

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, CHENNAI**

Excise Appeal No.41010 of 2017

(Arising out of Order-in-Original S. No. 49 & 50/2016-Commr. Dated 30.12.2016
passed by the Commissioner of Central Excise, Coimbatore)

M/s. Ponmani Industries

No. 5, Annamma Nagar
1st Cross road, Thanneerpandal
Peelamedu, Coimbatore – 641 004.

Appellant

Vs.

Commissioner of GST & Central Excise

6/7, ATD Street, Race Course Road
Coimbatore – 641 028.

Respondent

APPEARANCE:

Shri M.N. Bharathi, Advocate for the Appellant
Shri M. Ambe, DC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40301/2023

Date of Hearing: 18.04.2023

Date of Decision: 25.04.2023

Per M. Ajit Kumar,

This appeal is filed by M/s. Ponmani Industries, Coimbatore
against Order in Original No. 49 & 50/2016-Commr. Dated 4.1.2019.

2. The facts of the case are that the appellants are manufacturers
of Table Top Wet Grinders falling under Chapter Heading 85094010 of
the First Schedule to Central Excise Tariff Act, 1985. Table top wet
grinders were notified for payment of duty under section 4A of Central
Excise Act, 1944 (CEA, 1944). The appellant had got orders from Tamil
Nadu Civil Supplies Corporation (TNCSC) for supply of 2 lakh pieces of
tabletop wet grinders in the year 2011 – 12, in various phases. The

appellant assessed and cleared the goods under section 4A of the CEA, 1944 by claiming abatement @ 35% on the retail sale price. The DGCEI, Chennai Zone conducted a search on the appellant's premises on 23.1.2014. Their investigation led them to the conclusion that the appellant had willfully assessed their duty under Section 4A of the CEA, 1944, instead of Section 4 of CEA, 1944, even though they knew that Table Top Wet Grinders were sold only to one party (TNCSC) on an agreed price, which was not meant for retail sale but for free distribution to the eligible ration card holders in Tamil Nadu. The packages did not bear any RSP and did not carry the appellants brand name. Hence the appellant had evaded payment of duty by not assessing the goods under Section 4 of CEA, 1944. They also found that the appellant had cleared 1000 Table top wet grinders to TNCSC in December 2012 without payment of any duty. Their investigation culminated in the issue of show cause notice no 56/2015 dated 04/09/2015, demanding a differential duty of Rs 5,02,61,859/-, for the period December 2012 to June 2015. Another follow up notice was issued by the department on 25.7.2016 for the period from July 2015 to December 2015 for an amount of Rs.80,92,512/-. Both the notices were disposed off together, after following the due process, by issue of the impugned order. Aggrieved by the said order the appellants are before us in appeal.

3. We have heard learned Shri M.N. Bharathi, learned counsel on behalf of the appellant. He stated that it has been decided in a catena of cases that Tamil Nadu Government undertakings were not 'institutional consumers'. Therefore, exemption under Rule 3(b) of

LMPCR, 2011 is not applicable and their goods were assessable under sec. 4A of CEA, 1944. He also stated that the allegation of suppression and invocation of extended period for the issue of show cause notice will not be attracted in the present case. He relied on audit report Gr.3/November 2012/CBE II Division Coimbatore II-B Range wherein as per Advisory Note VII, they were reportedly advised to follow Sec. 4A price for the branded goods for future clearance. He has further relied upon the following judgments in support of their stand;

