

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

REGIONAL BENCH - COURT NO. 02

Customs Appeal No. 92 of 2011

(Arising out of Order-in-Original No.13/2010-11/CC(I), JNCH dated 19.11.2010
passed by the Commissioner of Customs (Import), Nhava Sheva))

M/s. Microtrack Business Systems Pvt Ltd.Appellant

1, Rowdon Street, Shubham,
Room No. 505, 5th Floor,
Kolkata - 700017

VERSUS

Commissioner of Customs (Import),Respondent
Nhava Sheva

Jawaharlal Nehru Custom House,
Post Uran, District – Raigad,
Sheva - 400 707.

WITH

Customs Appeal No. 93 of 2011

(Arising out of Order-in-Original No.13/2010-11/CC(I), JNCH dated 19.11.2010
passed by the Commissioner of Customs (Import), Nhava Sheva))

Shri Rajiv TibrewalAppellant

1, Rowdon Street, Shubham,
Room No. 505, 5th Floor,
Kolkata - 700017

VERSUS

Commissioner of Customs (I), Nhava ShevaRespondent

Jawaharlal Nehru Custom House,
Post Uran, District – Raigad,
Sheva - 400 707.

Appearance:

Shri Sudhir K. Mehta and Shri Hasmukh Kundalia, Advocates for the
Appellants
Ms. Trupti Chavan, Authorised Representative for Revenue

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85603-85604/2020

Date of Hearing: 07/11/2019

Date of Decision: 17 /07/2020

Per: S.K. MOHANTY

These appeals are directed against the impugned order dated 19.11.2020 passed by the Commissioner of Customs (Import), Nhava Sheva, wherein Additional Duty of Customs (CVD) amounting of Rs 15,70,478/- was confirmed alongwith interest; equal amount of penalty was imposed; goods valued at Rs.1,18,59,330/- were confiscated; redemption fine of Rs. 20,00,000/- was imposed on M/s Microtrack Business Systems Pvt Ltd. Penalty of Rs. 3,00,000/- was imposed on Shri Rajiv Tibrewal under Section 112 (a) of the Customs Act, 1962.

2. Brief facts of the case are that the appellant M/s Microtrack Business Systems Pvt Ltd are engaged in the business of sugar confectionary of various types such as soft chocolates, candies and other confectionary items; they have their own sales outlets operated as 'Candy Bar' at Delhi, Kolkata, Mumbai, Bangalore, Cochin, Ludhiana and Jaipur operated by their own sister concern viz M/sToras Confectionary India Pvt Ltd. or by their exclusive franchisees; different types of candies were kept in the Tops and Bins in loose form for display and consumers can themselves pick up and mix various candies and then the same were sold to the consumers in the loose form on the basis of weight.

2.1. The appellant had imported confectionary items, during July' 2003 and October' 2004, through JNPT and filed Bills of Entries; officers of DRI gathered information that the appellant was engaged in misdeclaration of retail sale price (RSP/MRP) of imported items for the purpose of calculation of Countervailing Duty (CVD) in terms of the proviso to Section 3 (2) of the Customs Tariff Act, 1975 read with Notification No. 13/2002-CE(NT) dated 01.03.2002 as amended; accordingly, searches were conducted at the office and godown premises of the appellant; various confectionary items were seized and statements of different persons were recorded.

2.2. On the basis of the documents/records seized and investigation into the matter, the department concluded that as per Note 5 of the General Note of ITC (HS) EXIM Policy, 2002-07/Foreign Trade Policy read with Weight & Measurement Rules, 1977, certain material particulars including MRP was required to be affixed on the imported sugar confectionary item before customs clearance; the appellant had not declared the requisite particulars like true and correct MRP on the imported goods, thereby had intentionally evaded payment of CVD. A show cause notice dated 28.06.2005 issued and was adjudicated vide the impugned order dated 19.11.2010, confirming the duty and penalty as above. Being aggrieved with the said impugned order, the appeals were preferred as above.

