

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 22536 of 2014 [DB]

[Arising out of Order-in-Original No. 06/2014-CE (Commr) dated 28/01/2014 passed by Commissioner of Central Excise and Service Tax, LTU, BANGALORE]

M/s ABB India Limited

Nelamangala, Sy.no. 8/3 And 88/4,
Basavanahalli Village, Kasaba Hobli,
Nelamangala Taluk
BANGALORE- 562123

.....Appellant(s)

VERSUS

**Commissioner of Central Excise
and Service Tax, LTU, Bangalore**

100 FT RING ROAD JSS TOWERS,
BANASHANKARI-III STAGE,
BANGALORE,
KARNATAKA- 560085

.....Respondent(s)

Appearance:

Shri G.Shivadass, Senior Advocate with Mr. Mohammed Ibrahim, Advocate for the Appellant

Smt. C.V. Savitha, Authorised Representative for the Respondent

**CORAM: HON'BLE SHRI P.ANJANI KUMAR TECHNICAL MEMBER
HON'BLE SHRI P. DINESHA, JUDICIAL MEMBER**

Final Order No. 20211 / 2022

Date of Hearing: 31/12/2021

Date of Decision: 28/04/2022

Per : P.ANJANI KUMAR

Heard both sides and perused the records of the case.

2. Brief facts of the case are that the Appellant is engaged in the manufacture of AC/DC drives, Low voltage Panels/ Switchgear and parts, Air Circuit Breakers (ACB), Miniature Circuit Breakers (MCB), Moulded Case

Circuit Breakers (MCCB), switch fuse units and Motor Starters classifiable under Chapter heading 8536 of the Central Excise Tariff Act, 1985; Appellant imports the above goods in bulk; the appellants discharge CVD; on receipt of the goods at the warehouse, the baby boxes are removed from the Master box for conducting physical tests on the products; thereafter, the goods are packed in baby boxes and packed in a separate carton box/ Master box; labels are affixed on both the baby and the master boxes; the Appellant discharges excise duty at the time of clearance of goods from their factory, as the activity undertaken at their factory amounts to manufacture in terms of Section 2(f)(iii) of the Central Excise Act, 1994 read with Sl. No. 93 of the Third Schedule to the Central Excise Tariff Act. The packages of the goods bear a declaration that the same are meant for industrial consumers; packages weighing less than 25 kg, are cleared on payment of excise duty on the MRP basis and packages weighing more than 25 kg are cleared on payment of excise on the transaction value under Section 4 of the Central Excise Act, 1944.

2.1. Revenue was of the opinion, on an audit of the of the Appellant's records at Nelamangala unit, for the period from January 2008 to March 2012, that the appellants wrongly clearing final products, falling under CETH 8536 (being specified goods notified under Notification No.14/2008 CE (NT) dated 01.03.2008 as amended and Notification No.49/2008 CE NT dated 24.12.2008), to non-industrial consumers i.e., dealers/channel partners by paying duty on transaction value under Section 4 instead of payment of under Section 4A of the Central Excise Act, 1944. On receipt of Audit's letter, appellants paid differential duty, with interest, in respect of goods weighing less than 25kg; a, contested that Section 4A of the Central Excise Act is not applicable to goods weighing more than 25 kg.

2.2. The Appellants was issued two Show Cause Notice dated 15.07.2013 and 01.05.2013 proposing, proposing to demand differential duty amounting to Rs. 1,28,81,098 and Rs 3,84,50,665, respectively for the period April 2011 to March 2012 and April 2012 to March 2013. The

Learned Commissioner of Central Excise, LTU, Bangalore vide common Order-in-Original dated 28.01.2014. Hence, this Appeal No. E/22536/ 2014

3. Shri Learned Senior counsel for the appellants submits that the following are undisputed facts in the instant case.

- The impugned goods such as ACB, Contactors, and Relays etc are meant for industrial consumers only cleared either directly or through channel partners.
- There is no dispute on the clearances of goods directly to industrial consumers; dispute is only in relation to goods cleared to industrial consumers through channel partners;
- Appellants have discharged the duty on goods, weighing less than 25 kg, cleared to industrial consumers through channel partners on their own or on being pointed out by audit.
- The Appellants are not paying excise duty on MRP in respect of goods weighing more than 25 kg.
- Impugned Order has confirmed the differential duty demand by adopting MRP based valuation for all goods cleared to industrial consumers through channel partners, whether weighing less than 25 kg or more than 25 kg.

