

Cce Vs. Kraftech Products Inc

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-07-2004

Reported in : (2004)(174)ELT396TriDel

Judge : S Kang, Vice-, V Agrawal

Appellant : Cce

Respondent : Kraftech Products Inc

Judgement :

1. The issue involved in this appeal, filed by the Revenue, is whether the Central Excise duty is payable by M/s. Kraftech Products Inc. on the assessable value determined under Section 4 of the Central Excise Act as claimed by Respondents or with reference to M.R.P. under Section 4A of the Central Excise Act as claimed by the Revenue.

2. Shri S.C. Pushkarna, learned D.R., submitted that the Respondents manufacture 'Godrej Permanent Powder Hair Dye' and 'Godrej Kali Mehndi'; that they were packing these products in multi-piece packages and were clearing to their sole buyer M/s. Godrej Soaps Ltd.; that a show cause notice date 13.7.2000 was issued to the Respondents for assessing the multi-piece packages under the provisions of Section 4A of the Central Excise Act on the ground that multi-piece packages even if having the total weight of contents of all commodities less than 10 gms., required a declaration under Rule 17 of the Standards of Weights & Measures (Packaged Commodities) Rules, 1977 (In Short PCR, 1977) and were

not eligible for exemption under Rule 34 (b) of PCR, 1977; that the Commissioner, under the impugned Order, has held that the provisions of Rule 34 of PCR, 1977, are unambiguous in nature and the exemption applies to any package containing a commodity; that he has accordingly did not confirm the demand of Central Excise duty, etc. The learned D.R. mentioned that Rule 2(j) of PCR, 1977, defines 'multi-piece package' means a package containing two or more individually packaged or labelled pieces of the same commodities of identical quantity intended for retail sale, either in individual piece or the package as a whole; that Rule 6 of PCR, 1977 requires that every package shall bear thereon or on a label securely affixed thereto a definite plain and conspicuous declaration; that retail sale price of the packages is one such -detail to be declared by a manufacturer; that Rule 34 (b) of PCR, 1977, provides that the "nothing contained in these Rules shall apply to any package containing a commodity if the net weight or measures of the commodity is twenty grams or twenty multi-litres or less, if sold by weight or measures." He submitted that the Central Board of Excise & Customs has clarified vide Circular No.492/58199-Cx., dated 2.11.99 that the exemption under Rule 34(b) is applicable to a package containing a commodity and this exemption does not apply to multi-piece package and that in respect of multipiece package 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 the Central Excise Act. The learned D.R.also relied upon the decision in the case of Varnic Herbs v. C.B.E.& C., New Delhi, 2004 (91) ECC 493 (Mad) : 2004 (163) ELT 160 (Mad) wherein the Madras High Court has held after referring to Rule 2(i), Rule 17 and Rule 34 (b) of PCR, 1977 Rules that : "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." 4. On the other hand, Sh. R. Ravinderan, learned Advocate, submitted that the only ground for the

appeal of the Revenue is Board's Circular dated 2.11.99 which was not relied upon in the show cause notice or at any time during the adjudication proceedings; that thus Revenue cannot now rely on the same in the appeal before the Tribunal, He relied upon the decision in the case of Kalyani Packaging Industry v. UOI, 2004 (96) ECC 442 (SC) : 2004 (169) ELT 195 (SC) wherein the Supreme Court has held, when the reliance was placed on circulars of 1973 and 1987 for the first time, that "Parties cannot be permitted to rely upon the material which have not been relied upon before the lower authorities/Court." He contended that thus the ground of appeal are beyond the scope of show cause notice and the Order-in-Original; that no new case can be made out at appeal stage as has been held in CCE v.M.R.K. Frozen Food Export, 1998 (61) ECC 532 (T) : 1998 (103) ELT 383 (T) and CCE v. Swastic Coaters Pvt. Ltd., 1998 (60) ECC 178 (T) : 1999 (103) ELT 533 (T). He also submitted that the decision in Varnica Herbs is per incuriam being contrary to the specific provisions of the Rules; that Rule 34(b) provides that the declaration in respect of maximum retail price is not required if the package contains less than 10 gms.

