IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

**Appeal No.E/603/2005 (by Dept.) &
E/CO/40895/2016 (by Assessee)**

[Arising out of Order-in-Appeal No.59/2005-(TRY) (ADK) dt. 13.04.2005 passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli]

Commissioner of Central Excise, Tiruchirappalli — Appellant

Versus

Novaa Paints — Respondent

Appearance:

Shri A. Cletus, ADC (AR)
For the Appellant

Shri M. Karthikeyan, Advocate
For the Respondent

CORAM:

Hon'ble Shri Justice (Dr.) Satish Chandra, President
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing : 18.01.2017
Date of Pronouncement: 07/03/2017

FINAL ORDER No. 40401/2017

Per : Madhu Mohan Damodhar

M/s.Novaa Paints (hereinafter referred to as the respondent or assessee) are an SSI unit engaged in the manufacture of paints and varnishes falling under CSH No.3209.90 of the Schedule to the CETA 1985, which are notified under Section 4A (M.R.P.) of

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the Central Excise Act, 1944. Subsequent to a visit by the departmental officers to the assessee's unit on 07-10-2003 and examination of relevant records, it appeared that there were clearances of excisable goods in excess of the exemption limit prescribed under Notification No.8/2000-CE dated 01.03.2000 as amended by Notification No.47/2000-CE dated 01.09.2000 without payment of duty.

2. From the investigations, it further appeared that :

(a) the respondents were supplying their excisable final product, namely paints, mainly to M/s.BHEL, M/s.Southern Railways and M/s.BIDASS Industrial Service Association;

(b) the respondents had made such clearances to BHEL on individual purchase based on tender order, according to their specifications;

(c) similar clearances had been effected to BIDASS on contract and purchase order basis ;

(d) for the supplies made to BHEL, the containers were stenciled 'BHEL USE ONLY' ;

(e) for the supplies made to BIDASS, the containers were stenciled 'BHEL APPROVED' ;

(f) the respondent had never sold the excisable goods in the retail market but for a small quantity excisable goods;

(g) Members of BIDASS Industrial Service Association were the Ancillary units of M/s.BHEL and that BIDASS supplied those paints only to the said units;

(h) therefore, assessment under Section 4A of the Act on MRP price did not appear to available to the respondents in respect of supply of excisable goods made to BHEL, BIDASS etc. which were manufactured exclusively for the use by those industries and where no MRP was affixed as evident from the distinctive markings thereon ;

(i) Scrutiny of the invoices for the years 2000-01, 2001-02, 2003-04 revealed that they had shown the value of products in their invoices only on the basis of purchase order /contract price which was corroborated by the statements of Shri Peter Xavier Raj, the Managing Partner of the respondent;

(j) the respondent had not paid any excise duty on the claim that they were an SSI unit;

(k) however, from analysis of commercial tax returns, balance sheets and tallied with invoices, the sales turnover of respondent was Rs.1,37,61,357/- for 2000-01, Rs.1,41,38,357/- for 2001-02, and Rs.1,25,61,124 for 2003-04 ; and

(l) therefore, respondent appeared to have crossed SSI exemption limit but had not paid duty that they were liable to.

3. Accordingly, a show cause notice dt. 11.10.2004 was issued to the respondents proposing that value of the paints cleared to industrial customers should be determined under Section 4 of the Act, demand of Central Excise duty of Rs.14,15,582/- under proviso to Section 11A (1) ibid, along with interest liability thereon, imposition of penalty under Rule 25 of the Central Excise Rules, 1944 read with Section 11AC ibid. The original authority vide OIO dt. 31.01.2005 confirmed the above proposals. On appeal, the Commissioner (Appeals) vide order dt. 13.4.2005

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(impugned order) set aside the order of original authority and allowed the appeal of the assessee on the following conclusions :-

(a) The words 'BHEL' and 'BHEL approved' and the paint supplied to M/s.BHEL and M/s.BIDASS will not fall within the ambit of Rule 34 (a) of Standards of Weights and Measures (PC) Rules, 1977

(b) Paint has not been supplied for the exclusive use of any industrial consumer or for the purpose of servicing any industry, mine or quarry.