4. Learned senior counsel submits that goods supplied to industrial consumers are exempted from declaration of MRP; nature of the goods itself proves that the goods are meant only for industrial consumers and not for retail consumers; as per Rule 3 of the Packaged Commodities Rules, 2011, the provisions of Chapter II are not applicable to the Packaged Commodities meant for industrial consumers or institutional consumers; further the above mentioned provisions are also not applicable to packages of commodities containing quantity of more than 25 kg; therefore, the Appellants submit that the Legal Metrology Act and the Rules thereunder are not applicable to the clearances made to industrial/ institutional consumers and goods weighing more than 25 kg. in the present case, the

Appellants have not affixed MRP on goods weighing more than 25 kg and have clearly declared on such products that they are '*For industrial use only*'; goods weighing more than 25 kg, were cleared only to industrial/ institutional consumers who have used these products in their own industry; further, the Appellants have declared MRP only on packages weighing less than 25 kg; even in respect of these clearances, made to industrial/ institutional buyers, provisions of the Legal Metrology Act and the Rules are not applicable; in view of the above, no demand can be raised in respect of goods weighing more than 25 kg which have been cleared to industrial and institutional consumers as the provisions of the Legal Metrology Act are applicable only to goods weighing less than 25 kg; further no demand can be sustained in relation to goods weighing less than 25 kg also as they clearly indicate that they are '*Packed for the exclusive use in any industry as a raw material or for the purpose of serving any industry, mine or quarry*'.

5. Learned senior counsel submits that as it is impossible for the manufacturers to reach all industrial and institutional customers in every nook and corner of the country, the said products are made available through their intermediaries, namely authorized dealers/channel partners apart from sales to direct industrial/ institutional consumers; further, the concerned buyer has to be a knowledgeable buyer and not a common consumer. Learned senior counsel submits that affixation of MRP is not required even where the manufacturer sells his packaged goods to an industrial and institutional consumer through dealers; impugned goods manufactured by them are components used in an electrical switchboard and cannot be used as a standalone product; the products are not used by consumers / common individuals; it is evident from the technical write-up and the product catalogue; he relies on EWAC alloys Ltd 2010 (275) ELT 193 (Kar) (single member) and order dated 24.01.2020 in Writ Appeal No. 1770/2012 (Division Bench).

6. Learned senior counsel submits that from of the jurisdictional High Court the following are evident.

- The standard weights and measurements Act are framed having the ultimate consumer in mind;
- The word 'consumer' has been defined in the Consumer protection Act, 1986 and does not include a person who obtains such goods for resale for any commercial purpose and therefore it should be a person who purchases goods for his personal use;
- The definition of 'Retail packages' refer to packaging which are intended for sale to the ultimate consumer and clause specifically indicate that the word 'consumer' does not include Industrial or Institutional consumers. This definition does not define the said expression 'Industrial or Institutional consumers' or the manner of their procurement;
- Rule 6 which prescribes a declaration on every package, therefore would not apply when the said package is not sold to an ultimate consumer and consequently in respect of such package there is no requirement to follow the Standard Weights and Measurement Act and Rules made thereunder;
- The exemption from the applicability of the Standard Weights and Measurement Act and the definition contained therein is the explanation is for industrial consumer and in the manner of their procurement, would apply only to the Rule 2A; and would not apply to the definition of Retail Packaging in Rule 2(p).
- The dealers to whom the goods are sold in this case are not covered under the definition of a consumer; since the dealer resells the goods to Industrial consumer.
- Once the package does not satisfy the definition of a Retail Package and the dealer to whom the package is sold does not satisfy the definition of consumer, the said Act and Rule would not apply to such supplies;

