, Raipur 2014 (306) ELT 645 (Tri.-Mumbai);

(iii) The appellant never declared the correct value of the impugned goods in their statutory returns with intent to evade payment of duty. Thus, they

have suppressed facts from the department and contravened the various provisions of Excise Act and the rules made thereunder; and

(iv) The Principal Commissioner was justified in imposing penalty and recovering interest.

14. The submissions advanced by the learned Counsel of the appellant and the learned Authorized Representative of the Department have been considered.

15. The issue involved in this appeal is about the interpretation of rule 3 of the Rules, which rule is contained in a Chapter that relates to “Provisions

Applicable to Packages Intended for Retail Sale”. Rule 3, dealing with applicability of Chapter II, provides for conditions under which the provisions

of Chapter II shall not apply. Rule 6 deals with “declaration to be made on every package”. It provides that every package shall bear a

declaration which, amongst others, shall include the retail sale price of the package, which is also called MRP. Thus, if the conditions specified in rule

3 are satisfied, it would not be necessary for the package to contain a declaration about the retail sale price in the package.

16. The contention of learned counsel for the appellant is that clauses (a) and (b) of rule 3 of the Rules envisage independent and unconnected

situations and so if either of the conditions set out in (a) or (b) of rule 3 is satisfied, the provisions of Chapter II shall not apply and consequently rule 6

will not be applicable.

17. The contention of learned Authorized Representative of the Department, however, is that both the conditions set out in (a) and (b) of rule 3 have

to be complied with, otherwise the package has to necessarily mention the MRP.

18. The terms “industrial consumer” and “institutional consumer” have been defined in rule 2(bb) and 2(bc) of the Rules. “Industrial

consumer”, has been defined to mean a consumer who buys packaged

commodities directly from the manufacturer or from an importer or from wholesale dealer for use by that industry and the package should have a declaration "not for retail sale". "Institutional consumer" has been defined to mean a institution who hires or avails of the facilities or services in connection with transport, hotel, hospital or other organization which buy packaged commodities directly from the manufacturer or from an importer or from wholesale dealer for use by that institution, and the package shall have a declaration "not for retail sale".

19. Rule 3 provides that the provisions of Chapter II shall not apply to, - (a); and (b) and what needs to be noticed is that (a) and (b) are separated by a semicolon that is followed by and.

20. Before examining the matter any further, it would be pertinent to note that the Supreme Court in State of Gujarat vs. Reliance Industries Ltd. Civil

Appeal Nos. 13047-13048 of 2017 decided on 22 September, 2017, emphasized the importance placed on punctuation. In Ashwini Kumar Ghose vs.

Arabinda Bose AIR 1952 SC 369 ,the Supreme Court also pointed out that when a statute is carefully punctuated, weight should be given to the

punctuation. In A.K Gopalan Vs. State of Maharashtra AIR 1950 SC 2,7 the Supreme Court, while construing article 22(7)(a) of the Constitution,

referred to the punctuation and derived assistance from it in reaching a conclusion that the Parliament was not obliged to prescribe both the

circumstances under which, and the class or classes of cases, in which a person may be detained for a period longer than three months, without

obtaining the opinion of the Advisory Board and that the Parliament on a true construction of the clause could prescribe either or both.

21. The meaning of the punctuation "semi-colon" in Webster's Third New International Dictionary is as follows:

"A punctuation mark; that is usually used to separate the independent clauses of a compound sentence when the clauses are joined by

no connective, when the clauses are joined by a conjunctive adverb, or when the clauses are joined by a coordinating conjunction but are

long and contain internal punctuation and that is often used to separate long items in a series."

22. The meaning of the punctuation "semi-colon" in World Book Dictionary is as follows:

â??A mark of punctuation that shows a separation not to complete as that shown by a period but more so than that shown by a comma. A

semicolon is used in ordinary prose, especially: a between coordinate clauses not connected by a coordinating conjunction and for clarity:

A teacher affects eternity; he can never tell where his influence stops (Henry Brooks Adams). b between sentence elements that are rather

long or are subdivided by commas: A fundamental, and as many believe, the most essential part of Christianity, is its doctrine of reward and

punishment in the world beyond; and a religion which had nothing at all to say about this great enigma we should hardly feel to be a

religion at all (G. Lowes Dickinson).â??

23. When rule 3 provides that the provisions of Chapter II shall not apply to (a); and (b), it would not mean that the conditions stipulated in both (a)

and (b) have to be satisfied for the provisions of Chapter II not to apply. â?? Andâ?? is clearly used disjunctively and not conjunctively. If what has

been contended by the learned Authorized Representative of the Department is taken to be the true intention behind enacting rule 3, than in that case

all that would have been stated in rule 3 would be that the provisions of Chapter II shall not apply to packaged commodities of more than 25 kg or 25

litres (excluding cement and fertilizer sold in bags up to 50 kg) meant for industrial consumers or institutional consumers.

24. The way rule 3 of the Rules is set out, makes it clear is that the provisions of the Chapter II shall not apply either to packages of commodities

containing quantity of more than 25kg or packaged commodities meant for industrial consumers or institutional consumers.

25. A Division Bench of this Tribunal in Heidelberg Cement (India) Ltd., examined this precise issue and held that the word â??andâ? between the

two clauses (a) and (b) of rule 3 of the Rules has to be read disjunctively and not conjunctively. The relevant portion of the decision in Heidelberg

Cement (India) Ltd. is reproduced below:

5.2 From the above, it can be seen that packages of commodities containing a quantity of more than 25 kg or 25 litre excluding cement and fertilizers

sold in bags upto 50 kg and packaged commodity meant the industrial or institutional consumer are excluded from the provisions of the said Rules. In

other words, the Rules exclude two categories - the first category is packaged

commodity containing a quantity of more than 25 kg or

25 litre and cement and fertilizer bags containing more than 50 kg. The second category is packaged commodity meant for industrial or

institutional consumer. As regards the second category there is no restriction with respect to the quantity of the goods contained in the package.

