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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

To

Dated: 10/10/2017

Appellant as per address in table below
Respondent as per address in table below

Final Order No. A/71184-71186/2017-EX[DB] dated 27/09/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar

	Application	Appeal	Name and Address of Appellant
1	E/CROSS/153/2007	E/1205/2007	**ITC LTD.** VIRGINIA HOUSE, 37, J.L NEHRU ROAD, KOLKATTA-700071
2		E/1206/2007	**ITC LTD.** VIRGINIA HOUSE, 37, J.L.NEHRU ROAD, KOLKATAA-700071
3		E/1207/2007	**Itc Ltd** Virginia House,37,j.l. Nehru Road KOLKATTA KOLKATTA 700071
			Name and Address of Respondent
4			C.C.E.-Bangalore-iii PB.NO.5400...QUEENS ROAD,CENTRAL REVENUES BUILDING, BANGALORE, KARNATAKA-560001
5			-C.C.E. MEERUT I Excise Chowk, University Road, Mangal Pandey Nagar, Meerut - 250005.
6			-C.C.E. MUMBAI 115, NEW CENTRAL EXCISE BUILDING, MAHRSHI KARVE ROAD, CHURCHGATE, MUMBAI-400020

Other Appellants and Respondents as per Annexure

Copy To
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18 C.D.R. 19 Office Copy 20 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH : ALLAHABAD

COURT No. I

CROSS Application No: E/CROSS/153/2007

APPEAL Nos: E/1207, 1205 & 1206/2007-EX[DB]

(Arising out of Order-in-Appeal No. 296-CE/MRT-I/2006 dated 26/12/2006 passed by Commissioner (Appeals), Customs & Central Excise, Meerut)

M/s I.T.C. LTD. **Appellant**

Vs.

Commissioner of Central Excise, Bangalore-iii
(E/1207/2007-EX[DB])

Commissioner of Central Excise, Meerut-I &
(E/1205 /2007-EX[DB])

Commissioner of Central Excise, Mumbai **Respondent (s)**
(E/1206/2007-EX[DB])

Appearance:

Shri Ravinder Narain (Adv.), Shri Ajay Aggarwal (Adv.) & Ms. Mallika Joshi (Adv.) for Appellant

Shri Pawan Kumar Singh (Supdt.) AR for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 27/09/2017
Date of Decision : 27/09/2017

FINAL ORDER NOs.-71184-71186/2017

Per: Anil Choudhary

The issue in this appeal is whether parts of cigarette packets namely slides/slits (inner frame) are excisable goods within the meaning of CETA 1985.

2. This is the second round of litigation. Earlier this matter, had reached before Hon'ble Supreme Court and vide order dated 26/11/2002, in

M/s I.T.C. versus C.C.E. reported at (2002) 146 E.L.T. 508, wherein disposing of the two Civil Appeals with respect to the Saharanpur and Mumbai units of the appellant, the Apex Court observed that the question of marketability of slides and slits was not taken in reply to the Show Cause Notice, yet, having regard to the fact that the question was raised in the synopsis of submissions before the Appellate Authority, but was not dealt with specifically by it, further it was urged before the Tribunal and no objection was taken as to maintainability of the contention on the ground that it was not raised before the Original Authority, we do not consider it appropriate to reject the appeal on this ground. The Apex Court was further of the view that the interest of justice would be met if the Orders under appeals, confirming the orders of Collector appeals which do not specifically record the material finding are set aside and cases are remanded to any of the Appellate Authorities for disposal of the cases a fresh after giving an opportunity to both the parties to lead evidence. Accordingly, the Apex Court remanded the matter to the Commissioner (Appeals), Meerut–I Uttar Pradesh. Similarly, on the same facts and circumstances the appeal of the appellant before the Apex Court regarding its Bangalore unit being Civil Appeal No. 7515 – 7517 of 2004 was also disposed of in same terms, vide order dated 08/02/2006 remanding the matter to the Learned Commissioner (Appeals), Meerut-I

3. Accordingly as directed the appellants herein appeared before the Learned Commissioner (Appeals), Meerut-I and made their various submissions with regard to marketability & manufacture, which was to be decided in terms of the directions of the Apex Court. The appellants filed an affidavit of one Mr. Aniruddha Sengupta who was the production

manager of the appellant company posted at the cigarette factory at Saharanpur since May, 2002, being affidavit dated 24/09/2004. The contents of the said affidavit are quoted herein below being relevant to the facts and circumstances: –