(c) The value of clearances as calculated by the appellants (pages 7-80 in EA.1) is correct as per Section 4A.

(d) The claim of the assessee that the paint manufactured and cleared by them will be covered under Section 4A is also fortified by the letters of the Range Superintendent vide OC Nos.230/97 dated 24.09.07 and 2684/97 dated 1.10.1997.

4. Aggrieved, Revenue has preferred this appeal *inter alia* on the following grounds:

(a) the paint sold by M/s.Nova Paints had the markings "BHEL use only", where the packages were sold to BHEL, and the markings 'BHEL approved', when the goods were sold to BIDASS. This fact brought out in the show cause notice has not been disputed by the assessee. Assessee have not placed on record any evidence to show that the paints in question were sold to any retail consumer. The evidence produced by the assessee before Commissioner (Appeals) showed only a few sales.

(b) when the goods are sold to industrial consumers there is no requirement under Standards of Weights and Measure

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(Packaged Commodities) Rules 1977 that M.R.P should be indicated on the packages as per Rule 34 (a) of these Rules.

(c) when there is no legal liability to indicate M.R.P on the packages, provisions of Section 4A will not apply even if the assessee voluntarily indicate MRP on that packages. The working of Section 4A and Board's Circular 625/16/2002-Cx dated 28.2.2002 makes this position clear.

(d) When MRP is adopted as basis for valuation under Section 4A, abatement as notified in Notification No.09/2000-CE (NT) dated 01.03.2000 is to be deducted from M.R.P. This abatement is worked out taking into account expenses and profit margins at different levels of trade upto retail level. When the price is declared for sale at the first wholesale level, which is the situation in the case of assessee, and from this price deduction as per Notification 09/2000-CE (NT) dated 01.03.2000 is allowed, the price gets artificially reduced and assessee gets unintended benefit. This is happening basically because the price purporting to be M.R.P is not the actual price for retail sale for the reason that the goods are never sold in retail but are sold to industrial consumers only and essentially in the nature of whole sale price.

(e) The assessee have not produced any evidence to prove that M.R.P has in fact been affixed on the packages. Since they are exempt from provisions of Rule 34 (a) ibid it is most likely that the assessee did not indicate such MRP on the package.

(f) Paint manufactured by he assessee was not sold in retail market and in the absence of retail sales, assessment under Sec.4 only can be made applicable to the assessee.

5. During the hearing, on behalf of the Revenue, Ld. A.R Shri A. Cletus reiterated the grounds of appeal and submitted that the order of Commissioner (Appeals) is not legal and proper, hence liable to be set aside and the order of the original authority is to be restored by allowing the Revenue's appeal.

6. On the other hand, respondent, through their Advocate, Shri M. Karthikeyan, supported the impugned order and reiterated the cross objections filed by them. In their cross-objections, respondent has *inter alia* contended that the industrial units are the ultimate consumers in the packaged form and there is no further sales from their end. The respondents also contend that after MRP valuation under Section 4A came into force w.e.f. 01-09-1997, the jurisdictional Range Superintendent of Central Excise, vide lettr dt. 29-09-1997 and 01-10-1997 had clarified that even if the goods are sold on tender/contract basis, MRP value will only be taken into account for the purpose of payment of duty. They also drew attention to the cross-examination of the Superintendent done during adjudication proceedings and emphasize that the impugned goods are not raw material for manufacture of boiler and boiler components by BHEL.

7. Heard both sides and have gone through the facts of the case.

8. As per Section 4 of the Central Excise Act, 1944, for the purposes of charging duty of excise, with certain exceptions, valuation of the excisable goods shall be the transaction value. However, whereon any goods retail sales price is required to be declared on the package thereof, under the provisions of Standards of Weights and Measures Act, 1976 (Legal Meteorology Act, 2009 w.e.f. 8.4.2001), the valuation of such excisable goods shall be deemed to be the retail sale price declared on the goods, less any amount of abatement that may have been prescribed by Notification. At the same time, the Standards of Weights and Measures Act (Packaged Commodities) Rules 1977 provide exemptions and exceptions where such MRP is not required to be affixed on the packages. It is therefore clear that when particular excisable goods are legally required to affix MRP, their valuation for calculating excise duty liability will be governed by provisions of Section 4A of CEA, 1944. However, if the excisable goods fall within the ambit of exemptions/exceptions from affixation of MRP, their valuation will necessarily fall out of the purview of Section 4A and instead, their valuation will be governed by Section 4 ibid.