7. Learned senior counsel submits that the decision of Jurisdictional High Court is binding on the Authorities / Tribunal and the assessee in their jurisdiction as held in CCE, Chandigarh vs. Kashmiri Conductors - 2002-TIL-353-CESTAT-DEL-LB and CCE, Jalandhar vs. Bhagwati Forex - 2014-TIOL-1173-CESTAT-DEL. He further submits that in the case of Jayanthi food processing Ltd vs. CCE - 2007 (215) ELT 327 (SC), it was held that where there is a requirement to follow the Standard Weights and Measurement Act, the provision of Section 4A would not apply even if the manufacturer voluntarily declare MRP etc; therefore, even if the goods are sold to the dealer who in turn supplies to the industrial consumer under a package satisfying the definition of retail package, provision of Section 4A would not apply, since the dealer who purchases the said package does not satisfy the definition of 'consumer'.

8. Learned senior counsel submits further the amendment carried out by Legal Metrology (Packaged Commodities) (Amendment) Rules, 2015 clearly indicates the intent of the government; the definition of the term 'industrial consumer' under Rule 2(bb) of PC Rules has been substituted by Legal Metrology (Packaged Commodities) (Amendment) Rules, 2015 as per which "(bb) 'industrial consumer' means the 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 shall have declaration 'not for retail sale'; it is pertinent to note that the Legal Metrology (Packaged Commodities) (Amendment) Rules, 2015 has brought about several amendments, however the amendment to Rule 2(bb) alone is by way of substitution and from any particular date. In other words it dates back to 2013; consumers who procure goods from the importer and wholesale dealer for use in their industry are brought at par with consumers who procure goods directly from the manufacturer so long as the package has a declaration 'not for retail sale'. Learned senior counsel submits that where an amendment is brought about by way of substitution, it has retrospective effect and the same has to be read and construed as if altered

words had been written into Act or Rules from their inception. Reliance in this regard is placed on the following decisions:

- (i) *Government of India vs. Indian Tobacco Association - 2005 (187) E.L.T. 162 (S.C.)*
- (ii) *CCE vs. Fosroc Chemicals (India) Pvt. Ltd. - 2015 (318) E.L.T. 240 (Kar.)*
- (iii) *Bandedkar Brother Pvt. Ltd. vs. Commissioner of Central Excise, Goa - 2015-TIOL-2485- CESTAT-MUM*
- (iv) *Commissioner of Income Tax v. Vatika Township Private Limited- MANU/SC/0810/2014*
- (v) *The Hassan Co-Operative Milk Producers Societies Union Limited v. State of Karnataka- MANU/KA/1717/2014*

Learned senior counsel submits that for the period from 2011 to 2013 in the absence of a definition of an industrial consumer, the only definition to be looked at is the definition of a retail package which is also not satisfied in the present case, for the period from 2011 to 2013 the decision of High Court would therefore squarely cover the case of the Appellant.

9. Learned senior counsel submits that the impugned goods are sold by weight and not in number; goods in question are sold essentially as industrial raw material and no specification in terms of numbers are attributed to such package nor are they displayed in any retail outlet; Tribunal in the following decisions have held that when the goods are sold by weight, the Standard Weights and Measurement Act would not apply even these are sold in numbers.

- *Sarvotham Care Ltd v. Commissioner of Cus & C.Ex., Hyderabad- 2012(286) E.L.T 357 (Tri-Bang.)*
- *Pidilite Industries Ltd. v. Commr. Of Customs (Import), Nava Sheva.- 2014(314) E.L.T 479 (Tri-Mumbai)*
- *Hindustan Lever Ltd. v. Commissioner of Customs, Raigad- 2014(312) E.L.T 491 (Tri-Mumbai)*

10. Learned senior counsel submits that Show Cause Notices were issued on 15.07.2013 and 1.05.2013 demanding duty for the period from April,