"I am the Production Manager of the Appellant Company, M/s ITC Ltd., posted at the Cigarette factory of the said company at Saharanpur since May, 2002. Earlier also I have worked in several factories manufacturing cigarettes of M/s ITC Ltd. at different locations and I have experience in the field of the production of cigarettes and packing thereof for the last over 20 years. I am fully conversant with the entire process involved in packing of cigarettes including the process of preparing 'shell type' and "hinge lid" type of cigarettes packets as well as the products and the equipment available in India for the manufacture and packing of cigarettes. The facts set out herein were prevalent during the relevant period from 1986 to 2000. On account of my long experience in this field, I am competent to depose as under: ***'Shell type of Cigarettes packets'***

Cigarettes are packed in different types of packets. One such type of cigarette packet consists of a shell, which is open from both ends. The shell, which is open from both ends, is required to be closed at the two open ends of the shell. For this purpose, a flat 'cut out' of paper board is required. Cigarettes, which are prepared on a separate cigarette making machine, are brought on a trolley to the packing machine. These cigarettes are put and folded in an aluminium foil. This folded aluminium foil containing the cigarettes, is placed on the aforesaid flat 'cut out' of paper board. This 'cut out' of paper board with the folded aluminium pack placed on it, is then slided into the shell, and the two ends of the 'cut out' are folded to close the *two open ends of the shell, to complete the packet of cigarettes. Since the 'cut out' is so slided into the shell, for want of a better description, the 'cut out' is also described as a 'Slide.' This 'cut out' is not a commercial commodity and is not bought and sold in the market. As described herein, it has different specifications and markings for each brand of cigarettes. The 'cut out' for one brand of cigarettes, cannot be used for another brand of cigarettes.*

For 'cut outs' for each brand of cigarettes, in the first instance, a suitable paper board is procured which is duty paid. The paper board required for packing different cigarettes is of different specifications. The difference in specification may be on account of (a) thickness, which varies from 205 to 250 gsm (grams per sq. mtr). (b) Nature of the Board i.e. foil, metalized, coated, folding box Board, etc. (c) colour, which may be white, yellow, gold etc.

After identifying the suitable paper board for preparing the 'cut out' required for the packet of a particular brand of Cigarettes, such duty paid paper board is obtained in Jumbo rolls, which are cut to the desired width in the form of 'Slit Reels'. Printing is first done on the slit reels. The 'slit reels' are printed with the printing material required for the respective brand of Cigarettes. Once it is printed for a particular brand of Cigarettes, it cannot be used for any other brand of Cigarettes. After printing, the slit reel is cut to obtain the 'cut out' of the requisite width, length and shape. In this manner, printing is done first and the cutting and creasing is done subsequently on the same machine. The 'cut outs' for each brand of cigarettes are 'design specific.'

The printed 'cut out' for each brand of Cigarettes has a distinct and different marking thereon which contains particulars and details applicable only to a particular brand of cigarettes. The markings and printing material is specified to also comply with the legal formalities of the declarations to be made on the packet for each brand of cigarettes as prescribed under Rule 93 of the Central Excise Rules, 1944 as well as the provisions of the Packaged Commodity Rules framed under the Standard of Weights and Measure Act. Apart from the aforesaid markings compulsorily required by law to be printed, other matters like the slogans, are also separately specified for each brand of Cigarettes, which are also printed thereon. Keeping these factors into consideration, the following details were required to be printed for each brand of Cigarettes during the period relevant for the above appeals, for each brand of Cigarettes:-

(i) Brand name like "Capstan Standard"

(ii) MRP like "Rs. 4.00 incl. of all taxes"

(iii) Name and address of the manufacturer like "Mfd. By I.T.C. LTD., 37, Chowrenghee Calcutta 71".

(iv) Name of the factory like "I.T.C. LTD. Saharanpur."

(v) Licence No. like "R-1/7/92"

(vi) Date of packing like "pkd. 05/02"

(vii) Slogan relating to each brand like "Capstan flavor. Nothing less"