9. Thus, The issue that comes up for decision in this appeal is whether the paints supplied by the respondent would require mandatory affixation of MRP or whether they are exempted from such requirement and in consequence, whether their assessment for levy of excise duty will be governed by Section 4A or Section 4 ibid.

10. At this stage, it would be useful to appreciate Rule 34 (a) of Standards of Weights and Measures (PC) Rules, 1977 as it existed during the material time :

"Rule 34:- Exemption in respect of certain packages-

Nothing contained in these rules shall apply to any package containing a commodity if:-

a) the marking 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:

Provided that this exemption shall not be available in respect of:

(i) any yarn which is sold in hanks to handloom weavers;

(ii) any component, part or material used in any workshop, service station or any other place where servicing or repairing of any bicycle, tricycle or motor vehicle within the meaning of Motor Vehicles Act, 1939 (4 of 1939) is undertaken;

(iii) any package containing a commodity of net content of 5 kilogram or 5 litre or less, and displayed for sale at the retail outlet.

(iv) Any package containing a commodity to be sold by number or length and displayed for sale at the retail outlet."

11. From the facts on record, it clearly emerges that the packages cleared by the respondent were stenciled with the markings "BHEL USE ONLY" and "BHEL APPROVED". There is no dispute on this fact. In this regard, it is observed that Rule 34 of the said Rules provides exemptions from affixture of MRP on packages which have been specifically packed not only for exclusive use of any industry as a raw material but also a commodity for the purpose of servicing any industry etc. There is no dispute that these paints were sold to BHEL in large volumes and that they are used, as stated by the respondents themselves, as "an input for finished goods to protect against erosion", without

which the goods are not marketed by BHEL. So also, purchase orders/documents and other facts on record bring out the fact that even in the case of other large volume purchasers like BIDASS, etc., the products were intended for industrial use only. The requirement of stenciled markings on the packages namely "BHEL USE ONLY" for supplies made to BHEL and "BHEL approved" to M/s. BIDASS (for ancillary units of BHEL) were specified in the contracts. M/s. BIDASS have also confirmed that they supplied the said paints only to their members who were ancillary units of BHEL.

12. It therefore transpires that the sales of paints effected by the respondent to BHEL or to BIDASS were only for the purpose of exclusive use of BHEL or their ancillary units and not for any further retail sale. It is not the case that BHEL or BIDASS were acting as wholesalers or traders of the respondent or that the former were further selling the paints obtained from the respondent to retail market. Viewed in this light, it becomes evident that the paints so sold by the respondent to BHEL or to other ancillary unit through BIDASS, have only been obtained by the latter as original equipment (OE) purchases and accordingly, clearances of paints to these entities would necessarily attain the colour of packages/commodity which have been specifically packed for the exclusive use of BHEL and/or, their ancillary units. In the cross-objections, appellant has placed reliance on the decision of the Hon'ble Apex Court in the case of *Collector of Central Excise Vs. Ballarpur Industries Ltd.* – 1989 (43) ELT 804 (S.C.), to substantiate their contention that the paints supplied by

them cannot be considered as " raw material for BHEL" etc. which, however, appears to be misconceived and misinterpreted. True, the Hon'ble Apex Court, in the said land mark judgement, has very succinctly clarified when the ingredients used in manufacture would be eligible to called "raw material". The relevant portion of the said judgement is reproduced below for better understanding :

