



REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. 143-147 OF 2010**

**Commissioner of Central Excise,
Jaipur -II**

... Appellant

versus

M/s Miraj Products Pvt. Ltd.

... Respondent

J U D G M E N T

ABHAY S. OKA, J.

FACTUAL DETAILS

1. These appeals take exception to the judgment and order dated 7th November 2008 passed by the Customs, Excise and Service Tax Appellate Tribunal (for short, 'the Tribunal'). The issue involved, in short, is whether the goods sold by the respondent-assessee are covered by Section 4 or Section 4A of the Central Excise Act, 1944 (for short, 'The Excise Act'). The proceedings commenced based on the show cause notices issued to the respondent-assessee. The first show cause notice issued on 22nd April 2004, pertains to a brief period in April 2003. The second show cause notice is of 31st May 2004

covering the period from May 2003 till December 2003. By a notification dated 1st March 2002 issued under sub-section (1) of Section 4A of the Excise Act, tobacco was notified by including the same at Sr.no.24A in the Notification with effect from 1st March 2003. The allegations made in both the show cause notices are similar. The show cause notice dated 22nd April 2004 was supplemented by an addendum dated 10th June 2004. The allegation against the respondent-assessee in the show cause notices was that the assessee was packing 33 pouches of 6 gms each of chewing tobacco and one pouch of 15 gms of chewing tobacco in a larger poly pack. It is alleged that MRP (maximum retail price) of Rs. 1 per pouch is mentioned on the pouches carrying a quantity of 6 gms, and MRP of Rs. 3 was mentioned on the pouch carrying 15 gms quantity. It is alleged that on the larger poly pack, a weight of 213 gms and MRP of Rs. 36 was mentioned. It is alleged in the show cause notice that the larger poly packs are group packages as defined in Rule 2(g) of the Standards of Weight & Measures (Packaged Commodity) Rules, 1977 (for short, 'the said Rules'). It is alleged that the group package made by the respondent was intended for retail sale. Further allegation in the show cause notice is that the weight of each group package exceeds 10 gms. Therefore, the group packages of the respondent-assessee are not covered by the exemption under Rule 34(b) of the said Rules. Reliance was placed on a decision of the Madras High Court in the case of **M/s.Varnica Herbs v. Central Board of Excise & Customs, New Delhi**¹.

¹ 2004 (163) ELT 160 (Madras)

Therefore, the respondent-assessee was called upon to pay duty on the poly pack sold by the assessee in the manner provided under Section 4A of the Excise Act. Apart from the differential duty, a demand was made for interest and penalty.

2. The respondent replied to the show cause notice by contending that 100 poly packs, each containing 33 small pouches of 6 gms each, and one pouch of 15 gms are being put into one HDPE bag (High-Density Polyethylene Bag). The quantity of 15 gms is kept in a zipper pouch, on which duty is paid under Section 4A of the Excise Act on MRP. A factual contention was raised in the reply by the respondent-assessee that it is not selling poly packs of 33 small pouches directly to the customers. It is stated that the assessee is clearing only HDPE bags containing 100 poly packs, and HDPE bags are being sold to distributors or dealers. Therefore, the assessee did not make a retail sale. It is contended by the respondent that poly packs containing 33 pouches of 6 gms quantity are not group packages within the meaning of Rule 2(g) of the said Rules, and the said poly packs and HDPE bags are wholesale packages as defined in Rule 2(x) of the said Rules. Therefore, the contention is that Section 4A will have no application.

3. After hearing the respondent, the order-in-original was passed by the Commissioner. By the said order dated 19th July 2005, the contentions raised by the respondent-assessee were rejected, and the demand made in the show cause notices was confirmed. The Commissioner referred to the

declarations made on poly pack and held that it was in terms of Rule 16 of the said Rules, and Rule 16 is a part of Chapter II of the said Rules, which deals with retail sales. It was held that a declaration on the poly packs confirms the requirement of Rule 6 and Rule 16 of Chapter II of the said Rules, and therefore, poly packs were intended for retail sale. The order further records that the sale price was mentioned on the poly pack, which was not the requirement of Rule 29 of the said Rules, which deals with declarations on the wholesale packages. However, the Commissioner held that the assessee's HDPE bags, which contain 100 larger poly pack packages and do not declare the sale price, would be wholesale packages. The Commissioner rejected the respondent's contention that the poly packs were not sold in retail by holding that whether the manufacturer sold them in retail or not is relevant and what is material is whether the goods were intended for retail sale.

4. By the impugned judgment, the Tribunal held that the decision of the Madras High Court in the case of **Varnica Herbs¹** was not a binding precedent. The Tribunal relied upon a decision of this Court in the case of **Commissioner of Central Excise, Vapi v. Kraftech Products Inc.²**. The Tribunal proceeded to set aside the Commissioner's order.