From the aforesaid process, it is evident that the printed 'cut out', is 'suited only for the packet of cigarettes of a particular brand' and the matter printed thereon is also as per the specific requirement for only that brand of cigarettes. Such 'cut out' can only be used, for the cigarette packet for *packing only that brand of Cigarettes. As such, these 'cut outs' have to be used within the process of packing cigarettes of a particular brand, by the particular manufacturer of Cigarettes himself within his factory and he has to necessarily use it himself and that too for the purpose of packing only a particular brand of cigarettes. It is not possible for the appellant to use such 'cut out' for packing any other cigarette of a different brand. This pre printed 'cut out' cannot be sold to any other competitor producing cigarettes which are of a different brand. The 'cut out' required for packing cigarettes of different brands are not interchangeable. Such 'cut outs', which are 'design specific' are not marketable. They are in process material required for closing the shell type of cigarette packets and are entirely used in the process within the factory. They are suitable only for a particular brand of cigarettes and are not a 'standard' item, which can be interchangeably used by competing manufacturers packing cigarettes of different brands. These 'cut outs' have never been sold by the appellant nor are they capable of being sold to any other manufacturer of Cigarettes. Such printed 'cut outs' are nothing but duty paid paper board having the requisite material printed thereon and cut to specific size and shape. Such 'cut outs' are not available in the market and are not a product which is ordinarily brought to the market for sale and purchase and are not generally dealt with in the market. It is not a product having any commercial name. The 'cut out' is also not capable of being sold to the 'consumer' in the market. These printed 'cut outs' or slides cannot be described as a marketable commodity or 'goods'. No distinct and different commercial commodity known to the market comes into existence upon cutting of paper board. This process cannot be treated as 'manufacture' to* *attract duty of excise. The twin tests for excisability of 'marketability' and 'manufacture' is not satisfied in respect of such 'cut out.'*

<u>*'CUT OUT' FOR 'HINGE LID' TYPE OF PACKETS.*</u>

Cigarettes are also packed in 'hinge lid' type of packets. In order to ensure that such packets, when opened, can be firmly closed again, a paper board 'cut out' is pasted on the inner front side of the packet, so that when the lid of the packet is closed, the lid gets stuck by the said 'Cut Out' and the packet gets firmly closed. In the absence of paper board 'Cut Out', the lid when closed, would not get stuck and would remain half open. This paper board 'Cut Out' is nothing but duty paid paper board cut to specific size and shape. For want of better description, this paper board 'cut out' is also described as a 'slit' or 'inner frame'.

For different brands of Cigarettes, the size and design of the hinge lid type of packet is different. As such, the 'cut out' required for packets for different brands is of different size and shape. Keeping in view the specifications of the packet required for each brand of cigarettes, the 'nature of paper board also different in terms of quality, thickness, colour, etc.' The paper board of the desired specifications is cut to different size and shape as required for the packet for the particular brand of cigarettes.

'Hinge lid' type of packets are prepared on highly sophisticated, automatic imported machines which are capable of packing cigarettes at a very high speed. Speed is the essence of an economical and commercially viable process of packing cigarettes in 'hinge lid' type of packets. The paper board 'Cut Out' is an in process material and is cut within the automatic process of packing on such machine itself. The process for packing cigarettes in the 'hinge lid' type of packets is given hereinafter.

For the purpose of packing cigarettes in 'hinge lid' type of packets, such packets are first obtained in a flat form which are pre printed and cut to the desired size, shape and design. These are also referred to as 'Hinge lid blanks' (HL blanks). The brand and trade name, licence no., name and address of the factory, MRP and other details, as required by law and in particular the declarations required to be made under Rule 93 of the Central Excise Rules, 1944 and the Package Commodity Rules, 1977, framed under the Standard of Weights & Measures Act, 1976 are already printed on the 'HL blanks'. These printed 'HL blanks' are stacked on a conveyor belt or hopper depending on the type of machine used and are fed into the machine in a flat form. These 'HL blanks' travel on one route within the said machine and at different stages, the requisite folding and gluing is done on the inner sides of the folded 'HL Blanks'.

On another stream within the same machine, preparation of the 'cut outs' for HL type of packets is carried out. These 'cut outs' are the subject matter of dispute in the present appeals. In this stream, duty paid paper board is used, which is pre cut into 'Slit Rolls' of the desired width. The width is as per the requirement for a 'hinge lid' packet for a particular brand of Cigarettes. These 'Slit Rolls' are fed in the same machine. A 'cutter' which is specially designed to cut the aforesaid paper board into 'cut out' of the desired shape and specifications is installed in the machine as a component part thereof. The paper board fed into the machine is cut within the same machine by this automatic cutter at extremely high speed so as to provide the requisite number of "cut outs" for 'hinge lid' packet of cigarettes, which are prepared in numbers ranging from 110 to 420 packets per minute.

In yet another stream within the same machine, cigarettes of a particular brand, which have been separately made, are fed in bulk into a hopper. The desired quantity of cigarettes i.e. 10 or 20 are placed automatically on top of a flat aluminium foil within this stream of the same machine. The aluminium foil is then automatically folded, to fully cover the cigarettes from all sides so as to form a bundle containing cigarettes.