> "5. The question, in the ultimate analysis, the whether in input of Sodium Sulphate in the manufacture of paper would cease to be a "Raw-Material" by reason alone of the fact that in the course of the chemical reactions this ingredient is consumed and burnt-up. The expression "Raw-Material" is not a defined term. The meaning to be given to it is the ordinary and well-accepted connotation in the common parlance of those who deal with the matter.
>
> The ingredients used in the chemical technology of manufacture of any end-product might comprise, amongst others, of those which may retain their dominant individual identity and character throughout the process and also in the end-product; those which, as a result on interaction with other chemicals or ingredients, might themselves undergo chemical or qualitative changes and in such altered form find themselves in the end-product; those which, like catalytic agents, while influencing and accelerating the chemical reactions, however, may themselves remain uninfluenced and unaltered and remain independent of and outside the end-products and those, as here, which might be burnt-up or consumed in the chemical reactions. The question in the present case is whether the ingredients of the last mentioned class qualify themselves as and are eligible to be called "Raw-Material" for the end-product. One of the valid tests, in our opinion, could be that the ingredient should be so essential for the chemical processes cluminating in the emergence of the desired end-product, that having regard to its importance in and indispensability for the process, it could be said that its very consumption on burning-up is its quality and value as raw-material. In such a case, the relevant test is not its presence in the end-product, but the dependence of the end-product for its essential presence at the delivery end of the process. The ingredient goes into the making of the end-product in the sense that without its absence the presence of the end-product, as such, is rendered impossible. This quality should coalesce with the requirement that its utilisation is in the manufacturing process as distinct from the manufacturing apparatus."

It is thus amply clear that while the Hon'ble Apex Court did go into the essentiality of the ingredients for the chemical processes culminating in the emergence of the desired end product, the Hon'ble Court also clarified that the relevant test is not the presence of the said ingredients in the end product, but the

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dependence of the end product for its essential presence at the delivery end of the process. By the respondent's own admission, the paints are used by BHEL or their ancillary units for anti erosion treatment etc. on the products manufactured by them. They are verily inputs for painting over the finished goods to protect against erosion. This being so, the paints supplied by the respondent will fall within the ambit of raw material, since without their application, the delivery end of the process would not be able to be effected by BHEL. The paints go into the making of the end product without which the presence of the end product is rendered impossible. Applying the ratio of the *Ballarpur Industries* judgement supra, the paints so supplied by respondent are definitely raw materials for BHEL etc.

13. What therefore emerges from the discussions herein above is that the respondents had supplied paints as per the prices agreed upon by the tender or contract, to M/s.BHEL or to their ancillary units through M/s.BIDASS, in packages on which markings were distinctly stenciled to indicate that they were for the exclusive use of BHEL. Allegation of the department that MRP prices had not been affixed on the packages so supplied, has also not been satisfactory controverted by respondent with evidence. The said paints are utilized exclusively by BHEL or their ancillary units for use on their final products (boilers etc.) as anti-erosion treatment for use on their original equipment manufactured by them. This being the case, the impugned goods are exempt from affixation of M.R.P in view of the special provisions of Rule 34 of the Standard Weights and Measures (PC) Rules,1977, especially

since all conditionalities of the said Rule are satisfied. Rule 34 ibid being a special provision, will then override the other general provisions of the said Rules. That is in conformity with the principle enunciated in the dictum ***Generalia Specialibus non derogent - (general things will not derogate from the special provisions).*** When the statute has prescribed any special provisions excluding the application of other general provision therein, that special provision will prevail over the general provision. In the circumstances, the valuation of the impugned goods would then not be under Section 4A of the Central Excise Act but under Section 4 only. The view taken by the Commissioner (Appeals) in the impugned order that the excisable goods are required to be assessed under Section 4A of the Act is therefore not sustainable and will required to be set aside. Our view is fortified by the decision of the Tribunal on this very issue, in the case of *Kroslink Polymers P Ltd. Vs CCE Pune-I* - 2015-TIOL-149-CESTAT-MUM where it was held that in such cases, goods have to be valued under Section 4 of the Central Excise Act. The operative part of the above decision is reproduced as under :

> "3. We have considered the said application and the merits and heard the ld. Departmental Representative.
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> 4. On perusal of the records, we find that both lower authorities have confirmed the demands raised on the appellant on the ground that they have wrongly adopted MRP based assessment under the provisions of Section 4A of Central Excise Act, 1944. It is noted from the records that the products "Glues and adhesives" were falling under Chapter 35 of the Central Excise Tariff Act, 1985; but the packing of the products manufactured by the appellant were indicating that they were supplied to industrial consumers and hence they were not covered by the provisions of Standards of Weight and Measurement Act, 1976. The factual finding of the first appellate authority are as under:-