2011 to March, 2012 and April 2012 to March 2013, respectively; part of the demand for the period prior to May 2012 amounting to Rs. 1,55,71,032 has been confirmed by, invoking the extended period under the proviso to Section 11A of the Act; extended period of limitation is not applicable as they have not suppressed any facts from the department, much less acted with an intent to evade the payment of duty; Longer period of limitation is not invocable as the issue relates to interpretation and is subject to divergent judicial views; longer period cannot be invoked for the period April 2011 – March 2012, as the department had issued the show cause notice dated 22.02.2013 for the earlier period i.e., January, 2008 to March, 2012 on the similar facts and issue is in dispute; as held in *Nizam Sugar Factory vs. CCE, A.P. 2008 (9) S.T.R. 314 (S.C.)*, extended period cannot be invoked in the subsequent Notice. Learned senior counsel submits that in the instant case, there cannot be any fraud or suppression with intention to evade payment of duty to attract Section 11AC of the Act, and hence, the imposition of penalty is not sustainable.

11. Learned Authorised Representative for the department reiterates the findings of OIO

12. Brief issue involved in the case is to see Air Circuit Breakers, MCCB and Switch Fuse unit classifiable under Chapter Heading 8536 2010, 8536 2020 and 8536 5090 meant for industrial consumers and weighing more than 25 kgs. are to be valued according to the transaction value under Section 4 of the Central Excise Act, 1944 or the MRP Value under Section 4A of the Central Excise Act, 1944. The appellants claim that their product are meant for industrial consumers and are not at all meant for individual consumers; in terms of Legal Metrology Rules, packages having more than 25 kg are not required to be declared with MRP; the appellant submits that the department has no objection when impugned goods are sold directly to the manufacturers in packages less than 25 kg or more than 25 kg; department takes objection on the clearance of goods made through their channel partners or dealers. They submit that exemption for industrial

consumers from affixing MRP labels cannot be denied only for the reason that the impugned goods are not supplied to industrial consumers directly from the appellant-manufacturer in view of the decision of Hon'ble High Court of Karnataka in the case of Ewac Alloys in Writ Appeal No.1770/2012 dated 24.01.2020.

13. For a proper appreciation, relevant legal provisions are reproduced as follows:

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) Whether 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.

Rule 2 of The Legal Metrology (Packaged Commodities) Rules, 2011:

(jj) “retail packages” means the packages which are intended for retail sale to the ultimate consumer for the purpose of consumption of the commodity contained therein included the imported packages:

PROVIDED that for the purpose of this clause, the expression ‘ultimate consumer’ shall not include industrial or institutional consumers.

An amendment brought into effect from 14.05.2015 substitutes the definition of industrial consumer to be as follows:

Rule 2 (bb): “industrial consumer” means the 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 shall have declared ‘not for retail sale’.

Rule 3 of the Legal Metrology (Packaged Commodities) Rules, 2011:

“3. Applicability of the Chapter- The provisions of this chapter shall not apply to-

- (a) Packages of commodities contained 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 the institutional consumer like transportation, airways, railways, hotels, hospitals or any other service institutions who buy packaged commodities directly by the manufacturer for use by that institution.
- (b) Industrial Consumer- Means the industrial consumers who buy packaged commodities directly from the manufacturer for use by that industry.”

14. We find that crux of the appellant’s argument is that the impugned goods are meant for industrial consumers only and a clear mention of the same is made on the packages; it is not the case of the department that the impugned goods are sold to consumers and are used by individual consumers; the very nature of the goods and the use as seen from the Technical Literature, would indicate that the goods cannot be used by individual consumers; though the word consumer is not defined either in the Customs Act or in the Legal Metrology Act or Rules thereof, judicial pronouncements have given the scope of the meaning of the term. From

the same, it is very clear that the impugned goods cannot be held to be intended for individual users.

