Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO. 3

Excise Appeal No. 729 of 2012-DB

(Arising out of OIA-431/2012/COMMR-A-/RBT/RAJ dated 17/07/2012 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-RAJKOT)

Swan Sweets Pvt Ltd **.....Appellant**
Survey No. 126, Jamnagar Khambhalia Highway,
Post : Vasai,
Jamnagar, Gujarat

VERSUS

C.C.E. & S.T.-Rajkot **.....Respondent**
Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat - 360001

WITH

Excise Appeal No. 11968 of 2013- Swan Sweets Pvt Ltd

Excise Appeal No. 11969 of 2013- Swan Sweets Pvt Ltd

APPEARANCE:
Shri Dhaval Shah, Advocate appeared for the Appellant
Shri Kalpesh P Shah, Assistant Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C.L.MAHAR

Final Order No. A/ 11476 - 11478/2023

DATE OF HEARING: 12.06.2023
DATE OF DECISION:10.07.2023

RAMESH NAIR

The issue involved in the present case is that in the case where the sugar confectionery falling under chapter heading under 1704.90 and 1804.90 being manufactured by the appellant, the individual piece weighing less than 10 grams per piece and the same are packed in 500 grams pack whether such product is liable to be valued on MRP basis under Section 4A or under Section 4 of Central Excise Act, 1944.

2. Shri Dhaval Shah, Learned Counsel appearing on behalf of the appellant submits that this issue in the appellant own case has been settled in their favour by the Hon'ble Supreme Court reported at 2010 (259) ELT 5 (SC). He further submits that the said judgment was relied upon by this Tribunal in the case of Makson Pharmaceuticals India Pvt. Ltd vide Final

Order No. A/ 11102 -11103/2023 dated 03.05.2023 and held that valuation of such goods is governed by Section 4 and not under Section 4 A of Central Excise Act, 1944.

3. Shri Kalpesh P Shah, Learned Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both sides and perused the records. We find that under the identical facts in the appellant's own case reported at 2006 (198) ELT 565 (Tri. Ahmd) it was held that wholesale pack of 500 grams to 1 kg is not retail pack and therefore taking the weight of individual piece of confectionery which is less than 10 grams will not be governed under Section 4A. The said decision of the Tribunal was approved by the Hon'ble Supreme Court reported at 2010 (259) ELT 5 (SC). This Tribunal considering the decision in the above cited case, in the case of Makson Pharmaceuticals India Pvt. Ltd (Supra) taking the same view decided the matter in the favour of the assessee vide Final Order No. A/ 11102 -11103/2023 dated 03.05.2023. The relevant portion is reproduced below:-

> *"06. We have carefully considered the rival submissions and perused the records. The revenue's appeal is only on the ground that by amendment dated 13.01.2007 in Rule 2(j) of the SWM (PC) Rules, 1977 the earlier judgment in the appellant's own company is distinguished. In this regard, we reproduce Rule 34 (b) which has prevailed prior to 13.01.2007 and subsequent to that which reads as under:-*
>
> *Before 13.01.2007*
>
> *Rule 34. Exemption in respect of certain packages Nothing contained in these rules shall apply to any package containing a commodity if,-*
>
> *(a)…….*
>
> *(b) the net weight or measure of the commodity is twenty grams or twenty mililitres or less, if sold by weight or measure.*
>
> *After 13.01.2007 Rule 34. Exemption in respect of certain packages Nothing contained in these rules shall apply to any package containing a commodity if,-*
>
> *(a)…….*
>
> *(b) the net weight or measure of the commodity is ten gram or ten mililitre or less, if sold by weight or measure.*
>
> *In view of the above rule, which was prevailing throughout the period involved in the present case, there is a clear provision that in case of the product of less than 10 grams, there is no requirement for affixing retail sale price. Since in the earlier decision of the Hon'ble Supreme Court it was categorically held that for the purpose of assessment, individual*

confectionary has to be taken and not the wholesale pack. The individual confectionary is undisputedly below the weight of less than 10 gram and in terms of Rule 34(b) of SWM (PC) Rules, 1977 there is no requirement for affixing the retail sale price. The said product cannot be taken under the ambit of Section 4A of Central Excise Act,1944.

5.2 In revenue's appeal, emphasis was made on the amendment of Rule 2(j) of SWM (PC) Rules, 1977, we reproduce the rule prevailing prior to 13.01.2007 and the amended Rule post 13.01.2007.