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"As per Section 4A(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 Standards of Weights & Measurement Act, 1976 (60 of 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. As per Rule 34 of the Standards of Weight & Measurement Act, 1977 the provisions of marking MRP are not applicable to products especially packed for exclusive use in the industry as a raw material or for servicing of any industry provided that the exemption shall not be available in respect of any package containing commodity of net content of 5Kg or 5 Litres or less and displayed for sale at retail outlet. In the present case, it is a fact that glues and adhesives are cleared to industrial consumers and the appellants have not demonstrated that any dealer have sold the material to the retailers. The appellants are marking the packages as "Industrial use". Therefore, their products are assessable to payment of duty under Sec. 4 i.e. "transaction value". The appellants contention that Rule 34 is an exemption and they were not eligible for this exemption because they had not satisfied the major condition of such rule (1)(a) of Rule 34 viz. the marking 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 serving any industry mine or quarry is not factually correct. I find that appellants have printed the words "for industrial use" and fulfil the condition of Rule 34. The appellants stand taken that exemption under Rule 34 is not mandatory is not acceptable. The duty liability and interest recovery is therefore confirmed."

5. As against such factual finding, the appellant in the grounds of appeal have not controverted the fact that they were selling the goods to industrial consumers, and also whether they have affixed MRP or not. In the absence of any evidence, we find that the first appellate authority has correctly upheld the demands raised and confirmed against the appellant.

6. We do not find any merits in the appeal and reject the same."

14. In consequence, the duty liability of Rs.14,15,582/- demanded by the original authority vide his OIO No.1/2005 dt. 31.1.2005 under Section 11A (2) of the Central Excise Act along with interest thereon under Section 11AB ibid, is just, fair and proper in law. Respondents cannot seek to avoid this duty liability by referring to letters dt. 29.09.1997 and 01.10.1997 of the jurisdictional Superintendent of Central Excise advising them that even if the goods are sold on tender/contract basis, MRP value will only be taken into account for the purpose of Central Excise duty. It must be remembered that these clarifications were proffered by the Superintendent immediately after the MRP assessment under

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Section 4A of the Act came into force w.e.f. 01-09-1997. It is also not known whether while issuing those letters, the said Superintendent had been informed by the respondent, who is otherwise functioning under the self-removal procedure, of the method and manner of supplies effected to BHEL/BIDASS, especially with regard to the markings "FOR BHEL USE ONLY" etc. made on the packages or the fact that the paints so supplied to BHEL/BIDASS were exclusively consumed by the latter in the manufacturing process of BHEL products. In any case, even if the respondent claims to have been misled by such advice, that cannot be used as a legal excuse for non-payment of applicable duty liability. Two wrongs cannot make a right. At the most, the fact of the respondent having been in receipt of such misleading advice can only be a mitigating factor in considering the propriety and/or quantum of penalty proposed in the SCN under Rule 25 of the Central Excise Rules, 2001/2002 read with Section 11AC of the Act.

15. In view of the above, the departmental appeal succeeds and is therefore allowed by setting aside the impugned order to the extent of restoring the Order-in-Original No.1/2005 dt. 31.01.2005, however, only to the extent of upholding assessment under Section 4 of the Act and confirming differential duty demand of Rs.14,15,582/- under Section 11A (2) of the Act, along with interest liability thereon under Section 11AB ibid. However, in view of the discussions in the preceding paragraph and also keeping in mind that there was some genuine confusion concerning MRP assessment under Section 4A of the Act in the

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initial stages after its introduction, there shall be no penalty on the respondent-assessee.

Appeal is disposed on the above terms. In view of disposal of appeal, the CO filed by respondent/assessee also gets disposed.

(Pronounced in open court on 07/03/2017)

(Madhu Mohan Damodhar)
Member (Technical)

(Justice Dr. Satish Chandra)
President

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