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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Date 08/10/2009

Appeal No. E/126 /2006 - EX[DB]
E/CO/ 134/06

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E. ROHTAK
SCO NO,6 SECTOR 1, ROHTAK.

C.C.E. ROHTAK — Appellant

Vs

GUPTA TOBACCO CO. — Respondent

I am directed to transmit herewith a certified copy of **Final order No. 760/ 2009 EX[DB]** dated 01-10-09 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
   GUPTA TOBACCO CO.
   VILLAGE SAFIABAD, DISTT. SONEPAT, HARYANA
2. Adv. / Consult SH. ASHWANI SHARMA, ADV, R-89, GREATER KAILASH-I, IIND FLOOR, N. DELHI -48
3. C.D.R
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. Director Publications, Customs, Excise. I.P. Estate, New Delhi
7. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8. Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12. Taxindiaonline.com Pvt.Ltd. B-XI/8183,Vasant Kunj, New Delhi - 110070
13. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
16. Office Copy
17. Guard file

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO.II

E /Appeal No.126/2006-Ex(Br)
CO 184/2006

(Arising out of order in appeal No. 367/GRM/RTK/2005 dated 20.10.05 passed by the Commissioner of Central Excise (Appeals), Gurgaon)

CCE, Rohtak — Appellant

Vs

M/s Gupta Tobacco Co. — Respondent

Appeared for the Appellant : Shri Sunil Kumar, SDR
Appeared for the Respondent : Shri Vivek Kohli
Shri Ashwani Sharma,
Advocates

Coram: **Hon'ble Mr.D.N. Panda, Judicial Member**
Hon'ble Mr. Rakesh Kumar, Technical Member

Date of Hearing: 2.9.09

Final Order No. 760/09-Ex /2009

Per D.N. Panda:

Revenue is on a limited issue as to whether chewing tobacco contained in 5 gms and 9 gms pouches sold in convenient bulk packs shall attract duty under Section 4A of Central Excise Act, 1944. Pleading of Revenue is that once the bulk pack is cleared irrespective of its contents being 5gms and 9 gms, it shall be subject to Section 4A of Central Excise Act, 1944. This issue was decided by the learned Commissioner (Appeals) in favour of assessee. Fact was stated by him in para 2 of his order and he considered the legal position relating to valuation in para 7 of his order. The reason which compelled the learned Commissioner to hold that 5 gms and 9 gms packages contained in bulk pack exempt from the purview of Standard Weights and Measures, 1977 appears under para 7. He held that those goods will not be subject to Section 4A of the Act for the purpose of valuation. It is appropriate to extract para 7 of the order of learned First Appellate Authority for convenience of reading:-

"At the outset, I find that there is no dispute to the fact that the appellant have been selling chewing tobacco in pouches of 5 gms, 9 gms, 10 gms and 25 gms and the department has no objection whatsoever on the assessments in respect of pouches of chewing tobacco containing 10 gms and 25 gms and the dispute is only confined to 5 gms and 9 gms pouches of chewing tobacco. Thus it appears that the weight is the only differentiating criterion between the various sizes of pouches. Moreover, chewing tobacco by its very nature is solid and not capable of being sold in numbers like Ready-made garments, tooth-brushes, tyres and tubes etc and hence, it is sold in weight. Thus contentions put forth by the appellant in this regard are forceful and tenable. A perusal of the various provisions of SWM act as well as SWM Rules as cited by the appellant clearly indicates that the product is sold by weight. The appellant, thus, appears to have met both the conditions of Rule 34(b) of SWM Rules i.e. the net weight of the commodity is less than 10 gms and their commodity is old by weight only. Thus, I find that 5 gms and 9 gms pouches of chewing tobacco are outside the purview of SWM Rules by virtue of the exemption contained in the Rule 34(b) of SWM Rules. In view of the above, I find that it is not required under the SWM Act and SWM Rules

made thereunder to affix the MRP on the subject product and in view of Board's Circular No. 625/16/2002-CX dated 28.2.2002 conclude that voluntarily affixing MRP which I not statutorily required would not bring the goods in question in the ambit of Section 4A of the Act."

2. According to the proposition of law stated by the learned Commissioner in para 6-7 of the appellate order, it is clear that law exempts commodity of 10 gms or 10 Ml or less if sold by weight or measure from purview of Weights and Measures Act, 1976. This reason has guided the learned Commissioner to hold that container is irrelevant when contents are below 10 gms or equal to 10 gms. In para 9-10 of the order, learned Commissioner has also dealt with the proposition of the Board and other authorities. It appears that while dealing with the matter, learned Commissioner was quite conscious of the legal position which is patent from para 10 of his order

3. Learned SDR Shri Sumit Kumar submits that when the goods were cleared by the respondents under the Weight and Measures Law, they are subjected to Section 4A of Central Excise Act, 1944. He relies on the decision of Hon'ble High Court of Madras in the case of Varnica Herbs Vs CBEC New Delhi reported in 2004 (163) ELT 160 (Mad) to contend so.

4. Heard both sides. We were under the impression at the first instance that factual evidence of Weights and Measures shall be relevant for the case. After hearing the learned Counsel for the respondent and also upon examination of facts elaborately dealt with by the learned Commissioner (Appeals) in para 2 of his order,

we are able to draw conclusion that the commodity packed in bulk packs are individually weighing 5 gms and 9 gms as demonstrated by facts borne by record. Therefore, without waiting for the invoice copy or other factual materials, we are able to agree with the finding of the learned commissioner (Appeals) who has brought out the point in dispute before him clearly for decision. He has tried to sort out the issue for consideration in para 6 of his order. Therefore, the factual matrix read with Rule and the law laid down by the Apex Court in para 23 of the judgment in the case of CCE Vapi Vs Kraftech Products reported in 2008 (224) ELT 504 (SC), we agree with the learned Commissioner (Appeals) and his order is not liable to be disturbed since he has held that valuation of goods in this case is to be governed by Section 4 of Central Excise Act, 1944. Accordingly, Revenue's appeal is dismissed.

(Order dictated and pronounced in the open Court).

(D.N. Panda)
Judicial Member

(Rakesh Kumar)
Technical Member

MPS*