- (a) *Butterfly Gandhimathi Appliances Ltd. Vs. CCE, Chennai - 2015 (327) ELT 114 (Tri. Chennai)*
- (b) *LLM Appliances Ltd. Vs. CCE, Chennai - 2015 (1) TMI 496, CESTAT, Chennai*
- (c) *Commissioner Vs. LLM Appliances Ltd. - 2016 (339) ELT A135 (SC)*
- (d) *Jayanthi Food Processing P. Ltd. Vs. CCE, Rajasthan - 2007 (215) ELT 327 (SC)*
- (e) *PG Electroplast Ltd. Vs. CCE, Noida - 2014 (307) ELT 787 (Tri. Del.)*
- (f) *Lenovo India P. Ltd. Vs. Commissioner of Customs, Chennai - II - 2018 (6) TMI 596 - CESTAT, Chennai*
- (g) *Twinkle Lamps Industries P. Ltd. Vs. CCE, Noida - 2017 (357) ELT 630 (Tri. All.)*
- (h) *Bigesto Technologies Ltd. Vs. CCE, Noida - 2018 (6) TMI 562 - CESTAT, Allahabad*

4. We have heard Shri M. Ambe, learned AR appearing on behalf of Revenue. He has reiterated the points given in the impugned order. Revenues stand is that the purchase of packaged commodity i.e. wet grinders from the appellant by TNCSC has to be treated as direct purchase of goods by 'institutional consumers' and will hence be covered by exclusion under Rule 3 of Legal Metrology (Packaged Commodities) Rules, 2011 (LMPCR, 2011). Since the wet grinders

cleared by the appellant are not covered under LMPCR, 2011, it was not necessary or legally required to affix RSP on the packages of wet grinders cleared. The fact also remained that no RSP or MRP was affixed on the packages by the appellant at the time of clearance. Hence the valuation in such cases has to be done in terms of sec. 4 of CEA, 1944 and the impugned order needs to be upheld.

5. We have carefully gone through the appeals and its connected records and the facts submitted by the parties during the hearing. The issues for determination are:-

(i) whether the table top wet grinders sold by the appellant to TNCSC should be assessed under Section 4A or under Section 4 of the CEA 1944.

(ii) whether the 1000 Table top wet grinders cleared to TNCSC in December 2012 without payment of any duty was proper.

(iii) whether the invocation of extended period for issue of show cause notice will be attracted in the present case.

6. We find it necessary, at the outset, to examine and delineate the legal provisions and their applicability to this case before discussing the merits of the impugned order based on a factual matrix. The main issue on which the valuation of the impugned goods under Section 4/ 4A of CEA 1944, revolves is whether the clearance of the said wet grinders is covered under LMPCR, 2011. Rule 3 falling under Chapter 2 of LMPCR, 2011 which determines the legal position is as under: -

“Applicability of the chapter, the provisions of this Chapter shall not apply to: -

(a) Packages of commodities containing quantity of more than 25 kg or 25 litre excluding cement and fertilizer sold in bags upto 50 kg and

(b) Packaged commodities meant for industrial consumers or institutional consumers.

Explanation: - For the purpose of this rule -

- i) "Institutional consumer" means the institutional consumer like Transportation, Airways, Railways, Hotels, Hospitals or any other service institutions who buy packaged commodities directly from the manufacturer for use by that institution*
- ii) "Industrial consumer" means the industrial consumer who buy packaged commodities directly from the manufacturer for use by that industry"*

Although the issue has not been raised by either party to the dispute, it is seen that an amendment was brought to the said rule by Legal Metrology G.S.R.359(E) Notification Dated 06/06/2013, during the period covered by the impugned order, which is reproduced below.

In exercise of the powers conferred by sub-section (1) read with clause (j) of sub-section (2) of Section 52 of the Legal Metrology Act, 2009 (1 of 2010), the Central Government hereby makes the following rules further to amend the Legal Metrology (Packaged Commodities) Rules, 2011, namely:

1. (1) These rules may be called as the Legal Metrology (Packaged Commodities) Amendment Rules, 2013.

(2) Save as otherwise provided in these rules, they shall come into force on the date of their publication in the Official Gazette.