15. We find that Hon'ble Apex Court has dealt on the provisions of Section 4A of the Central Excise Act, 1944 and have held that the following criteria should be met in case the goods are to be assessed under the provisions of Section 4A. Hon'ble Apex Court in the case of Jayanti Food Processing Pvt. Ltd. (supra), after quoting the relevant provisions, have held that:

"2.....This Section was introduced with the sole idea to end the uncertainty caused in determining the value of the goods under Section 4 and then assessing the duty under that Section. Section 4 was the basic formula for valuation of excisable goods and for the purposes of charging of the duty of excise. It provided the mechanism of determining the valuation of the goods under various circumstances, e.g., in the matter of wholesale trade or in the matter of sales being at the different prices for different places of removal or in case where the assessee sold the goods only to related persons, etc. Section 4A of the Act, as would be clear from the language of sub-section (1), linked the valuation of the goods to the provisions of SWM Act or the Rules made thereunder by firstly providing that it would be for the Central Government to specify any goods in respect of which the declaration of price on the package was required under the provisions of SWM Act, Rules made thereunder or any law for the time being in force. In short sub-section (1) was linked with the packages of the goods in respect of which the retail sale price was required to be printed under SWM Act and the Rules made thereunder or any other law. Sub-section (2) then provides that such specified goods where they are excisable goods would be valued not on any other basis but on the basis of the retail sale price declared on such packages. The Section also provides that the assessee would be entitled to the deduction from such valuation the amount of abatement provided by the Central Government by a notification in the Official Gazette. In short after introduction of Section 4A, the nature of sale lost its relevancy in the sense that the valuation did not depend upon the factor whether it was a wholesale or sale in bulk or a retail sale. The whole section covered the goods which were packaged and sold as such with the rider that such package had to have a retail price thereupon under the provisions of SWM Act, Rules made thereunder or under any other law. Thus, viewed from the plain language of the Section, where the goods are excisable goods and are packaged and further such packages are required to mention the price thereof under the SWM Act, Rules made thereunder or under any other law and further such goods are specified by the Central Government by notification in the Official Gazette, then the valuation of such goods would be on the basis of the retail sale price of such goods and only to such goods the provisions of sub-section (2) shall apply whereby it is provided that the value of such goods would be deemed to be the such retail price declared on the packages. Of course, the assessee shall be entitled to have a reduction of abatement as declared by the Central Government by the notification

in the Official Gazette. Even at the cost of repetition the following would be factors to include the goods in Section 4A(1) & (2) of the Act :

- (i) The goods should be excisable goods;
- (ii) They should be such as are sold in the package;
- (iii) There should be requirement in the SWM Act or the Rules made thereunder or any other law to declare the price of such goods relating to their retail price on the package;
- (iv) The Central Government must have specified such goods by notification in the Official Gazette;
- (v) The valuation of such goods would be as per the declared retail sale price on the packages less the amount of abatement.

If all these factors are applicable to any goods, then alone the valuation of the goods and the assessment of duty would be under Section 4A of the Act.”

16. In the instant case, we find that it is not disputed by the either parties that the goods are excisable; sold in the package, the goods are specified vide Notification No.14/2008-CE (NT) dated 1.3.2008 as amended and Notification No.49/2008-CE (NT) dated 24.12.2008 to fall under Section 4A. However, the dispute appears to be regarding the definition of ‘Industrial Consumer’. Whereas the definition of ‘Industrial Consumer’ at the relevant point of time meant industrial consumers who buy packaged commodities directly from the manufacturer for use by that industry. We find that learned Commissioner has confirmed the demands mainly on the grounds that:

- The goods are notified under Section 4A.
- The appellants have not given any justification for non-applicability of Section 4A for items weighing more than 25 kg when the goods are assessed to duty on the basis of numbers and not by weight.
- The goods have been cleared to non-industrial consumers/customers such as dealers and channel partners and hence, are not excluded from the application of Legal Metrology Act, 2012.
- As the issue was detected consequent to a conduct of an audit, extended period is rightly invoked.