The bundle of cigarettes in aluminium foil comes from one stream of the same machine. The paper board 'Cut Out' comes from the other stream of the same machine, which is put on top of the aluminium bundle containing cigarettes. From another stream of the same machine, the printed 'HL Blanks' in flat form comes, on which glue has been put at specified places on the inner portion including the sides of the 'HL Blank'. The bundle of aluminium foil containing cigarettes and the paper board 'cut out' sitting on it, is then automatically placed, in continuity in the same machine, on top of the printed 'HL Blanks', which are in flat form, on which glue has already been put, as stated above. Thereafter, in a continuous process within the same machine, the printed 'HL Blank' in flat form, is automatically folded from the sides as well as from the top. In this manner, the printed 'HL Blank' is converted into a 'hinge lid' packet containing cigarettes with the 'cut out' pasted on the inner front side of the packet.

The aforesaid cigarette packing machines which are used for packing cigarettes in hinge lid type of packets are extremely fast and pack at the rate of about 110 to 420 packets per minute. In this manner on an average, (keeping into consideration packets of 10s and 20s), about 3,000 cigarettes are packed per minute. On the slowest machine, 110 packets per minute i.e. about 1.8 packets per second are prepared and on the fastest machine 420

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packets per minute i.e. about 7 packets per second are prepared. These are the only machines available for packing cigarettes in hinge lid type of packets which are all imported. It is impossible to conceive that at any stage of this process of packing on such high speed automatic machines, 'Cut Outs' of paper board can be taken out from this automatic machine or that such 'cut outs' can be fed into the said packing machine. Such paper board 'Cut Outs' are not a marketable commodity and are not known to the market. The cutting of paper board has to be necessarily done within the said packing machine as an in process material in a continuous process, which culminates in a 'hinge lid' packet of Cigarettes. These are cut within the machine by a 'cutter' which is specially designed to cut the desired size and shape of the 'cut out' , and such specially designed 'cutter' is a component part of the said automatic packing machine.

Keeping in view the aforesaid process of packing hinge lid type of packets, it is not conceivable and indeed it is impossible to even suggest that such paper board 'cut out's ' which cannot be taken out of the machine, can be considered as a commodity which can ordinarily be taken to the market for buying or selling.

There is no manufacturer of cigarettes or any other producer in India who has any equipment to separately produce such paper board 'cut out's' to be supplied to any other manufacturer of cigarettes for packing them in ' hinge lid' type of packets. It is also not possible to do so. There is no possibility of any cigarette manufacturer using any such paper board 'Cut Out' from any outside source. Keeping in view the high speed automatic process of packing of 'hinge lid' type of cigarettes and the special sophisticated, automatic and high speed machines required to prepare the *same, buying and selling of such paper board 'Cut Out' is not at all conceivable. Trading of such 'cut outs' is not done in the cigarette industry. The preparation of paper board 'Cut Out' at an intermediary stage within the automatic machine involves only cutting of paper boards to the desired size and shape and nothing more. Mere cutting of paper board to a particular size and shape cannot amount to 'manufacture'. No new commercial commodity known to the market comes into existence. Such 'cut outs' are also not capable of being marketed and cannot be described as a marketable commodity. They are not generally bought and sold in the market and does not ordinarily come to the market for buying and selling. It is not a product which can be sold to the 'consumer'. There is no possibility at present, keeping in view of the aforesaid automatic machines available for making 'hinge lid' type of packets to even consider the supply of such paper board 'Cut Out' by one person to another.*

A different size and shape of paper board 'Cut Out' is required for each brand of Cigarettes packets of the 'hinge lid' type. Such paper board 'Cut Out' is not a 'standard' item. Such paper board 'Cut Out' is not available in the market and is not a product which is ordinarily brought to the market for sale and purchase. It is not a 'standard' item or goods known and generally dealt with in the market. It is not a product having a commercial name. They are cut to size and shape for a particular brand of cigarette having a 'hinge lid' type of packet of a specification of size and design to suit the requirement thereof, The preparation of these paper board 'Cut Outs' within the machine in a continuous and uninterrupted process, cannot be described as an independent process of 'manufacture' and such cutting of paper board, does not bring into existence a new, distinct and *different commercial commodity known to the market, so as to attract duty of excise. The 'twin tests' for excisability of 'marketability' and 'manufacture' is not satisfied in respect of such paper board 'Cut Out'.*

I say that the aforesaid paper board 'cut out' for both type of packets, i.e., 'Shell type' as well as 'hinge lid' type, cannot be described as a marketable commodity and the preparation thereof, in the manner aforesaid, cannot be described as a manufacturing process. As such no duty of excise is leviable thereon.