2. In the Legal Metrology (Packaged Commodities) Rules, 2011

(a) in rule 2,

(i) after clause (b), the following clauses shall be inserted, namely:

(bb) "industrial consumer" means the consumer who buys packaged commodities directly from the manufacturer for use by that industry;

(bc) "institutional consumer" means any institution which hires or avails of the facilities or service in connection with transport, hotels, hospitals or such other service institutions which buy packaged commodities directly from the manufacturer for use by that institution;

(ii) in clause (k), the proviso shall be omitted;

(b) in rule 3, the Explanation shall be omitted;

The applicability of legal provisions at a given period of time cannot be determined by the mutual consent of parties to the dispute or due to their ignorance of law. We hence propose to examine the dispute as per law which was applicable at the relevant periods of time.

7. To include the impugned excisable goods sold in packages for assessment under Section 4A of CEA 1944, there should be a requirement in the Legal Metrology Act, 2009 (LMA, 2009) or the Legal Metrology (Packaged Commodities) Rules, 2011 (LMPCR, 2011) made there under or any other law to declare the price of such goods relating to their retail price on the package. Rule 3 falling under Chapter 2 of LMPCR, 2011 states that the applicability of the provisions of the Chapter shall not apply, among other things, to packaged commodities meant for 'industrial consumers' or 'institutional consumers'. The fact that the appellant is clearing packaged commodities is not disputed. Further the issue whether the packaged commodities sold by the appellant were meant for 'industrial consumer' is not before us as the impugned order, at para 39, categorises TNCSC not as a 'industrial consumers' but as a 'institutional consumers'. We hence examine the correctness of the impugned order categorizing TNCSC as a 'institutional consumers', whereby the applicability, or otherwise, of LMPCR, 2011 to the impugned goods can be determined.

8. As per the 'Explanation' to the Rule 3 prior to its amendment, 'Institutional consumer' means institutional consumer like Transportation, Airways, Railways, Hotels, Hospitals or any other service institutions who buy packaged commodities directly from the manufacturer for use by that institution. This rule has subsequently

been amended. As per the amendment brought to Rule 3 by G.S.R.359(E) Notification Dated 06/06/2013, published in the Gazette of India on 06/06/2013, the definition of ‘industrial consumers’ or ‘industrial consumers’ has been made adding clauses (bb) and (bc) to Rule 2 and omitting the explanation given in Rule 3. Since the period covered by the impugned order is from December 2012 to December 2015, the law as it stood pre and post amendment will be both relevant in deciding the matter.

9. Before examining the issue it would be relevant to compare the meaning of the term ‘institutional consumer’ in Rule 2 and 3 of LMPCR, 2011 pre and post amendment.

Pre-Amendment ('Explanation' to Rule 3) <i>"Institutional consumer" means</i>	Post Amendment (clause (bc) to Rule 2) <i>"institutional consumer" means</i>
<i>the institutional consumer</i>	<i>any institution</i>
<i>like Transportation, Airways, Railways, Hotels, Hospitals or any other service institutions</i>	<i>which hires or avails of the facilities or service in connection with transport, hotels, hospitals or such other service institutions</i>
<i>who buy packaged commodities directly from the manufacturer</i>	<i>which buy packaged commodities directly from the manufacturer</i>
<i>for use by that institution</i>	<i>for use by that institution</i>

It is noticed that the amendment to Rule 3 has brought about substantial changes in the law and apart from making the meaning of ‘institutional consumer’ broader, it has also by addition of the word ‘which hires or avails of the facilities or service’ introduced an intermediary service provider, that was not there in the earlier definition. Since the period in the impugned order covers both the pre and post amended period of Rule 2 and 3, the matter has to be

examined as per the provisions of law which was prevalent during the period of demand for duty.

