IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
[COURT III : Division Bench B1]

Appeal Nos.: E/496, 516/2010

Sl. No.	Appeal No.	Appellant	Respondent
1.	E/496/2010	The Commissioner of G.S.T. & Central Excise, Chennai North	M/s. Titan Industries Ltd., Watch Division, Hosur
2.	E/516/2010	M/s. Titan Industries Ltd., Watch Division, Hosur	The Commissioner of G.S.T. & Central Excise, Chennai North
Arising out of Order-in-Appeal No. 66/2010 (M-III) dated 17.05.2010 passed by the Commissioner of Central Excise (Appeals), Mahatma Gandhi Road, Chennai.			

Appearance:-
Ms. Radhika Chandrasekhar, Advocate
for the Appellant

Ms. T. Usha Devi, DC (AR)
for the Respondent

CORAM:
Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing: 27.02.2019
Date of Pronouncement: 18.03.2019

Final Order Nos. 40522-40523 / 2019

Per Bench :

The issue involved in all these appeals being the same and also connected, they are heard together and disposed of by this common order. The parties are hereinafter referred to as 'assessee' and 'Department' for the sake of convenience.

2.1 Brief facts are that the assessee manufactured and cleared watches falling under Chapter 91 of the Central Excise Tariff Act, 1985. They had manufactured and cleared in bulk certain quantity of watches on specific order given by some industrial organizations to be given for free distribution to the employees of such industrial organizations. The assessee declared the contract price and availed concessional rate of duty of 8% under Notification No. 10/2003-CE dated 01.03.2003 as the contract price, according to them, was less than Rs. 500/- per watch.

2.2 The Department was of the view that the concessional rate of duty under Notification No. 10/2003 is not eligible to the assessee. After due process of law, an amount of Rs. 23,00,470/- being the differential duty at the rate of 16% was demanded along with appropriate interest and penalties were also imposed. Aggrieved by such Order, the assessee filed appeal before the Commissioner (Appeals). The Department's contention in such appeal was that the contract price at which the assessee has paid duty cannot be considered as M.R.P. and hence, Notification No. 10/2003 is not applicable to the assessee. The Commissioner (Appeals) held that the goods are liable to be assessed under Section 4A and concessional rate of duty under Notification No. 10/2003 is eligible for the clearances effected by the assessee to the industrial consumers.

3.1 However, after scrutinizing the different clearances, it was observed by the Commissioner (Appeals) that apart from the four instances, there was no evidence adduced by the assessee to show that the watches were sold at a price less than Rs. 500/-. Therefore, for sales other than the four instances, the benefit of the said Notification was not extended to the assessee. The Commissioner (Appeals) thus remanded the matter to the adjudicating authority to re-work the duty payable on the basis of the conclusion that for the remaining clearances, the concessional rate of duty of 8% would not be eligible to the assessee. Aggrieved by such Order that the watches are assessable to duty under Section 4A and disallowance of concessional rate of duty for major part of the clearances, the assessee has filed Appeal No. E/516/2010.

3.2 Against the very same Order, the Department has filed Appeal No. E/496/2010 aggrieved by the concession granted by the Commissioner (Appeals) for certain clearances.

4.1 On behalf of the assessee, Ld. Advocate Ms. Radhika Chandrasekhar appeared and argued the matter. She submitted that the assessee has supplied watches in bulk to institutional customers like M/s. Ranbaxy Ltd., M/s. Tata Tele Services Ltd., M/s. Varun

Beverages Ltd., Noida, M/s. Honda Motors Ltd. and M/s. Ashok Leyland Ltd. The appellants have paid excise duty at the rate of 8% for such clearances under Notification No. 10/2003 dated 01.03.2003. As per Notification No. 10/2003 watches with retail price less than Rs. 500/- are eligible for exemption from duty of excise as in excess of 8%. The allegation in the Show Cause Notice is that the benefit of the Notification is available only when retail sale price is less than Rs. 500/- and not for watches having ex-factory price or wholesale price of Rs. 500/- or below. In paragraph 3 of the Show Cause Notice it is stated that according to Board Circular No. 625/16/2002-CX dated 28.02.2002 (F. No. 6/44/2000-CX.1) in respect of bulk sales which are not meant for retail sales as such, the provisions of Standards of Weights and Measures Act will not apply; that in such cases, valuation will have to be done under Section 4 of the Central Excise Act, 1944 and not under Section 4A. Again, in paragraph 4, the Department contends that when clearances were made for retail sales, duty was discharged under Section 4A on the value affixed on the packages. While cleared in bulk, the assessee has to adopt Section 4 valuation. In paragraph 6 of the Show Cause Notice, it is alleged that the effective rate of 8% would apply only to those watches having 'retail sale price' of Rs. 500/- and below and not for the watches having ‘ex-factory price’, ‘wholesale price’, ‘dealers price’, etc., of Rs. 500/- and below. Thus the allegation in the Show Cause Notice is that for the watches cleared to institutions based on ex-factory price, the rate of duty would be 16% and not 8% as the assessee do not fall into the criteria prescribed in the said Notification.