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4. The appellants also appeared for personal hearing and also led evidence in support of the contentions. They also made available Mr. Aniruddha Sengupta who had sworn the affidavit for the purpose of cross-examination /explanations if required. The Learned Commissioner (Appeals), has been pleased to hold that the slides/slits are marketable and hence excisable observing that the contentions of the appellant that slides/slits (inner frame) are not manufactured products since no different or new commercial commodity comes into existence and that the same are used in a continuous process within the factory premises itself is not tenable in view of the ruling of Hon'ble Delhi High Court in M/s Zupiter Printing versus Union of India, 1991 (34) E.C.R. 7, where it has been observed that it is a common practice for the manufacturers of cigarettes to acquire cigarette packets and parts thereof from parties who are engaged mainly in the manufacture of cigarette packets and their parts. In the case of the M/s Zupiter Printing the party was manufacturing only outer shells of cigarette packets for the cigarette manufacturer. Thus, the marketability of cigarette packets and parts thereof, that is inner frames is established beyond doubt

as the same is manufactured by the manufacturers other than the cigarette manufacturer has been found in the case in M/s Zupiter Printing. The Learned Commissioner has also made reference to the Larger Bench ruling of this Tribunal in C.C.E. versus G.T.C. 2005 (184) E.L.T. 29 with reference to aluminium foil, in which cigarettes are packed is cut to shape and size and embossed with the word 'Pull'– it was held that the product is a result of an integrated and continuous process and cannot be assessed separately, particularly in view of the fact that cigarette is assessed in packed condition. The Learned Commissioner also referring to the ruling in the case of M/s Albert David Ltd. versus C.C.E. 2004, (60) R.L.T. 412 observed that poly pouches which emerged in the continuous uninterrupted integrated process of filling of milk in them are not capable of being sold to the consumers in the market as they do not come into existence independent of filled pouch. Further, taking notice of the contention of the appellant with respect to the slides/slits (inner frames) which are prepared within the automatic machine and used within the continuous uninterrupted integrated process, the same principle should be applied. The Learned Commissioner (Appeals) observed that the contention is not tenable in view of the ruling in M/s Zupiter Printing (supra). It was further observed that the test of marketability is established. The articles of cigarette packets i.e. slides/slits (inner frames) is marketable beyond doubt in the light of above case law as well as the ruling in M/s Zupiter Printing (supra).

5. Being aggrieved the appellant assessee is before this Tribunal challenging the finding of the Learned Commissioner on the ground that the slides/slits (inner frame) are not marketable, whereas the Revenue is in

cross objections in support of the order of the Learned Commissioner (Appeals).

6. The Learned counsel for the appellant in support of the contentions have taken us through the ruling of the Apex Court in the case of Union of India versus M/s Sonic Electrochem (P) Ltd. 2002 (145) E.L.T. 274, wherein the question before the Court was – whether plastic body, a part of Electro Mosquito Repellent (EMR) and fragrant mat are chargeable to excise duty under clause 5(f) of Notification No. 160/86 – C.E. and sub-heading 3307.49 respectively of CETA 1985. It was the argument of the assessee that plastic bodies were manufactured to suit the design requirements of the assessee – EMR. The plastic body is not a standardised item or goods known and generally dealt with in the market and as such the High Court has rightly found that it is not marketable. Further Court continued to hold that the plastic body, which is a part of the EMR is exempt under clause 5(d) of Notification No. 160/1986 – CE, wherein the contention of Revenue was that under clause 5(f) of the Notification, plastic body – a part of EMR is liable to excise duty. The Apex Court observed that for an item to be dutiable, there are twin requirements under the Tariff Act. Being (a) manufacture and (b) marketability. There is no dispute as regards the manufacture, that the plastic bodies are manufactured by the assessee, but the germane question is whether it has marketability. The plastic body is being manufactured to suit the requirements of the EMR of the respondents and is not available in the market for being bought and sold. It is not a standardised item or goods known and generally dealt with in the market. It has been manufactured by the respondent assessee for its captive consumption. It is not a product known in the market with any

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commercial name. Further observed that the plastic body of EMR does not satisfy the criteria of marketability, taking notice of the fact that different manufacturer of the same product have a different plastic body to suit its design and requirement. If one goes to the market to purchase plastic body of EMR of a particular manufacturer either for replacement or otherwise one cannot get it in the market because it is not a commercially known product.