9.1. Pre-amendment.

We find that the question whether the goods sold by the appellant to TNCSC can be considered as being meant for an 'institutional consumer' was examined by a Coordinate Bench of this Tribunal in the case of Butterfly Gandhimathi Appliances Ltd Vs Commissioner of C Ex Chennai III, 2015 (327) E.L.T. 115 (Tri. - Chennai). The matter is pending for a final decision in the Supreme Court on an appeal filed by Commissioner of Central Excise, Chennai-IV [2016 (339) ELT A135 (SC)]. In the said case the appellant M/s. Butterfly Gandhimathi Appliances Ltd. were manufacturers of mixies and table top wet grinders falling under Chapter 8509 40 10 of the First Schedule to the Central Excise Tariff Act, 1985. The appellant procured orders from the Tamil Nadu Civil Supplies Corporation (TNCSC) for implementing the scheme of free distribution of the said goods to the beneficiaries of the families holding Ration Cards as announced by the Govt. of Tamil Nadu. The goods were assessed to duty on Retail Sale Price (R.S.P.) value under Section 4A of the CEA 1944. Revenue was of the view that valuation for payment of excise duty should have been done under Section 4 of the CEA 1944 on the ground that the goods were supplied to 'institutional consumers' and they accordingly demanded differential duty. The Hon'ble Tribunal held;

"11. It is evident from the above decision that the Tribunal has clearly held that the M/s. ELCOT procured Colour Television sets for Government of Tamil Nadu for free distribution of the CTVs among the poor sections of people of Tamil Nadu on behalf of Govt. of Tamil Nadu cannot be called as a "service industry" as it is not a commercial activity. Similarly, in the present case, TNCSC carried out procurement of Mixies, Table Top Wet

Grinders, Electric Table Fans and Electric Rice Cookers for free distribution to the women beneficiaries, who are holding family cards eligible for drawal of rice on behalf of Tamil Nadu Government. The TNCSC is an undertaking of the Government of Tamil Nadu similar to M/s. ELCOT. M/s. ELCOT had been entrusted by Govt. of Tamil Nadu for procurement of colour T.V. sets and in the present case, TNCSC has been entrusted to procure Mixies, Table Top Wet Grinders, Electric Fans & Electric Rice Cookers. Therefore, the ratio of the above decision of the Tribunal in the case of PG Electroplast (supra) clearly applies to this case.

. . . .

15. Respectfully following the Hon. Apex Court's decision and the decision of Tribunal in the case of PG Electroplast Ltd. (supra) we are of the considered view that the appellants correctly discharged the duty under Section 4A based on RSP basis. Accordingly, we set aside the impugned orders passed by the Adjudicating Authority in respect of both the appellants and allow the appeals with consequential reliefs, if any...."

We find that TNCSC is an undertaking of the Government of Tamil Nadu and cannot be said to be a service institution. We also find that the Hon'ble Supreme Court in its judgment in Jayanti Food Processing (P) Ltd. Vs. CCE, Rajasthan reported in 2007 (215) ELT 327 (SC) had held as under;

16. This Court in Coal Mines Provident Fund Commissioner v. Ramesh Chander Jha [AIR 1990 SC 648] in a different context, observed as under :

The word "service" in Section 2(17)(h) must necessarily mean something more than being merely subject to the orders of Government or control of the Government. To serve means 'to perform functions; do what is required for'." [Emphasis supplied]

We hence concur with the judgment of the Hon'ble Tribunal in Butterfly Gandhimathi Appliances supra and hold that TNCSC is not an 'institutional consumer' as per Rule 3 of LMPCR, 2011, as it then stood. As regards Revenues claim that the packages did not bear any RSP and did not carry the appellants brand name and hence were to be valued under Section 4 of CEA 1944, it is to be stated that this act of omission alone will not take the goods outside the purview of valuation under

Section 4A of CEA 1944, if otherwise covered. Sub section 4 of Section 4A states that where the manufacturer removes such goods from the place of manufacture, without declaring the retail sale price of such goods on the packages such goods shall be liable to confiscation and the retail sale price of such goods shall be ascertained in the prescribed manner and such price shall be deemed to be the retail sale price for the purposes of this section. Hence we find that the appellant has correctly applied Section 4A of CEA 1944 for clearance of the impugned goods during this period.