4.2 She submitted that the goods covered in the Show Cause Notice are not sold in retail to the ultimate individual consumers. They are sold to industries/organizations who intend to distribute them to their employees as complimentary gifts. The names of the institutional/industrial consumers are engraved on the watches. The Department does not have a case that there is further sale from such institutions to other customers. The institutions to which the watches have been supplied are the ultimate consumers.

4.3 In the Show Cause Notice itself it is stated that watches are cleared at a price below Rs. 500/-. The price includes all taxes, freight, transport charges, commission and all charges towards advertisement, delivery, packing, forwarding and the like and the said price is the sole consideration for sale or clearances made to the institutions. The Department has not established, by any evidence, that the assessee has collected more than Rs. 500/- per watch from the institutions. The watches are thus sold at a contract price of less than Rs. 500/- to institutional customers and they were not sold on M.R.P. basis. The duty was discharged adopting Section 4, the contract price being the assessable value.

4.4 The intention of the exemption Notification was to extend the benefit of concessional duty to those goods which are assessed under Section 4 of the Act when sold at a price less than Rs. 500/-. There is no reference in Notification No. 10/2003 that the goods which are subject to assessment under Section 4A of the Central Excise Act alone would be eligible to concessional rate of duty if the M.R.P. (RSP) is below Rs. 500/-. Explanation II of the Notification defines retail sale price. It is clear that irrespective of the assessing mechanism, being under Section 4 or under Section 4A of the Central Excise Act, 1944, the benefit of Notification No. 10/2003 would be available. She argued that the goods which are falling under the provisions of the Standards of Weights and Measures Act, 1976 can alone be subjected to assessment under Section 4A. The Tribunal in the ***assessee's own case reported in 2007 (216) E.L.T. 327*** has held that the provisions of Section 4A do not apply unless the provisions of the Standards of Weights and Measures require declaration of retail sale price.

4.5 The observation of the Commissioner (Appeals) that there is no evidence produced by the assessee to substantiate their claim that the goods sold were only to industrial consumers and that the price was less than Rs. 500/- is factually incorrect and travels beyond the scope of the Show Cause Notice. There is no such allegation in the Show Cause Notice. In fact, the Show Cause Notice states that the appellant has sold goods only to industrial consumers and that the price of the goods was less than Rs. 500/-.

4.6 She therefore submitted that the demand denying the benefit of concessional rate of duty under the Notification cannot sustain and prayed for setting aside the same.

5.1 Ld. AR Ms. T. Usha Devi appearing on behalf of the Department reiterated the grounds stated in the appeal filed by the Department. She submitted that the Commissioner (Appeals) has set aside the demand in respect of four clearances made by the assessee and has confirmed the demand with respect to the sales made to others, thus partly allowing the appeal filed by the assessee. The Commissioner (Appeals) has erroneously set aside the penalty stating that the issue involved is in the nature of interpretation and also involves applicability of the Notification.

5.2 As per Sl. No. 7 of Notification No. 10/2003-CE dated 01.03.2003, only watches and clocks of retail sale price not exceeding Rs. 500/- per piece are eligible for exemption. In the instant case, though the goods (watches) are covered under Notification issued under Section 4A of the Act, the sales were not in retail since they were sold to institutional organizations. There was no retail sale price in this case and no M.R.P. was exhibited on the packages to comply with the Standards of Weights and Measures (Packaged Commodities) Rules, 1977.

5.3 The watches cleared to institutions based on ex-factory price as per the purchase order should have suffered duty at the rate of 16% ADV and not 8% ADV due to non-availability of retail sale price, which is the criteria prescribed in the Notification. In the absence of retail sale price, the assessee is not eligible for availing exemption under Notification No. 10/2003.

5.4 The decision of the Hon'ble Supreme Court in the case of ***M/s. Jayanti Food Processing (P) Ltd. Vs. Commissioner of C.Ex., Rajasthan - 2007 (215) E.L.T. 327 (S.C.)*** covers the issue under consideration. The Hon'ble Apex Court has clearly held that in a situation of bulk sale to institutional organizations where the M.R.P. has not been indicated, valuation has to be done as per Section 4 of the Act. In the present case, the assessee has sold their watches to institutional consumers like M/s. Ashok Leyland, M/s. Honda Motors. There is no evidence that it was not sold to ultimate consumers. Hence, the ratio of the decision in the case of *M/s. Jayanti Food Processing (P) Ltd. (supra)* would be rightly applicable.

5.5 In such circumstances, the impugned goods are to be assessed under Section 4A of the Central Excise Act and consequently, in the absence of retail sale price on the packages, the assessee are not eligible for exemption under Notification No. 10/2003. The Order of the Commissioner (Appeals) holding that the assessee is eligible for assessment under Section 4A of the Central Excise Act, 1944 and concessional rate of duty of 8% for the clearances effected to industrial consumers is therefore incorrect and requires to be set aside.