17. The department's contention is that the exclusion from the applicability of the Rules would be available only when the impugned goods are sold by the appellant-manufacturer directly sold directly to industrial consumers. The arguments of the appellants is that only for the reason that the impugned goods are sometimes not sold directly, and are sold through channel partners, does not take away the nature of the goods of being that of industrial use. The very nature of the goods indicates that the goods are not for use by any individual consumer. They rely on the judgment of Karnataka High Court in the case of Ewac Alloys (supra) and submit that it is not the nature of sale that affects the nature of the product. The product is only for industrial use and a declaration to the same is also made on the packages whether it is less than 25 kg or more than 25 kg and whether they are sold directly to the industrial consumers or through channel partners. We find that Hon'ble High Court of Karnataka held as follows:

"7. The learned single Judge has framed the following point for consideration:

"Whether the requirement of Rule 6 is to be complied with by a manufacturer who sells his packaged goods to an industrial consumer through a stockiest?"

8. The learned single Judge was pleased to observe that the word 'consumer' is not defined under the Act or the Rules and considered the word 'consumer' from the dictionary. As per the Black's Law Dictionary, Eighth Edition, the word 'consumer' is defined as a person who buys the goods or services for personal, family or household use, with no intention of resale, a natural person who uses products for personal rather than business purposes. The words 'consumer product' is defined as an item of personal property that is distributed in commerce and is normally used for personal, family or household purposes. The word 'consumer transaction' is defined as a bargain or deal in which a party acquires property or services primarily for a personal, family or household purpose. The 'consumer goods' means a goods by or use primarily for personal, family or household purpose and not for resale or for purchasing other goods. In this context, ordinarily, the word 'consumer' refers to an individual who buys goods or service for himself or his family or for his household use. Therefore, a producer or manufacturer or a whole sale dealer who buys goods is excluded in common parlance.

9. The learned single Judge considered the word 'consumer' as defined under Section 2(d) of Consumer Protection Act and held that it

excludes a person who obtains such goods for resale or for any commercial purpose. The consumer should be an individual who purchases goods for his personal use. Reseller of goods or purchaser of goods for any commercial purpose is not treated as consumer. Therefore, when the word 'consumer' is not defined under the Act and Consumer Protection Act was enacted to protect the interest of consumer whose interest is not sufficiently protected under the Act.

10. As per Rule 6 of the Rules which prescribes the declaration to be made on every package makes it clear that one of the requirement, which a package should contain is common generic names of the commodity contained in the package, as contained in Rule 6(1)(b).

11. The learned single Judge considering the definitions of 'retail package', 'retail sale', 'retail sale price' and considering Clause (a) of Rule 34 of the Rules held that Rule 34 expressly exclude the application of Rule 6 to any package containing a commodity if the making on the package unambiguously indicates that it has been specially packed for the exclusive use of any industry as a raw material or for the purpose of servicing any industry, mine or quarry. The packages meant for industry, mine or quarry, did not fall within these Rules.

12. From the perusal of the Rule 2-A, the explanation expressly states that 'For the purpose of this rule' and then gives the meaning of institutional consumer and industrial consumer. On the date Rule 2-A was introduced by way of amendment into the Rules, Rule 2(p) was also substituted introducing the very same words 'industrial consumer and institutional consumer' in the proviso. Thus, it amounts to re-writing the Rules by the Court which is not permitted in law. The difference between the definition of institutional consumer and industrial consumer in Rule 2-A and Rule 2(p) appears to be thus.

13. In rule 2-A, industrial consumer or the institutional consumer are purchasing the packaged commodities directly from the manufacturer. In the case of retail package, the manufacturer of goods meant for industrial use may not be able to supply the goods directly. Therefore, they may take the assistance of a stockiest. If the customers are spread over the country and if the manufacturing unit is in one part of the country and they want to concentrate on manufacturing activity, they may not have resource or ability to arrange for the sale of their product throughout the country. In these circumstances, it is quite but natural that they need middle men or stockiest as distributors, through whom they would distribute their product or sell their products to an industrial or institutional user. In such an event, that packaged commodity cannot be construed as a retail package. Therefore, after deleting Rule 34(a), in the very definition of 'retail package', the legislature while defining the meaning of 'ultimate consumer' to whom a retail package is meant, excluded institutional or industrial consumer. Thus, it is clear that the protection under this Act is confined only to individuals and persons who are eking out livelihood by self employment and not to institutional and industrial consumers or consumers who purchase

goods in large quantities.