9.2 Post-amendment (notification dated 06/06/2013).

As discussed in para 9 above the amendment to Rule 3 of LMPCR, 2011 has brought about substantial changes in the law making it broader and introducing the concept of an intermediary. The decision rendered by the Hon'ble Tribunal in Butterfly Gandhimathi Appliances Ltd supra and other judgments cited by the appellant are based on the pre-amended Rule 2 and 3 of LMPCR, 2011, or even based on the earlier Standards of Weights & Measures (Packaged Commodities) Rules, 1977 and are distinguished. They will not be automatically applicable to the post amendment period of Rule 2 and 3 of LMPCR, 2011. However it is well settled that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest and that all allegations to be met by the respondent have to be clearly spelt out in it, so that the respondent can make a proper defence of his case. We find that the amended Rule 2 and 3 of LMPCR, 2011, was not made a part of the show cause notice, for the relevant period and the appellants were not required to meet that legal challenge. This being

so the demand by quantifying the duty based on the value of goods determined under Section 4 of CEA 1944, for the post amendment period must also fail.

9.3. As per the discussions above, the demand for duty on the impugned goods quantified under section 4 of CEA 1944 for the entire period covered by the impugned order is not legal and proper. With duty not payable the penalty imposed, on the foundation of the incorrect valuation of goods, is also not legally sustainable. Hence the demand for duty quantified under section 4 of CEA 1944 and the penalty imposed in this regard are set aside.

10. We next consider point (ii) of para 5 above i.e. whether the 1000 Table top wet grinders cleared to TNCSC in December 2012 without payment of any duty was proper. As noted from the impugned order the appellant has paid a duty of Rs.1,72,089/- (duty of Rs. 1,67,076/- Education Cess – Rs. 3,342/- and secondary Education Cess – Rs.1,671/-) on 30/08/2015 towards Central Excise duties along with interest of Rs.82, 603/- on the said goods adopting the value under Section 4A of CEA 1944, during the course of investigation. The appellant has not sought any specific relief in this regard in their appeal. That duty was payable on the 1000 Table top wet grinders cleared to TNCSC in December 2012, is not in dispute. The valuation for the same would also be as per section 4A of CEA 1944 for the reasons discussed above. Hence the appropriation of the amounts paid during investigation as done at para 1 (vi) of the 'Order' portion of the impugned order is hence correct and is upheld.

11. Finally, having found that no differential duty, as was quantified in the impugned order, is payable for the entire period, the question at point (ii) of para 5, whether the invocation of extended period for issue of show cause notice will be attracted in the present case, loses relevance. We however notice that the appellant during the hearing, in pursuance of their submissions against invocation of extended period, has relied on audit report Gr.3/November 2012/CBE II Division Coimbatore II-B Range wherein, purportedly as per Advisory Note VII, by the Central Excise Department they were advised to follow Sec. 4A price for the branded goods for future clearance. We find that this important matter, involving a critical document that would be fatal to the departments allegation of suppression of facts, was not agitated by the appellants before the Lower Authority. It does not find mention in the impugned order nor was it a point in the appeal filed by them before this Authority. Suddenly we find the document (copy) being introduced at the end of oral submissions through the 'Synopsis' submitted by the appellant. No petition was filed by the Learned Counsel to accept the document at the appellate stage as per the relevant provisions of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982. Moreover, we find that the so-called audit report is neither addressed to anyone nor is it issued under the letter head of the Central Excise Department or signed by any authority. It has also not been authenticated by the Learned Counsel or the appellant, making the whole thing very suspicious and unreliable. Advocates / consultants / departmental representatives all represent their respective parties to help the Tribunal in the administration of justice. They owe a duty to

their parties and can, following the proper procedure, place before the appellate forum all that can be fairly, reasonably and legally submitted on behalf of the parties and not more. We sincerely hope that we do not come across another such occasion in future.

12. For the reasons as discussed above we allow the appeal with consequential relief, as per law, except for the amounts confirmed in the impugned order relating to 1000 table top wet grinders cleared to TNCSC in December 2012 and which has been dealt with in para 10 above. The appeal is disposed off accordingly.

(Pronounced in open court on 25.4.2023)

(M. AJIT KUMAR)
Member (Technical)

(SULEKHA BEEVI C.S.)
Member (Judicial)