² (2008) 12 SCC 321.

SUBMISSIONS

5. The learned counsel appearing for the appellant submitted that the decision of this Court in the case of ***Commissioner of Central Excise, Vapi²***, has no application as the assessee in the said case was selling three sachets of 3 gms of hair dye in one pack. Learned counsel pointed out that thus the total weight of the pack was 9 gms, which was covered by the exemption under Section 34(b) of the said Rules. The learned counsel pointed out that the weight of poly packs and HDPE bags is much more than 10 gms in the present case. Learned counsel submitted that what was being sold by the respondent was a group package meant for retail sale, and therefore, Section 4A was rightly applied by the Commissioner. Learned counsel submitted that even otherwise, as the poly packs are not sold by weight or measure, Rule 34 (b) of the said Rules has no application. Learned counsel submitted that the Tribunal had not considered the factual position in this case, which the Commissioner considered in detail. Learned counsel further submitted that one pouch of 15 gms quantity of chewable tobacco forms part of the poly pack on which the respondent was admittedly paying duty in accordance with Section 4A of the Excise Act. Learned counsel has taken us through the relevant provisions of the said Rules.

6. The learned counsel representing the respondent supported the impugned judgment and urged that the principles laid down by this Court in the case of

Commissioner of Central Excise, Vapi², will squarely apply. It was submitted that HDPE bags containing 100 poly packs containing 34 pouches was not meant for retail sale; therefore, it cannot be treated as a group package, and it has to be a wholesale package that is not meant for retail sale. Learned counsel submitted that there is no need to interfere with the impugned judgment, which takes the correct view.

CONSIDERATION OF SUBMISSIONS

7. It is not in dispute that the respondent is dealing with chewing tobacco. From 7th April 2003, the respondent started the practice of packing together 33 pouches of 6 gms each and one pouch of 15 gms of chewing tobacco in a larger poly pack. The Revenue contends that as the larger poly pack has weight and MRP printed on it, the same was a group package intended for retail sale. The case made out in the show cause notices is that the poly pack contains a quantity of more than 10 gms of chewing tobacco, and therefore, exemption under Rule 34(b) of the said Rules will not apply. As can be seen from Clause (b) of Rule 34 of the said Rules, the exemption will apply to any package containing a commodity if the net weight of the commodity is 10 gms or less and if the same is being sold by weight. The stand of the respondent-assessee in reply to the show cause notices is that though the poly packs may have MRP printed on it, it was never intended for retail sale. Moreover, the respondent was packing 100 poly packs in one HDPE bag, and the HDPE bags were sold to distributors. The weight of the chewing tobacco in one poly

pack or HDPE bag is more than 10 gms. Therefore, Rule 34(b) of the said Rules has no application.

8. As far as facts are concerned, even in the order-in-original passed by the Commissioner, which was impugned before the Tribunal and in particular, clause (d) of paragraph 16, it is accepted that the respondent is packing 100 poly pack packages in one HDPE bag.

9. The real controversy is whether the commodity sold by the respondent will attract Section 4A of the Excise Act. Sub-section (1) of Section 4A of the Excise Act reads thus:

“Section 4A. Valuation of excisable goods with reference to retail sale price.

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(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 Measure (PC) Rules, 1976 (60 of 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.”**

(emphasis added)

10. In the facts of the case, chewable tobacco has been notified under sub-section (1) of Section 4A. The question is whether the provisions of the said Rules framed under the Standards of Weights and Measure (PC) Rules, 1977, require a declaration of retail sale on the packages of the respondent.

In short, the controversy is whether the packages made by the respondent-assessee are such that under the said Rules, there is a requirement to declare the retail price of the goods on the packages.

11. Now, we turn to the said Rules. Chapter II of the said Rules deals with the provisions applicable to packages intended for retail sale. Retail sale is defined in Rule 2(q) of the said Rules, which reads thus:

“(q) “retail sale” in relation to a commodity, means the sale, distribution or delivery of such commodity through retail sales agencies or other instrumentalities for consumption by an individual or group of individuals or any other consumer;”

Therefore, to attract the definition of retail sale, a commodity has to be sold, distributed, or delivered for consumption by an individual, a group of individuals, or any other consumer. Thus, the sale or distribution of a commodity to a dealer who, in turn, sells the commodity to retail dealers will not be a retail sale.

12. Rule 2(g) defines group package which reads thus:

“2(g) “group package” means a package intended for retail sale, containing two or more individual packages, or individual pieces, of similar, but not identical (whether in quantity or size), commodities;

Explanation.- Commodities which are generally the same but differ in weight,

measure or volume, appearance or quality are similar but not identical commodities;”

Therefore, a package can become a group package, provided it is intended for retail sale. In this case, there is no dispute that the respondent's poly packs and HDPE bags contain more than 2 individual packages of similar commodities but are not identical in quantity. The question is whether the package made by the respondent was intended for retail sale.