or less than 10 ml.; that if the contention of the Revenue is that the judgment upholds the view that even if the multi-piece package contains less than 10 g/10 ml., the package requires declaration of M.R.P. and hence covered by Section 4A of the Central Excise Act, then the judgment is per incuriam, being in ignorance of the terms of a statute or of a rule having the force of a statute. Reliance has been placed on the decision in Municipal Corporation of Delhi v. Gurnam Kaur, AIR 1989 SC 38 wherein the Supreme Court did not "uphold the decision of the High Court because, it seems to us that it is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the face of a statute."; The learned Advocate further mentioned that in Para 2 of the Madras High Court judgment it is stated that herbal hair dye is packed in sachets of 8 gms. in weight in pouch and six such pouches are being packed in a Mono carton; that thus clearly the petitioner therein was selling the product in Mono carton containing 48 gm. which weight was more than the weight specified in Rule 34 (b) of PCR, 1977; that in the present matter the Respondents sell their impugned product by weight i.e. a sachet containing 3 gm of powder hair dye

and/or in a multi pack containing 3 such sachets, total net weight being 9 gm. only; that it cannot thus be said that impugned product in sachet is not intended to be sold by weight or measure.

5. He also contended that the circular dated 2.11.1999 reiterates the correct legal position under Rule 34 (b) as the query raised in the circular related to the net quantity of multi-piece package exceeding 10 gms. or 10 ml.; that thus clarification that all multi-piece packages (without specifying the net content of the product) being not eligible for the exemption under Rule 34 (b) is contrary to law; that if the circular is so read, the packages of the type involved in the present appeal, i.e. multi-piece package containing less than 10 gm./10 ml. will be eligible for exemption under Rule 34 (b). Finally, he submitted that merely because a product is notified under Section 4A of the Central Excise Act, it cannot ipso facto be said that every package containing and product should be assessed to duty under Section 4A; that Board's Circular No. 411/44/98 Cx dated 31.7.98 clearly states that in case a manufacturer voluntarily affixes M.R.P. which is not statutorily required then the excise duty on goods in such packing shall not be charged on the basis of Section 4A of the Act as the said Section applies only when there is a statutory requirement of affixing the M.R.P.; that, therefore, merely because a product is notified under Section 4A, all the packages cannot be assessed to duty under Section 4A unless the package is such that it requires M.R.P. to be declared thereon statutorily; that as the multi-piece package contains less than 10 gm, it does not require to contain M.R.P. declaration statutorily in terms of Rule 34(b) of PCR, 1977; that the Tribunal in the case of the Respondents themselves has upheld their contention in the following decisions :Kraftech Products Inc. v. CCE, Vapi 6.1 We have considered the submissions of both the sides. Section 4A of the Central Excise Act provides that the Central Government may specify any goods, in relation to which it is required, under the provisions of the Standards of Weights & 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 price and the value of such goods shall be deemed to be the retail sale price declared on such goods less such amount of abatement as may be allowed. It is thus apparent from the provisions of Section 4A, that the value shall be deemed to be the retail sale price only if : (a) The Central Government specifies any excisable goods by

notification in Official Gazette in this regard; and (b) It should be required under the provisions of Standards of Weights & Measures Act or 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 the goods.