There is a "semi colon" between the two clauses. This would clearly indicate that the word "and" between the two clauses

have to be read disjunctively and not conjunctively. In other words, in respect of both the above categories, the provisions of PC Rules would

not apply.

(emphasis supplied)

26. A Division Bench of the Tribunal in ACC Cement Ltd. followed the decision of the Tribunal in Heidelberg Cement (India) Ltd. and observed as

follows.

"4.4 We therefore now will require to go the Rules to ascertain whether the retail sale prices are required to be declared or otherwise on

the types of goods cleared by the appellant. The provisions of SoW & M Rules require that retail sale prices should be mentioned on

packages intended for retail sale. However, Rule 2A of the Rules clarify that these requirements shall not apply to

(a) packages of commodities containing quantity of more than 25 kg or 25 litre excluding cement and fertilizer sold in bags up to 50 kg;

and

(b) packaged commodities meant for industrial consumers or institutional consumers.

Explanation: For the purpose of this rule,

(a) Institutional consumer Means those consumers who buy packaged commodities directly from the manufacturers/packers for service

industry like transportation including airways, railways, hotel or any other similar service industry.

(b) Industrial Consumer Means those consumers who buy packaged commodities directly from the manufacturers/packers for using the

product in their industry for production, etc.

4.5 It is seen that the appellant had sold cement in packs of 50 kgs each. Except

for 945.05 MTs (self-consumption) and 632.30 MTs (stock-in-transit closing stock at warehouse), the remaining portion of the disputed clearances totalling to 29415.25 MTs were sold either to manufacturers, users, asbestos and cement/pipe manufacturers, ready-mix concrete manufactures or otherwise to builders, as infrastructure/buildings/ government projects construction, educational institutions, hospitals and societies. From a combined reading of the above reproduced provisions of Rule 2A of the Rules, these genre of buyers would fall under the category of Institutional Consumer or Industrial Consumer, in our opinion. On this score itself, we find that the provisions applicable to packages intended for retail sale in Chapter II of the said rules, will not apply to the clearances of cement by the appellant to its Industrial or Institutional consumers.

4.6 It can be argued that for exemption from retail sale price will apply only where the conditionalities of both (a) and (b) of Rule 2A *ibid* are satisfied and that since packs contain only 50kgs, and not more than 50 kgs., they would still be considered as packages intended for retail sale. However, we find that in the case of Heidelberg Cement (India) Ltd. Vs CCE Nagpur & Raigad 2015 (315) ELT 53 (Tri.-

Mumbai), the Tribunal has ruled that word "and" between Rule 2A(a) and 2A(b) has to be read disjunctively and not conjunctively."

27. The aforesaid interpretation of rule 3 of the Rules and consequent non-affixation of MRP on the 40 kg packages, finds support from the clarification given by the Legal Metrology Department by letter dated June 29, 2019. The Legal Metrology Department clarified to the Appellant that "if wall putty is packed in packages above 25 kgs, as per Rule 3(a) of the said Rules, the provisions of Chapter II including Rule 6(1)(e), (requiring printing of MRP) do not apply to such packages" and further that "packages of 40 kg and 50 kg of all the goods other than cement & fertilizer, are exempted from affixing of MRP declaration. The Legal Metrology Department is the best judge to decide as to whether a product is required to be affixed with MRP or not.

28. The reasons given by the Principal Commissioner for discarding the clarification given by the Legal Metrology Department on two counts, namely that the provisions of rule 3 are clear and it is not clear as to on what facts and

documents the clarification was given, cannot be accepted in view of the aforesaid discussion.

29. Merely because MRP was declared on the package will not mean that the valuation of the excisable goods for the purposes of charging of duty of excise should be carried out under section 4A of the Excise Act, if otherwise in law, the valuation is required to be undertaken under section 4 of the Excise Act. The Board by a Circular dated February 28, 2002, has also clarified that section 4A of the Excise Act will not be attracted when there is no statutory requirement of affixing MRP on the goods in question, even though an assessee may have voluntarily affixed the MRP on such goods.

30. In H&R Johnson (India) Ltd. ,the assessee cleared tiles in retail packages to real estate developers after affixing MRP and paid duty on MRP basis under section 4A of the Excise Act. The Department contended that since the sales were made to institutional/industrial consumers, the Rules would have no application and duty must be paid under section 4. The Tribunal held that there is no difference in respect of packages sold to retail customers and sold to the alleged industrial consumers. The Tribunal also held that the clarifications issued by the Legal Metrology Department, cannot be disregarded. The decision would have no application in the present case since there is no requirement to examine whether the 40 kg packages are capable of being sold in retail since such packages are outrightly excluded from the purview of the Rules. Further, this decision supports the case of the appellant that reliance should be placed on the clarifications issued by the Legal Metrology Department.

31. Thus, as the appellant had cleared wall putty in packages of 40 kg, the provisions of rule 6 contained in Chapter II of the Rules will not apply and if this be so, the provisions of section 4A of the Excise Act under which the value of goods is deemed to be the retail sale price declared on such goods, would not be applicable. The appellant was, therefore, justified in determining the value of the goods under section 4 of the Excise Act.

32. Thus, for all the reason stated above, the Principal Commissioner was not justified in concluding that the valuation of wall putty in packages of 40 kg was required to be determined under section 4A of the Excise Act.

33. The order dated July 26, 2019 passed by the Principal Commissioner, therefore, cannot be sustained and is set aside. The appeal is, accordingly

allowed.