3. The learned Advocate appearing for the appellants submitted that the goods in question were never sold to the ultimate buyers in packaged form and thus, the provisions of Standards of Weights and Measures (Packaged Commodities) Rules, 1977 would not be applicable for determination of value under Section 4A of the Central Excise Act, 1944. He has relied upon the Circular No. 625/16/2002-CX., dated 28.02.2002 issued by the CBEC to state that since the retail sell of confectionary items was effected to the ultimate consumers in loose form, the appellant was not under any statutory obligation to observe the procedures or comply with the requirement of the aforesaid Rules, 1977 and in such cases, the valuation was required to be done under Section 4 of the Act and the provisions of Section 4A cannot be resorted to for that purpose. The learned Advocate has relied upon the judgment of Hon'ble Supreme Court in the case of Jayanti Food Processing (P) Ltd Vs CCEX, Rajasthan [2007 (215) ELT 327 (S.C.)] and of this Tribunal in the case of Swan Sweets Pvt Ltd. Vs CCE, Rajkot [2006 (198) ELT 565 (Tri.-Mumbai)], to justify the above stand.

4. On the other hand, the learned AR appearing for the Revenue reiterated the findings recorded in the impugned order.

5. Heard both sides and perused the case records.

6. In this case, the appellant had imported cartons of 3 Kg to 6 Kg. of loose candies and sugar confectionary items, which were sent to its own franchise viz. M/s Toros Confectionary (India) Pvt Ltd, where they were put in the bins and sold in loose form to the ultimate consumers. This fact has also been acknowledged in the impugned order at paragraph 19.7. However, the learned adjudicating authority has confirmed the demand on the ground that the impugned goods were imported in packaged form for retail sale attracted the provisions of Section 4A of the Act, 1944 read with the provisions of Standards of Weights and Measures Act, 1976 (for short, referred to as the "SWM Act") and the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 (for short, the "SWM Rules").

7. Valuation of excisable goods with reference to retail sale price is contained in Section 4A of the Central Excise Act, 1944. The said statutory provisions mandate that in case of sale of the excisable goods in packaged form, where the packages are required to be mentioned with the price thereof under the SWM Act, SWM Rules or any other law, then the valuation would be determined on the basis of the retail sale price of such goods declared in the packages. Various expressions namely, 'retail dealer', 'retail package', 'retail sale', 'retail sale price' etc. have been defined in Rule 2 of the SWM Rules, 1977. The phrase 'sell of such packages/commodities' are commonly finding place in such definition clauses. On a careful reading of the statutory provisions, it would be manifestly clear that in order to fall under the provisions of Section 4A of the Act, the sale of excisable goods should be in a packaged form and there should be a requirement in the SWM Act and the rules framed there under for displaying the MRP on such retail package.

8. It is an undisputed fact on record that the candies/chocolates of different variety are displayed by the retail outlets in the tubs and bins, wherefrom according to the choice, the buyer picks up the chocolates in loose form and mixed up with other kinds of chocolates and thereafter the chocolates so picked up by the buyer are sold without any packages, on the basis of weight only. The appellant

used to circulate the price list for retail sale for its outlets, which were made of the quantity like 10 gm, 20 gm, 50 gm of mixed candies. The imported goods were packed in cartons only for transportation purpose and not otherwise. The statements of various persons referred to in the impugned order have also endorsed such means and methods adopted for sale of confectionary items from the retail outlets. Since, the notified goods in this case were not sold in packaged form or condition to the ultimate buyers, there was no statutory requirement on the part of the appellant to declare the retail sale price of loose chocolates for determination of the value as per Section 4A of the Act. In this context, the CBEC vide Circular dated 28.02.2002 has clarified that if there is no statutory obligation under the provisions of SWM Rules to declare the retail sale price of the packages, then the provisions of Section 4A would not be applicable.

9. The issue arising out of the present dispute with regard to determination of the value under Section 4A of the Act has been dealt with by the Hon'ble Apex Court in the case of Jayanti Food Processing Pvt. Ltd. (Supra), wherein it has been held that Section 4A of the Central Excise Act, 1944 would not be applicable in cases where the goods are sold in retail in loose or unpackaged condition. The relevant paragraphs in the said judgment are extracted herein below:

"9. The assessee is engaged in manufacturing of ice-cream falling under sub-heading 2105 of the Central Excise Tariff Act, 1985. It used to supply the ice-cream in four litres pack to the Catering Industry or as the case may be hotels, the hotel used to sell the said ice-cream in scoops. The assessee used to specifically display on the said packs that "the pack was not meant for retail sale". The ice-cream contained in the said pack of four litres used to be sold in unpacked form by the hotel to which the said ice-cream used to be supplied. The contention of the assessee, therefore, was that since the pack which could be described as the bulk pack of four litres, was not meant to be sold in retail, it was bound to be treated as a wholesale transaction and as such the assessee was not required under SWM Act and the Rules made thereunder to print the Maximum Retail Price (hereinafter referred to as "MRP") which was a pre-condition for application of Section 4A of the Act for the purposes of valuation and assessment. The further contention of the assessee is that the assessee is entitled to exemption under Rule 34 of the SWM (PC) Rules. This stand was not

accepted by the Assessing Authority or the Appellate Authority who held that the valuation would have to be under Section 4A and not under Section 4 of the Act (perhaps because that would yield more revenue). The Tribunal has upheld those orders dismissing the appeals filed by the present appellant. That is how the matter has come before us.