6.2 The Board has also clarified vide letter F. No. 341/64/97 TRU dated 11.8.97 that Sub-section 4A applies only when the MRP is required to be indicated under the provisions of Standards of Weights & Measures Act or under any other law for the time being in force. The same clarification has been reiterated by the Board vide Circular No.411/44/98 Cx dated 31.7.98 wherein it is mentioned that "Section 4A applies only when there is statutory requirement of affixing the MRP." 6.3 The Central Government has made Standards of Weight and Measures (Packaged Commodities) Rules, 1977 under Section 83 of the Standards of Weights & Measures Act, 1976. Rule 1(3) of these Rules provides that the Rules shall apply to commodities in the packaged form which are, or are intended or likely to be sold, distributed or delivered or offered or displayed for sale, distribution or delivery or stored for sale, or for distribution or delivery, in the course of inter-State trade or commerce. There is no definition of "package" in the Rules which however define "combination package", "fancy package", "group package", "multi-piece package", "retail package", and "wholesale package". Rule 6 requires every package to bear thereon or on a label a definite, plain and conspicuous declaration which, inter alia, will include 'the retail sale price of the package'; Rule 34 of P.C.R. 1977, exempts any package "from the applicability of PCR, 1977 if "the net weight or measure of the commodity is twenty gms. or twenty mililitres or less, if sold by weight or measure." There is no force in the submission of the learned SDR that Rule 34(b) is not applicable to a multi-piece package since there is no qualifying words used in the case Sub-rule (b) of Rule 34 of P.C.R., 1977. The only condition stipulated therein is that the net weight or measures of the commodity should not exceed 20 gm/20 ml. and sold by weight or measure. Similar views have been expressed by the Tribunal in Respondents' own case (Order dated 10.5.2004, supra) wherein the Tribunal has held as under : "The language of the rule does not warrant the interpretation ought 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 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" 6.4 We also observe that Tribunal again vide Order dated 29.7.2004, in the case of Respondents and in respect of impugned products themselves has held that the second Proviso to Rule 34 "relates to declarations in respect of Maximum Retail Price, net quantity. When these two proviso of rule 34(b) are read together it is clear that the declaration in respect of Maximum Retail Price and the net quantity is not required to be made if the net content of the package is less than 10 gms. or 10 ml. Therefore, the Appellants' multi-piece packages having only 9 gms.

in the multi pack under consideration is clerly exempt from the requirement of declaration of MRP under Standards of Weights and Measures Act. In other words, it is not obligatory to declare MRP of such packages." The Tribunal has, therefore, held that "the package herein is not liable for assessment to duty under Section 4A of the Central Excise Act, 1944." 7.1 The learned S.D.R. has placed heavy reliance on Circular No.492/58/99-CX dated 2.11.1999 and the decision of Madras High Court in Varnica Herbs. He do not agree with the learned Advocate's contention that reliance on circular dated 2.11.99 in beyond the scope of show cause notice inasmuch as the notice clearly mentioned that the multi-piece package is to be assessed under the provisions of Section 4A of the Central Excise Act and not on the basis of assessable value determined under Section 4 of the said Act. More reliance on circular in support of the charge levelled in show cause notice does not mean that the Revenue has travelled beyond the scope of the notice. We are, however, of the view that there is nothing in the language of Rule 34(b) of PCR, 1977 to arrive at a conclusion that it does not apply to multi-piece package. The Law Ministry has only advised that "this exemption does not appear to be applicable to multi-piece packages." The Law Ministry has not categorically advised that Rule 34 (b) does not apply to multi-piece package. Secondly the Board has only clarified : (i) that the declaration of retail sale price of multi-piece packages and individual pieces contained in such multi-piece package is statutorily required under Rule 17 (1) of PCR, 1977; and (ii) that in respect of of multi-piece packages of 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 the Central Excise Act.

7.2 The Central Board of Excise & Customs has not clarified that exemption contained in Rule 34(b) of PCR, 1977 will not apply to multi-piece package. It has only clarified that the provisions of Section 4A will be applicable as the declaration of retail sale price is required to be declared on multi-piece package statutorily under Rule 17(1) of PCR, 1977. In the case of Varnica Herbs, the Madras High Court has held that the circular dated 2.11.99 is not null and void "as the purpose of the impugned circular is to issue clarification in the matter relating to manner of levying excise in respect of article." The Hon'ble High Court has held that "the contention of the petitioner that exemption under Rule 34 would be applicable is not acceptable." The decision is in respect of the product 'herbal hair dye' packed in sachets of 8 gms. in weight in Photo Protective Pouch and six such pouches were packaged in a Mono Carton. The net weight of the commodity so contained in Mono carton was thus 48 gms. which is much more than the limit of weight prescribed in Rule 34(b) of PCR, 1977. In view of this factual position, the exemption under Rule 34 is not applicable and the Hon'ble High Court did not accept the contention of the petitioner that the net weight of individual sachete was less than 10 gms. which was not sold either by weight or by measure. As in the present matter the net weight of the commodity is less than maximum weight limit prescribed in Rule 34 (b) of PCR 1977, the exemption contained therein is available to the Respondents. We, therefore, hold that the impugned products are liable to be assessed on the basis of assessable value determined under Section 4 of the Central Excise Act and not under Section 4 of the Act. Thus, the appeal filed by the Revenue is rejected.

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