CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL REGIONAL BENCH AT HYDERABAD

Division Bench

Court – I

Excise Appeal No. 809 of 2012

(Arising out of OIO No. 1/2012-(C.E.)-Commr., dt.11.01.2012 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-I)

Tata Coffee Ltd
Sy No.63 & 64, Toorpan Mandal,
Medak District, Telangana – 502 334

......Appellant

VERSUS

Commissioner of Central Tax
Medchal - GST
Opp Mehdi Function Palace, Above SBI Bazarghat,
Lakdikapul, Hyderabad – 500 004

......Respondent

Appearance

Shri P.R. Ranganath, Advocate for the Appellant.
Shri B. Sangameshwar Rao, AR for the Respondent.

Coram:
HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30053/2024

Date of Hearing: 09.08.2023
Date of Decision: 08.02.2024

[Order per: A.K. JYOTISHI]

The Appellant – Tata Coffee Ltd (100% EOU) is in Appeal against the impugned Order-in-Original No. 1/2012-(C.E.)-Commr., dated 11.01.2012. The Original Authority confirmed demand of Rs.71,29,754/- against the Appellant and also imposed penalty of equal amount under Sec 11AC.

2. The facts, in brief, are that the Appellants are, inter alia, engaged in manufacture of "instant coffee", falling under Chapter sub heading No. 2101 1110 of the First Schedule to the Central Excise Tariff Act (CETA). They are effecting clearances of instant coffee in retail packs viz., pouches, under the brand names like Tata Café 50gm & 500gm packs, Aveon Café Premium of 50gms, 100gms packs, Royal 50gm, 100gm pouches, etc., into the Domestic Tariff Area (DTA). The department felt that for the purpose of charging Central Excise Duty for clearances in the DTA, the value of the goods has to be

determined in accordance with the provisions of Customs Act 1962 and Customs Tariff Act (CTA) 1975 and for the same reason, it appeared to them that since in relation to the said goods, it is required under the provisions of Standards of Weights and Measures Act 1976 and the Rules made thereunder, to declare the retails sale price (RSP/MRP) of the said goods on the package of said goods and since the said goods are specified in the notification issued under Sec 4A of the Central Excise Act (CEA) 1944, the value of the goods for calculation of the additional duty of customs (ACD) levied in terms of Sec 3 of the Customs Tariff Act, shall be deemed to be the RSP declared on the imported goods, less the abatement from the RSP allowed in respect of the said goods under sub-sec (2) of Sec 4A of the CEA, 1944 in terms of the proviso to Sec 3(2) of the CTA 1975.

3. Further, in terms of S.No.3 of Notification No. 23/2003-CE dt.01.03.2003, when excisable goods are cleared by a company into DTA, in accordance with provisions of Export and Import Policy and subject to fulfillment of conditions in the notification, such clearances of goods are exempted from so much of the duty of excise leviable thereon under Sec 3 of the CEA, as in excess of amount equal to aggregate of duties of excise leviable under Sec 3 of CEA or under any other law for the time being in force on like goods produced or manufactured in India other than in an export oriented undertaking.

4. Therefore, the department, relying on the provisions of Sec 4A for the purpose of valuation for charging central excise duty, issued SCN demanding differential central excise duty of Rs.71,48,227/- and also by invoking extended period of limitation as per proviso to Sec 11A(1) of the CEA 1944 and also proposed for levy of penalty under Sec 11AC. On adjudication, the Original Authority examined the submissions made by the Appellant and the facts of the case as well as the legal provisions.

5. The main argument of the Appellant is that they have been clearing excisable goods only in bulk/pouches or tins to their C&F agents, who in turn sell the same in bulk to institutions for consumption or for use in other products, which has to be considered as removal to institution only and therefore, Sec 4A has no application. In fact, there were also direct removals to institutions in bulk for same purpose and in such cases also Sec 4A would not be applicable. According to Sec 4A of CEA, only where for a particular excisable goods, the manufacturer is required to mark MRP on the packets in terms of Standards of Weights and Measures (Packaged Commodities) Rules, 1977, then only Sec 4A is applicable. In fact, it is submitted that even for the packets,

which contained instant coffee of 10gm or less, the differential duty has been demanded. In the course of adjudication, they further clarified that wherever invoices are in the name of C&F agent, such goods move to the institutional customers through the agent and the property in goods remained with them until received by the customers. Further, the packages were affixed with stickers identifying customer (i.e., institutional buyer – for instance, Indian Airlines) and therefore, in such cases, there cannot be demand for differential duty. The Original Authority, after examining the records and the legal provisions, allowed the plea of the Appellant to the extent of packages, which contained less than 10gm or more than 25kg of instant coffee, and also where sales were made directly by the Assessee to institutional customers. It was also noted by the Adjudicating Authority that in the following cases, the benefit of Sec 4A cannot be given to the Appellant for the reasons indicated below:

a) The contention of the assessee with reference to sale of packages of less than 10gm was not verified by the jurisdictional Assistant Commissioner who reported that the goods cleared from the factory are in the nature of packed cartons containing 2400 sachets and weighing 3.6kg/7.2kg, as the case may be. However, the assessee, in spite of being given an opportunity, failed to produce any evidence that individual sachets were for retail sale and not whole carton. Hence, no benefit from the application of the provisions of Sec 4A of the Act, on packages of 10gm or less as claimed by the assessee can be extended to them.
b) Similarly, in respect of clearances claimed to have been made to institutional consumers, on verification it is seen that majority of the clearances are through C&F agents and there were direct sales to Indian Airlines only in few cases. As per Explanation (a) to Rule 2A of Standards of Weights & Measures (Packaged Commodities) Rules, Institutional Consumer means those consumers who buy packaged commodities directly from the manufacturers/packers and not to the C&F agent who supply the goods to the service industry. Hence, the exemption from application of provisions of Sec 4A of the Act needs to be restricted only to the sales made directly to Indian Airlines.
c) In respect of trade samples and allowance coffee for the employees, there is neither any provision in the statute for exemption from the operation of Standards of Weights & Measures (Packaged Commodities) Rules 1977/ Sec 4A of the Act nor the Assessee cited any provisions in support of their contention.

d) Valuation under Sec 4A of the Act will be applicable even to containers containing 23kg. However, they have failed to adduce any evidence that they cleared the goods weighing more than 25kg in one container and hence their contention to this effect is not admissible.

6. Heard both sides and perused the records.

7. The core issue to be decided in the Appeal is whether in the facts of the case, Sec 4A of Central Excise Act was applicable to the clearances effected by the Appellant or otherwise. Admittedly, instant coffee is a specified good covered within the ambit of applicability of Sec 4A. Sec 4A provides for valuation of excisable goods with reference to RSP, which is required to be indicated under the provisions of the Standards of Weights & Measures Act 1976 and Rules made thereunder, subject to prescribed abatement, if any, from such Retail Price. Therefore, what is crucial to understand is whether the goods, which were cleared by the Appellant were covered within the provisions of Standards of Weights & Measures Act or otherwise. It is noted that the provisions of Standards of Weights & Measures (Packaged Commodities) Rules, 1977 are not applicable, inter alia, to packaged commodities meant for industrial consumers or institutional consumers. The Institutional Consumer means those consumers who buy packaged commodities directly from the manufacturers/packers and not through the C&F agent who supply the goods to the service industry like transportation, hotel or any other similar service. Similarly, the Industrial Consumers are the one who buy packaged commodities directly from manufacturers/packers for using the product in their industry for production or use.

8. Obviously, in the present case, goods in question are not indicated for industrial consumers. The Rules also provide for exemption from applicability of these Rules to any package containing commodity if the net weight or measure of the commodity is 10gm or 10ml or less, if sold by weight or measure. The Adjudicating Authority has heavily relied on the word 'directly' from the manufacturer/packer to arrive at the conclusion that for the supply to or through C&F agent would not be covered within the exceptions contained under Rule 2A.

9. The Appellants have given a detailed breakup of different types of clearances in their reply to the Commissioner. In the Annexure-I & II to the reply, they have provided additional information in relation to the same

worksheet which was appended to the SCN, which was based on invoices issued by them. Therefore, basically, they have provided explanation on invoice to invoice basis. In Annexure-I, the invoices have been raised to 20 different parties under 4 types of transactions, which has been further detailed in Annexure-II. They have also explained, the abbreviations used in Annexure-I & II to explain the transactions, which are as follows:

a) If the transaction is sale to the parties for resale, the same is marked as "MRP (RS)".
b) If the transaction is sale to institutions for consumption, the same is identified as "INST Sale".
c) If the package on sale does not attract Standards of Weights & Measures Act, then it is noted as "S.4A-NA" to indicate that Sec 4A does not apply to such transaction.
d) In cases where there is no obligation for marking MRP as per the Standards of Weights & Measures Act, but still the MRP is marked, the said transaction is identified as "MRP (RS) – S.4A-NA". This is to show that even while MRP is marked Sec 4A does not apply to such cases.