> *2. Definitions In these rules, unless the context otherwise requires- (j) "net quantity", in relation to commodity contained in a package, means the quantity by weight, measure or number of such commodity contained in that package, excluding the packaging or wrapper;]*

From the above substitution of Rule 2(j) of SWM (PC) Rules, 1977, we do not find any adverse effect in the principle of law on the issue in hand laid down by the Hon'ble Supreme Court. Despite the substitution of Rule 2(j), the provision of Rule 34(b) of SWM (PC) Rules, 1977 remain intact, according to which there is no requirement for affixing/printing retail sale price on the package of the goods of less than 10 gram therefore, we do not find any substance in the revenue's appeal. The law laid down by the Hon'ble Supreme court in the appellant's own case shall continue to be applicable in the present case also. The relevant order of the Hon'ble Supreme Court in the appellant's own case is reproduced below:-

> *2. In view of the order of this Court dated 15th September, 2008, dismissing CA. No. 7559 of 2008 (D.19192/2008) [2008 (232) E.L.T. A107 (S.C.)], preferred by the Revenue against the order of the Tribunal in the case of Central Arecanut & Cocoa Marketing & Processing Co-Op. Ltd. v. C.C.E., Mangalore, 2008 (226) E.L.T. 369 (Tri.-Chennai), the issue raised in the appeals is no more res integra. In the said order, the Tribunal relying on its earlier decision in the case of M/s. Swan Sweets Pvt. Ltd. [2006 (198) E.L.T. 565 (Tribunal)], one of the respondents in the present appeals had held that a package containing about 100 or more individual pieces of an article, like „Eclairs" brand chocolates etc., each weighing 5.5 grams would qualify for exemption under Rule 34 of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 and will not attract assessment under Section 4A of the Central Excise Act, 1944.*
>
> *3. In view of the said decision, with which we are in respectful agreement, there is no merit in these appeals, which are dismissed accordingly, with no order as to costs.*

Civil Appeal No. 1290/2007

> *4. In view of the decision of this Court in Civil Appeal No. 7559 of 2008 (D.19192 of 2008), affirming the decision of the Tribunal in the case of Central Arecanut & Cocoa Marketing & Processing Co-Op. Ltd. v. C.C.E., Mangalore, 2008 (226) E.L.T. 369 (Tri.-Chennai), this appeal is dismissed.*

Civil Appeal No. 5856/2006

> *5. Having regard to the fact that the revenue involved in the case is stated to be less than Rs. 15,000/-, we decline to entertain the*

appeal. The same is dismissed accordingly, keeping open the question of law sought to be raised in the appeal.

In view of the above order of the Hon'ble Supreme Court, the issue is no more res-integra accordingly, the revenue's appeal is liable to be dismissed.

5.3 As regard the assessee's appeal, wherein they have challenged the confirmation of demand by the adjudicating authority under Section 11D, we find that though the appellant have raised invoice showing the total excise duty in terms of Section 4A but since the differential duty demand i.e. between Section 4 and Section 4A was not sustained, the same was held to have been collected by the assessee from their customer accordingly, the demand was confirmed under Section 11D. On the submission of the appellant and on the perusal of record, it is clear that the assessee though raised invoices showing duty under Section 4A but in respect of the differential duty they have issued credit note to their customers and consequently the said amount was not collected. In this regard, for ease of reference we reproduce provision of Section 11D as under:-

***SECTION [11D. Duties of excise collected from the buyer to be deposited with the Central Government**. — (1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, [every person who is liable to pay duty under this Act or the rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods] in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government. [(1A) Every person, who has collected any amount in excess of the duty assessed or determined and paid on any excisable goods or has collected any amount as representing duty of excise on any excisable goods which are wholly exempt or are chargeable to nil rate of duty from any person in any manner, shall forthwith pay the amount so collected to the credit of the Central Government.]*

[(2) Where any amount is required to be paid to the credit of the Central Government under [sub-section (1) or sub-section (1A), as the case may be,] and which has not been so paid, the Central Excise Officer may serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.

(3) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under subsection (2), determine the amount due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(4) The amount paid to the credit of the Central Government under [sub-section (1) or sub-section (1A) or sub-section (3), as the case may be,] shall be adjusted against the duty of excise

payable by the person on finalization of assessment or any other proceeding for determination of the duty of excise relating to the excisable goods referred to in [subsection (1) and sub-section (1A)].

(5) Where any surplus is left after the adjustment under sub-section (4), the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Assistant Commissioner of Central Excise for the refund of such surplus amount.]

From the plain reading of the above Section 11D, it is clear that the provision of section 11D shall apply only in case where the assessee collects the duty and does not deposit to the government. In the present case, though the appellant have shown the duty in the invoice but at the same time by issuance of the credit note to the customer, said amount was not collected. Moreover, the duty was paid under protest and thereafter credit note was issued. With this fact, it cannot be said that the assessee has collected any duty and the same was not deposited to the government exchequer. In view of this fact only, it is viewed that there is no application of Section 11D in the facts of the present case therefore, the demand confirmed under Section 11D cannot be sustained.

06. As a result, revenue's appeal no. E/1273/2011 is dismissed and assessee's appeal no. E/1234/2011 is allowed."

5. In view of the above decision which is based on the judgment of Hon'ble Supreme Court in the appellant's own case, the issue is no longer res- integra, therefore, the impugned order is not sustainable, hence, the same is set aside and appeals are allowed.

(Pronounced in the open court 10.07.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

C.L. MAHAR
MEMBER (TECHNICAL)

geeta