7. Reliance is also placed on the ruling of the Apex Court in the case of Board of Trustees versus Collector of Central Excise, A.P. 2007 (216) E.L.T. 513, wherein the Visakhapatnam Port Trust, a statutory body under the major Port Trust Act used 'Cement, Concrete Armour Units' (CCAU) for the installation of break waters in the outer harbour for the purpose of keeping the water calm and tranquil, whether the said CCAU constitute excisable goods. The Hon'ble Court observed that these CCAU units weight is about 50 metric tones each. They are like Tripods which usher the water calm and tranquil. In order to constitute "goods" twin tests have to be satisfied namely, process constituting manufacture and secondly marketability. In the facts of the case the second test of marketability is in issue. It is well settled that goods are manufactured with the object being sold in the market. If the goods are not capable of being sold then the test of marketability is not fulfilled. Further, the burden is on the Department to prove whether there is the process which constitutes manufacture and secondly, whether the product is marketable. The Hon'ble Court further observed that the CCAU are essentially in prisomoid form. These blocks or units are made to order. They are of certain specifications and are harbour or location specific. It would depend on the water level required to be

maintained in the harbour. There is no evidence to show that these blocks could be used in any other harbour. Accordingly, it was held that the goods – CCAU fail the test of marketability and hence not excisable to excise duty. The Learned counsel also relies on the ruling in the case of M/s Gujarat Nermada Valley Fertiliser Company Ltd. versus Collector of Excise & Customs 2005 (184) E.L.T. 128 (SC), wherein also relying on the ruling in the case of Union of India versus M/s Sonic Electrochem Private Ltd. (supra), it was held that the marketability onus lies on Revenue to prove marketability. Marketability cannot be established on basis of mere stability. Sufficient proof that the product is commercially known is necessary. Unless a product is capable of being marketed and is known to those who are in the market as having an identity as a distinct identifiable commodity, then the article is subject to excise duty. The fact that an article falls within the schedule by itself does not make it marketable. Actual sale is not necessary, but articles must be capable of being sold in market or known in market as goods.

8. The Learned counsel also referred to the ruling of the Apex Court in the case of C.C.E. versus M/s I.T.C. Ltd. (their own case) reported at 2003 (152) E.L.T. 241, wherein the question before the Apex Court was whether cigarette packets would be 'other packing containers' or 'boxes' within the meaning of Tariff Item No. 17 of Central Excise Tariff Act, in view of the contention of the Revenue that cigarette packet is a small paper box and cannot be termed as a container which is relatively large enclosure. The contention of the assessee was that cigarette packet would be neither packaging container nor a paper box. Under the tariff as relevant during the said period, paper and paperboard, all sorts (including paperboard, mail

board, store board, cardboard and Corey wooded board) and articles thereof specified below, in or in relation to the manufacture of which any processing is carried on with the aid of power, where exempt. Whereas boxes cartoons bags and other packing containers (including flattened or folded boxes and flattened or folded cartons), and whether in assembled or unassembled condition were liable to ad valorem duty. The Notification No. 66/82 – CE provided exemption to articles of paper or paperboard, except printed boxes and printed cartons (including flattened or folded printed boxes and flattened or folded printed cartons) whether the assembled or unassembled condition. It was the contention of the appellants that under Rule 93 the Department itself considers the cigarette packets as packets and not boxes and in sharp contrast the rules specifically refers to boxes/booklets in respect of matches in Rule 71, 72 and 74 of Central Excise Rules 1944. Referring to the ruling in the case of C.C.E. versus M/s Punjab Anand Lamp Industries 1989 (43) E.L.T. 816, wherein the question was whether the packets/wrappers of the GLS bulbs were commercially known and marketable as packets, boxes or containers. It was held that the bulbs or tube shells had no independent market and were utilised for captive consumption for the end product. In the present case, it is to be understood that in context, cigarette packet cannot be termed as container as discussed in M/s Punjab Anand Lamp industries (supra), but it can be considered a small packet or a box containing cigarettes. Further, with respect to marketability, reliance was placed on the ruling in M/s Asia Tobacco Company Ltd. versus Union of India, 1992 (58) E.L.T. 418 Madras High Court, which indicated that cigarette packets are marketable. In that case, what was marketed and purchased was outer shell of cigarette packet for keeping in the cigarettes but it was held not to be a container. Similarly, in M/s Zupiter Printing and another versus Union of India (supra). The petitioner M/s Zupiter Printing was manufacturing cigarette outer shells of printed sheets supplied by M/s Godfrey Philip India Ltd, manufacturer of cigarettes. There are facts on record revealing that such packets or parts thereof are manufactured as per the order and are sold. This leaves no doubt that such packets are manufactured and are marketable. The Apex Court held that a cigarette packet containing shell and the slide covering all sides would be a box. Further, there is no question of double taxation because excise duty on cigarettes is separately levied and in regard to packet duty is to be levied on the basis of Tariff Item 17(4).