12. We have already referred to the facts appearing in the orders of the authorities below which suggest that at one point of time the assessee used to display the MRP on the four litres pack voluntarily. Shri Subba Rao very heavily relied on this fact. We do not think that merely because the assessee displayed the MRP on the four litres pack, that would negate the case of the appellant altogether. We have already shown in the earlier part of the judgment the conditions required for application of Section 4A. The plain language of Section 4A(1) unambiguously declares that for its application there has to be the "requirement" under the SWM Act or the Rules made thereunder or any other law to declare the MRP on the package. If there is no such requirement under the Act and the Rules, there would be no question of application of Section 4A. Thus if the appellant is successful in showing that there is no requirement under the SWM Act or the Rules made thereunder for declaration of MRP on the package, then there would be no question of applicability of Section 4A(1) & (2) of the Act. Even if the assessee voluntarily displays on the pack the MRP, that would be of no use if otherwise there is no requirement under the SWM Act and the Rules made thereunder to declare such a price.

13. Learned Counsel for appellant took us through the rules extensively which rules we have already quoted above. The thrust of the argument was that firstly the assessee could not be said to be a "retail dealer" as contemplated in Rule 2(o) of the SWM (PC) Rules nor could the package be described as "retail package" to be covered under Rule 2(p). Learned Counsel firstly suggested that the assessee was not directly selling the package to the consumer, he was in fact supplying the package to the intermediary for being sold to the hotel industry. Learned Counsel, therefore, argues that there was no connection in between the assessee and the consumer nor was the package meant to be sold as a "package". The counsel is undoubtedly right as Rule 2(o) contemplates the sale of commodity in a packaged form directly to the consumer. The definition also includes a wholesale dealer provided again that the package is to be sold to the consumer directly as a package. That is not a case here as the 4 litre pack is not meant to be sold to the consumer directly. We would have to essentially go through to the definition of "retail package" and one look at Rule 2(p) would show that in order to be covered under that definition such package must have been intended for "retail sale" for consumption by an individual or a group of individuals. In our view these two definitions would have to be read together to properly understand the scope thereof. In order that the package should be properly described as a "retail package", the sale has to be through the

"retail sale" for consumption by an individual or a group of individuals. In the present case, admittedly, the sale of the package was only to the hotel. It may be that the hotel may ultimately sell the commodity therein, i.e., the ice-cream (not the package) to the individuals or the group of individuals. This was not a sale in favour of an individual or group of individuals. We would have to understand the scope of the term "consumer" used in Rule 2(o) to be the individual or group of individuals who consume the commodity. It is undoubtedly true that for a sale being a "retail sale" it need not contain material for the consumption of a single individual only, it can be for a group of individuals also. However, a hotel to which the package is supplied cannot be covered in the term "individual or group of individuals" as contemplated in Rule 2(p) defining "retail package". We have already explained earlier that the nature of sale is of no consequence. The material consideration is that such sale should be in a "package" and there should be a requirement in the SWM Act or the Rules made thereunder or any other law for displaying the MRP on such package. We find the requirement to be only under Rule 6(1)(f) which applies to "retail package" meant for "retail sale". What is required to be printed under Rule 6(1)(f) is the "retail sale price" of the package. "Retail sale price" is defined under Rule 2(r) and it suggests that the "retail sale price" means the maximum price at which the commodity in packaged form may be sold to the ultimate consumer. The Rule further suggests the manner in which the "retail sale price" shall be mentioned on the package. It is the case of the appellant that the four litres pack was not meant to be sold as the package to the ultimate consumer and the sale was only to the intermediary or as the case may be, to the hotel. If that was so, then there is no necessity much less under Rule 6(1) (f) to mention the "retail sale price" on the package."

10. In view of the foregoing discussion, we do not find any merit in the impugned order, in so far as it has confirmed the adjudged demands on the appellants. Accordingly, by setting aside the impugned order, the appeals are allowed in favour of the appellants.

(Order pronounced in the open court on 17/072020)

(S.K.Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)