13. Rule 2(x) of the said Rule defines “wholesale package”, which reads thus:

“(x) “wholesale package” means a package containing-

(i) a number of retail packages, where such first mentioned package is intended for sale, distribution or delivery to an intermediary and is not intended for sale direct to a single consumer; or

(ii) a commodity sold to an intermediary in bulk to enable such intermediary to sell, distribute or deliver such commodity to the consumer in smaller quantities; or

(iii) packages containing ten or more than ten retail packages provided that the retail packages are labelled as required under the rules.”

14. Now, we turn to the order-in-original and the findings recorded therein. The Commissioner held that Rules 6 and 16

form a part of Chapter II of the said Rules and, therefore, apply to the packages intended for retail sale. The Commissioner found that the poly packs contained a declaration in terms of both Rule 6 and Rule 16. The Commissioner referred to the format of declaration to be made under Rule 29, which is a part of Chapter IV of the said Rules, which did not apply to packages intended for retail sale. The Commissioner held that Rule 29 does not require a declaration of sale price on the wholesale package. The Commissioner found that the poly pack containing 33 plus one small packages contained a declaration of the price. Therefore, the Commissioner held that the poly packs were intended for retail sale. Otherwise, there was no reason to mention MRP on the poly packs. The Commissioner held that the intention to make retail sale of the poly packs was clear, and, therefore, whether poly packs were sold by way of retail sale was irrelevant.

15. As noted earlier, in view of sub-section (1) of Section 4A, the question is whether there is any requirement in the said Rules to declare the retail sale price of the commodity on the package. What is relevant is whether the package is of such nature that attracts any of the provisions of the said Rules, which mandatorily require the mention of retail price on the package. In case of a package that does not attract provisions of the said Rules regarding mentioning the retail price, even if the retail price is mentioned on the package, that itself will not attract sub-section (1) of Section 4A of the Excise Act.

16. However, on facts, we may not be required to deal with the issue of whether a poly pack containing 33 plus one small package was intended for retail sale. The reason is that the specific case made out by the respondent in reply to the show cause notices was that the respondent was selling HDPE bags containing 100 poly packs containing 33 plus one smaller pack has not been rejected by the Commissioner. In fact, the Commissioner seems to have accepted the contention, as seen from Clause (d) of paragraph 16 of the order-in-original. In clause (d), the Commissioner held thus:

“(d) Further the intentions of the assessee that HDPE bag is a wholesale package and the larger polypack packages are group packages intended for retail sale is also expressed from the fact that there is no requirement under Rule 29 of the Standards of Weights & Measures (Packaged Commodities), Rules, 1977 of mentioning sale price or unit sale price or the MRP on a wholesale package whereas their larger polypack package contains the declaration "MAX UNIT SALE PRICE" and they are not declaring sale price on HDPE bag (it has also been admitted by them in the reply to Show Cause Notice that their HDPE bag is a wholesale package), therefore, this larger polypack package containing the declaration "MAX UNIT SALE PRICE" cannot be considered as a wholesale package but can be considered only a group package intended for retail sale. Only the HDPE bag of the assessee, which contains 100 larger polypack packages and does not

contain declaration of sale price, would be a wholesale package.”

(emphasis added)

17. In so many words, the Commissioner held that an HDPE bag containing 100 poly packs does not contain a declaration of selling price and therefore, it would be a wholesale package. There is no finding recorded that what is distributed or sold by the respondent is a poly pack containing 33 plus one small pack. The respondent's case that 100 poly pack packages are being put in one HDPE bag has been accepted by the Commissioner. Therefore, the respondent is selling HDPE bags containing 100 poly packs each to the distributors and dealers. The said Rules do not require the display of price on such HDPE bags. Even assuming that 100 poly packs were retail packages, HDPE bags would be covered by the definition of 'wholesale package' as defined in clause (iii) of Rule 2(x) of the said Rules. Thus, the HDPE bags are not group packages within the meaning of Rule 2(g).

18. Though the impugned judgment is not satisfactorily worded, for the reasons which were recorded above, the ultimate conclusion recorded in the impugned judgment that Section 4A(1) of the Excise Act was not applicable to the goods subject matter of the show cause notices, cannot be faulted with. Hence, there is no reason to interfere with the impugned judgment.

19. Accordingly, the appeals are dismissed with no order as to costs.

.....J.

(Abhay S. Oka)

.....J.

(Pankaj Mithal)

**New Delhi;
July 08, 2024.**