9. The Learned counsel also relied on the ruling in the case of M/s Zupiter Printing and other versus Union of India (supra), wherein the issue before the Hon'ble Delhi High Court was whether outer shells of cigarette packet are neither boxes nor containers, being open at both ends and these are not goods, known to the market, hence not excisable under Tariff Item 17(4). M/s Zupiter Printing filed writ petition before the Hon'ble Delhi High Court challenging the order on the ground inter alia that the Board has no authority under the law to give direction to a quasi judicial authority like the Assistant Commissioner, who was seized of the matter on the judicial side nor can outer shells of the cigarette packet which are open from both sides be classified as box or container. The fact in the said case was that M/s Zupiter Printing was manufacturing outer shells of printed sheets supplied to it by Godfrey Philip India Ltd, a manufacturer of cigarettes on job work basis. M/s Zupiter Printing was only charging conversion charges that is converting the printed sheets into outer shells. The outer shells prior

to the introduction of the Finance Bill, 1982, were cleared under Tariff Item No. 68, which is a residuary entry. But pursuant to Finance Bill, 1982, the Superintendent instructed M/s Zupiter Printing to classify the outer shell under Tariff Entry No. 17(4) and further to obtain licence and apply for re-classification. This direction of the Superintendent was objected to the petitioner (M/s Zupiter Printing). The Hon'ble High Court considered the issue on merits and observed that a cigarette packet, according to the petitioner, consists of two component parts, one component part is described as outer shell, the other a slide which is inserted in the shell to complete the packet. The said packet becomes complete only when slide is inserted into the outer shell. The outer shell cannot be itself hold or contain the cigarettes. It is only when the slide which contains the cigarettes is inserted in the shell, it becomes a cigarette packet. The High Court further observed that the question for consideration, whether the outer shell manufactured by M/s Zupiter Printing which has no lid and open from both sides can hold and keep cigarettes. The answer would be in the negative. This is neither an encasement nor a receptacle which can hold the thing in itself. Even if we do not give much importance to the dictionary meaning of the word "box" still the currect guide in such a case is the context and the trade meaning. It was further observed that the definition of goods makes it clear that to become goods an article must be something which can ordinarily come to the market to be sold and bought. But at the shell stage, it can neither be bought nor sold in the market. Accordingly, it was held that the shells of cigarette packets manufactured by M/s Zupiter Printing can neither be bought nor sold in the market. Accordingly it held that the shells of cigarette packets manufactured by M/s Zupiter Printing are not excisable under Entry 17(4) of the first schedule, as introduced by Finance Act, 1982. The Learned counsel have also relied on the ruling in the case of C.C.E. versus M/s Aamaratara Industries, 1988 (37) E.L.T. 152, wherein this Tribunal – (Larger Bench) considered the evidentiary value of affidavits and opinion of experts and trade as to nature and marketability of goods. It was held that the same cannot be summarily rejected without any material or cross-examination and just on opinion. Relying on the observations of the Apex Court in M/s Mehta Parikh & Company versus Income Tax Commissioner, 1956 SC 554 – clearly suggest that when affidavits are filed before an officer, normally speaking, if he so desires to challenge the correctness of the averments made in these affidavits, he should call the deponent for being cross-examine or test the correctness of the averments by any other means open to him and it would not be proper for the officer to arbitrarily reject the affidavits as incorrect. Further observed that the method followed by the Assistant Collector in dealing with the experts affidavit and trade opinion is clearly contrary to the observations of the Apex Court.

10. The Learned counsel also referred to the ruling in M/s Asia Tobacco Company Ltd. versus Union of India, 1992 (58) E.L.T. 418 wherein the Hon'ble Madras High Court held that it is clear from Notification No. 66/1982 – C.E. that the intention was to exempt all containers and boxes falling under Tariff Item No. 17(4) relating to paper and paperboard and articles thereof except printed cartons and printed boxes. Further held that carton box could not be in any way used to describe a packet of cigarettes. It was also observed that it is settled law that for the purpose of classification of the goods for levy of excise, the description of the articles

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is to be determined in accordance with the understanding prevalent in the trade. The cigarette packet is only known as packet in the trade parlance and not as box. Thus, the cigarette packet can only be a container, or an article made of paper and would be wholly exempt from duty under the said Notification and not fall within the exception relating to printed cartons and printed boxes. It was further observed that it is not in dispute at the stage of assembly. It is not only the packet which is assembled, but a packet of cigarettes containing cigarettes therein. Thus, if this assembly is to be treated as manufacture, the manufacturer is not of a packet but of a cigarette packet containing cigarettes. Thus, a cigarette packet cannot be subjected to duty twice over. Even otherwise, it is submitted that the outer shells and inner slides cannot be subjected to any separate assessment. Whatever it may be, there is absolutely nothing to show that the outer shells are to be called box. Thus, as packets are not liable to excise duty. Accordingly, it was held against the Revenue that shells are not dutiable. The Learned counsel also relied on the ruling of the Apex Court in the case of Commissioner of Income Tax versus Brij Lal Lohia and Mahabir Prasad Khemka 1972 (84) I.T.R. 273, wherein it was held that there is no res judicata in tax matters and under similar facts and circumstances for a subsequent period, wherein an assessee brings additional material on record and the courts below. It could the Tribunal held in favour of the assessee the same was upheld by the Apex Court.