6. Heard both sides.

7. The issue is with regard to the eligibility of the benefit under Sl. No. 7 of Notification No. 10/2003 dated 01.03.2003. For better

appreciation, the relevant part of the aforesaid Notification is extracted below :

*"**Effective rates of excise duty for specified goods***

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Explanation II – For the purposes of this notification the "retail sale price" means the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes, local or otherwise, freight, transport charges, commission payable and all charges towards advertisement, delivery packing, forwarding and the like, as the case may be, and the price is the sole consideration for such sale.

Explanation III – For the purposes of this notification, the rates specified in column (4) of the said table are ad valorem rates, unless otherwise specified.

Table

S. No.	*Chapter or heading No. or sub-heading No.*	*Description of goods*	*Rate under the First Schedule*
(1)	*(2)*	*(3)*	*(4)*
.	.	.	.
.	.	.	.
.	.	.	.
7.	*91*	*Watches and clocks of retail sale price not exceeding Rs. 500 per piece*	*8%*

8. As seen above, the definition of 'retail sale price' though has been adopted as it stands in the Central Excise Act, 1944, it can be seen that the said definition of retail sale price in the Notification is only for the purpose of the Notification. The definition in Explanation II starts with the words "for the purpose of this Notification", whereas the definition of 'retail sale price' in

Explanation I in the Central Excise Act, 1944 starts with the words "for the purposes of this Section".

9.1 Section 4A deals with 'Valuation of excisable goods with reference to retail sale price'. Sub-Rule (1) of Section 4A provides that 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 (Standards of Weights and 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 sale price of such goods to which the provisions of Sub-Section (2) shall apply. Thus, Section 4A has a reference to the Standards of Weights and Measures Act, 1976. However, the Notification does not have any reference to the Standards of Weights and Measures Act, 1976. It can be understood that the definition of retail sale price given in the Notification is only for the purposes of the Notification. The 'retail sale price' in the Notification, therefore, cannot be stretched to the application of the Standards of Weights and Measures Act, 1976 and the Standards of Weights and Measures (Packaged Commodities)Rules, 1977 (hereinafter referred to as the 'SWM Act and Rules'). The

Notification does not lay down that the benefit is applicable only to goods to which the SWM Act and Rules apply.

9.2 Even though excisable goods which are assessable under Section 4 is in packaged form and is sold to the ultimate consumer and fits into the other conditions of the Notification, the benefit of concessional rate of duty would be eligible. Thus, it is not necessary that for availing the benefit of the Notification, the goods have to be assessable under Section 4A of the Act. The Department has confused the definition of retail sale price given in the Notification with that of the definition given in Section 4A of the Central Excise Act. Though the definition of retail sale price has been adopted *in verbatim*, it has to be seen that the retail sale price as defined in Section 4A would be applicable for the purposes of that Section only. Thus, in the case of goods which are assessable under Section 4A, when the goods are cleared to industrial consumers, as per the provisions of the Standards of Weights and Measures Act, there is no requirement to affix the M.R.P. In such cases, the goods would be assessable under Section 4 of the Central Excise Act, 1944. The decision rendered in *M/s. Jayanti Food Processing (P) Ltd. (supra)* makes this clear.

9.3 In the present case, the Notification does not refer to the Standards of Weights and Measures Act, 1976. Thus, even if the goods are cleared to industrial consumers or otherwise, if they are sold to the ultimate consumer at a price which is not exceeding Rs. 500/- per piece, the clocks or watches would be eligible for the benefit of the Notification. Further, even the Show Cause Notice states that the assessee has cleared the watches only to institutional consumers. So also, it is seen stated that they have cleared it below Rs. 500/-. On this score, the finding of the Commissioner (Appeals) that the goods are to be assessed under Section 4A since the assessee has not established that they have cleared their goods to institutional consumers in the cases excepting the four instances, is factually incorrect.

9.4 At the cost of repetition, we have to say that the Notification in question has no reference to the SWM Act and Rules. We have to emphasize that even if the valuation is under Section 4 or under Section 4A, the benefit of the Notification under Sl. No. 7 would be eligible if the price at which the goods are sold (contract price) is less than Rs. 500/- per piece.

10. At this juncture, it is also noteworthy that the name of the industry/organization was engraved on the watches and the assessee has put forward a specific plea that these were sold to the industrial organizations for being distributed to their employees as complimentary gifts. The Department has not put forward any evidence to show that there has been a further sale by the industry/ organization to another person. Therefore, in the present case, the ultimate consumer is the industry/organization to which the assessee has sold the watches. This being so, the retail sale price being less than Rs. 500/-, the assessee are eligible for the benefit of the Notification.

11. Thus, the impugned Order in Appeal Nos. E/496/2010 and E/516/2010, in as much as it denies the benefit of the Notification, is set aside.

12. The Assessee Appeal is allowed with consequential reliefs, if any, as per law. The Department Appeal is dismissed.

*(Pronounced in open court on **18.03.2019**)*

(Madhu Mohan Damodhar) — Member (Technical)

(Sulekha Beevi C.S.) — Member (Judicial)

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