14. In the present case, respondent No.1 is a manufacturer of industrial product. On the packet, it is expressly stated that it is meant for industrial use. The product which is manufactured by them is high end industrial welding products, such as electrodes, brazing rods, powders and fluxes. Respondent No.2 is their selling agent and selling these products through a network of stockiest spread all over India, 90% of the sales are generated through the involvement of core team of sales/service engineers of respondent No.2 who are trained in specialized Eutectic Castolin Welding Process.

15. The learned single Judge after considering the entire material on record has rightly held that the impugned notices issued by appellant No.2 are one without authority, illegal and contrary to the express provision contained in the enactment, cannot be sustained and rightly quashed the notices. We do not find any grounds to interfere with the impugned order.”

18. We find that it is not disputed that the impugned goods are intended for industrial consumers; the endorsement that they are for industrial use only is made on the packets and that they weigh more than 25 kg. The contention of the department is that when the clearance is through the channel partners, they are not excluded from the provisions of Legal Metrology Rules/Act. The appellants contend that as it is impossible for the manufacturers to reach all industrial and institutional costumers in every nuke and corner of the country, the goods are made available through their channel partners, in addition to direct sale to the consumers. We find that the dealer is not a individual consumer and the goods are routed through them to the industrial consumers. The department had no objection in case of very same goods cleared directly to the industrial consumers. Thus, there is an ambiguity in the treatment of the impugned goods by the department. It is the very same goods that are sold directly to the industrial consumers and also through channel partners. We find that such a treatment by the department defies logic as the nature of the goods is not changed just by the way they are sold. The characteristics, the usage and the users are not changed. We find that Hon’ble High Court of Karnataka has dealt with this issue in an elaborate manner and have concluded, as discussed above, that routing of the goods through dealers or

intermediaries would not change the nature of the goods as long as they are not put to use by individual consumers. Going by the Technical Literature and the submissions of the appellant, we find that the goods are for industrial use only. Department has not shown any contrary evidence to show that the goods are used by individual consumers. Under the circumstances, we find that the ratio of the judgment of Hon'ble High Court of Karnataka in the case of Ewac Alloys (supra) is squarely applicable. Moreover, the appellants have contended that the amendment carried out in 2015, to include the sales through dealers also, was by way of substitution and that it has to be construed as if the words had been written into the Act or Rules *ab initio*. The appellants have also contended, relying on some decisions, as above, that when the goods are sold by weight, the Legal Metrology Rules would not apply even if they are sold otherwise in numbers. However, the issue being decided squarely by the Karnataka High Court as discussed above, there is no need to go into the interpretations and other legal issues. In due deference to the same, we hold that the impugned goods having more than 25 kg in weight, are to be treated to be meant for industrial use, notwithstanding the fact that some of the sales are routed through channel partners.

19. The next issue contested by the appellants is the invocation of longer period. They submit that they have not suppressed any facts from the department and moreover, two show-cause notices were issued invoking longer period in violation of the ratio of Hon'ble Apex Court's judgment in the case of Nizam Sugars (supra). We find that the appellant's contentions are acceptable and the department has not made out any case for invocation of extended period.

20. In view of the above, we allow the appeal partly in the following terms:

- (i) We hold that impugned goods, in packages having weight more than 25 kg are not chargeable to duty under Section 4A, only for

the reason that they are sold through channel partners;
differential duty demanded on this count is set aside.

(ii) All other demands, if any, within normal period are confirmed.

(iii) Penalty is set aside.

(Order pronounced in the Open Court on **28/04/2022.**)

(P. ANJANI KUMAR)
TECHNICAL MEMBER

(P. DINESHA)
JUDICIAL MEMBER

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