11. Accordingly, the Learned counsel for the appellants prays for allowing the appeals holding that slides /slits (inner frames) are not taxable/dutiable under the Central Excise Act since they are not marketable and no material is brought by Revenue in support of marketability.

12. The Learned AR for Revenue have relied upon the impugned order.

13. Further relying on the grounds of cross objection, it is urged that the Learned Commissioner (Appeals) have given due consideration to the ruling in the case of C.C.E. Vs M/s S.R. Tissues 2005 (186) E.L.T. 385 (SC), and accordingly held that the paper board is cut to different shape and size and undergoes processing of creasing, folding and printing before being made suitable for its use as a slide/slit to be used with the shell. In the process paperboard loses its identity and gets a new name that is slide/slit. Further the process of manufacture of slide/slit does not involve mere cutting of paperboard into smaller sizes. So far the contention of the appellants that the Commissioner (Appeals) has mixed the issue of inner frames and slides/slits is not correct as the Learned Commissioner (Appeals) in his order has discussed both type of items and given his findings. Accordingly, further placing reliance on the ruling in the case of Delhi Cloth, & General Mills, an entirely new product has emerged after cutting slitting, folding and creasing of paperboard known as a slides/slits (inner frame) in the tobacco trade, industry and further in view of the M/s Zupiter Printing (supra), the marketability of cigarette packets and part thereof is established. The Learned Commissioner (Appeals) have elaborated the point of marketability, by observing - "Therefore, to accept the claim that slides/slits (inner frames) are neither a manufactured product nor marketable will be a travesty of truth and miscarriage of Justice, in view of the fact that the paperboard was transformed into slide a product which are well-known in the cigarette industry and the fact that parts of cigarette packets have been found to be manufactured by cigarettes

manufacturer, thus establishing the marketability of the goods beyond doubt."

14. Having considered the rival contentions we find that the findings of the Learned Commissioner (Appeals) are erroneous and factually wrong. The Learned Commissioner (Appeals) have whimsically brushed aside the affidavit of Mr. Aniruddha Sengupta filed in support of the contentions by the appellant. Neither any question was put by the Court below to the said Mr. Aniruddha Sengupta nor the Revenue (in spite of being available), chose to cross-examine the said Mr. Anirudh Sengupta. Thus, we hold that the contentions and averments made by Mr. Aniruddha Sengupta have to be accepted in support of the contentions of the appellant as true and correct. Further we find that the Learned Commissioner have relied upon the ruling in the case of M/s Zupiter Printing (supra). We find that the said ruling supports the case of the appellant herein, as the issue therein was taxability of cigarette shells only manufactured by M/s Zupiter Printing by way of job work for the cigarette manufacturer. The question in that case was limited to whether the cigarette shells are excisable if they are considered as a box. Further we find that in spite of opportunity given by the Apex Court in the second round of litigation. The Revenue have not brought a single iota of evidence in support of marketability of slide/slits (inner frames). Further we find that the findings of the Apex Court in the case of M/s Sonic Electrochem Private Ltd. (supra) are squarely applicable, wherein the Apex Court held that the plastic body of the EMR is specific to a particular manufacturers as per their design and logo and as such is not marketable or a product known in the market, hence not marketable. Similarly, we hold that in the facts of the present case slide/slits are not goods or product

known in the market and hence not marketable. We also find that the slide/slits in the facts of the present case are specific to the appellant as manufactured by them for their own brand separately and cannot be inter-used by other cigarettes manufacturers for their brands. We also find in the facts of the case that the slides/slits are also not interchangeably usable by the appellant itself for its various cigarettes being manufactured under different brands. We also take note of the fact that these slides/slits are not manufactured separately and or purchased from outside by any of the cigarette manufacturers including the appellant. These are manufactured in a continuous process at the stage of packing of the cigarettes by automatic machines in the course of packaging of cigarettes. There is no output which can be called as slide/slits cleared by the appellant or any cigarettes manufacturer. Accordingly, in view of our findings, we allow these appeals with consequential benefits by holding that slides/slits are not capable of being marketable and accordingly are not excisable/dutiable. The impugned order stands set aside. Cross objection also stands disposed of.

(Dictated & Pronounced in Court)

-Sd/-
(ANIL G. SHAKKARWAR)
Member (TECHNICAL)

-Sd/-
(ANIL CHOUDHARY)
Member(JUDICIAL)

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