10. They have admitted that in certain cases, Sec 4A would be applicable correctly and they have on their own calculated the differential duty liability and also paid the same for the normal period of limitation. They have also admitted that they had inadvertently followed old practice of paying duty on the basis of FOB value of exports, which was the method of determination of value under Sec 4 of Central Excise Act 1944 as held in their own case by the Tribunal earlier. They have further vehemently contested that there is no requirement or obligation to mark MRP for goods, which contains less than 10gm of instant coffee in terms of Rule 34 of Standards of Weights & Measures (Packaged Commodities) Rules 1976. They have also argued that even when they have mentioned MRP on such packets/sachets that, per se, would not cover it under Sec 4A, if there is no obligation under the Rules to declare the same.

11. In so far as the issue of institutional sale is concerned, they have indicated that these were the cases where instant coffee has been sold to the institutions for consumption (and not for retail sale) and therefore, it could not be covered under the Standards of Weights & Measures Act and Rules made thereunder. Further, as regards dispatches to C&F agents, it was only for the purpose of forwarding to the institutional buyers, even though the invoices were in the name of C&F agent, the goods actually moved to institutional customers

through the C&F agent. The sale is by Tata Coffee Ltd, which is evident from the fact that invoice for sale is issued by Tata Coffee Ltd only. The C&F agents are merely clearing and forwarding agents, who carry the goods to the customers and the property in the goods remained with them (Tata Coffee Ltd), until received by the customer (institutional buyer). It was also submitted that in the case of institutional sale through C&F agent also, the packages move from the factory affixed with the stickers identifying the customers and the MRP is not marked on these packages as these were meant for consumption by such institutions and not for resale. Therefore, according to them, barring the admitted amount, differential duty cannot be demanded. They have also additionally argued that in the facts of the case, there is no justification for invoking extended period. Since the practice being followed for the valuation was based on the earlier decision of the Tribunal, vide Final Order No.817-819/2004 dt.19.04.2004 (Tata Coffee Ltd vs CCE, Hyderabad) [2004 (168) ELT 460 (Tri-Bang)] and after the insertion of Sec 4A, the practice had continued inadvertently and therefore, there was no intent to evade. They have also relied on the fact that ER1 returns were filed regularly and copies of all invoices till October 2008 were being enclosed along with ER2 returns till the time the Appellants were asked not to submit invoices with ER2 returns. Therefore, basically, when the department was aware of the Appellant's clearances, there could not have been any intention on their part to suppress any fact with intent to evade duty.

12. From the submissions made and the facts discussed in the OIO, as also urged at the hearing, it is obvious that this is a case where depending on the nature of packet size, the applicability of Sec 4A would have to be determined. If the sale is to the institution directly, Sec 4A would not be applicable. However, when the sale is through C&F agent, the question is whether it could be covered within the ambit of Sec 4A or otherwise. From the submissions made, it is obvious that C&F agents were only acting as freight and forwarder and the goods were all along meant for institutional buyers only. Therefore, this transaction could be considered in the nature of institutional sale in terms of explanation to the Rules. There is nothing contrary on record to prove that these goods were not meant for institutional buyers or there was any resale by such buyers. Therefore, the goods would be covered under the exemption. Similarly, for packet sizes of less than 10gm also Sec 4A would not be applicable. For small packets cleared in bulk, in a packed condition, the Appellants have relied on the judgment of CCE, Rajkot vs Makson Confectionery

Pvt Ltd [2010 (259) ELT 5 (SC)], whereby the Hon'ble Supreme Court upheld the decision of the Tribunal holding that a package containing about 100 or more individual pieces of an article like éclairs brand chocolate, each weighing 5.5gm, would qualify for exemption under Rule 34 of Standards of Weights & Measures (Packaged Commodities) Rules. Therefore, relying on this ratio, even if the instant coffee of pouches less than 10gm were cleared in bulk and not meant for retail sale, it would be exempted under Rule 34 and therefore, will not attract Sec 4A of Central Excise Act 1944.

13. On the grounds of limitation also the Appellants have a very strong case, in view of the fact that they have made their practice fairly known to the department as also the fact that they were following the earlier practice in view of judgment of CESTAT in their own case and therefore, the element of intention to evade is clearly missing. It is evidently a case of interpretation where they were under the impression that despite having C&F agents involved in transaction to the institutional buyers, they were still not covered within the ambit of Sec 4A. Therefore, in the facts of the case, the department has not been able to establish the grounds for which extended period can be invoked.

14. In essence, as per the detailed explanation given in the Annexure in reply to interim and final reply of the SCN to the Adjudicating Authority, such explanations are clearly acceptable and in the given circumstances, there was no requirement for the Appellants to follow Sec 4A for determining the duty for the payment of Central Excise Duty on the goods cleared to DTA.

15. In view of our findings and observations, we allow the Appeal and set aside the Impugned Order. The Appellant will be entitled to consequential benefits, in accordance with law.

16. Appeal allowed.

(Pronounced in the Open Court on 08.02.2024)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

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