

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

**WEST ZONAL BENCH**

**EXCISE APPEAL NO: 99 OF 2012**

[Arising out of Order-in-Original No: 70/BR-70/TH-I/2011 dated 27<sup>th</sup> October 2011 passed by the Commissioner of Central Excise, Thane – I.]

Y & Associates  
Godrej Hygiene Products Ltd  
Pirojshanagar, Eastern Express Highway, Vikhroli (E)  
Mumbai – 400 079

***...Appellant***

*versus*

Commissioner of Central Excise  
Thane –I  
4<sup>th</sup> Floor, Navprabhat Chambers, Ranade Road  
Dadar (W), Mumbai - 400028

***...Respondent***

**WITH**

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Dadar (W), Mumbai - 400028

***...Respondent***

**APPEARANCE:**

Shri Rajesh Ostwal, Advocate for the appellants

Shri N M Tagade, Joint Commissioner (AR) for the respondent

**CORAM:**

**HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)**  
**HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)**

**FINAL ORDER NO: A/ 86421-86422/2021**

|                   |            |
|-------------------|------------|
| DATE OF HEARING:  | 25/03/2021 |
| DATE OF DECISION: | 18/06/2021 |

PER: C J MATHEW

In order-in-original no. 70/BR-70/TH-I/2011 dated 27<sup>th</sup> October 2011, now impugned before us, Commissioner of Central Excise, Thane-I has adjudicated two notices issued, in identical circumstances, under section 11A of Central Excise Act, 1944 for recovery of duties arising from contract entered into between M/s Y & Associates and M/s Godrej Hygiene Products Ltd on 22<sup>nd</sup> June 2007 for retail packing of 'baby and clinical diapers' and 'sanitary napkins' that continued till June 2011. In accordance with the agreement, the latter provided 'diapers' and 'packing material' along with specifications to the former who were to undertake packing and storage with responsibility for compliance with legal prescriptions. It was alleged that 'baby diapers' and 'sanitary napkins' were rendered liable to duties of central excise in notification no. 10/2010-CE dated

27<sup>th</sup> February 2010 by inserting these descriptions at serial no. 96B and serial no. 96C in notification no. 4/2006-CE dated 1<sup>st</sup> March 2006 despite which the goods were cleared without discharge of the levy arising therefrom. M/s Y & Associates were held liable to duty of ₹ 1,26,51,977 for having undertaken 'manufacture' within the meaning of section 2(f)(iii) of Central Excise Act, 1944 read with the Third Schedule therein, along with interest thereon under section 11AB of Central Excise Act, 1994, as well as to penalty of like amount under section 11AC of Central Excise Act, 1944 while M/s Godrej Hygiene Products Ltd was imposed with penalty of ₹ 25,00,000. The goods, valued at ₹ 4,30,25,400 that were cleared between 27<sup>th</sup> February 2010 and 30<sup>th</sup> June 2011, were confiscated but allowed to be redeemed on payment of fine of ₹ 1,00,00,000. Hence these two appeals have been filed and which, owing to commonality of issues, are taken up for disposal in this proceeding.

2. Armed with the factual matrix of the goods imported by M/s Godrej Hygiene Products Ltd having been supplied under the referred contract to M/s Y & Associates, of notification no. 10/2010-CE dated 27<sup>th</sup> February 2010 having inserted entries prescribing effective rates of excise duty in notification no. 4/2006-CE dated 1<sup>st</sup> March 2006 and of the transformation of supplied material into marketable packages necessary for commercial acceptance which, covered as it was within section 2(f)(iii) of Central Excise Act, 1944, warranted assessment in

terms of ‘retail selling price’ under section 4A of Central Excise Act, 1944, the impugned order, drawing upon the meaning assigned to ‘rendered’ and ‘marketable’ in the decision of the Tribunal in *Lakme Lever Ltd v. Commissioner of Central Excise* [2001(127) ELT 790 (Tri-Mumbai)], concluded that the liability did devolve.

3. Learned Counsel for appellants contests coverage within the Third Schedule to Central Excise Act, 1944 *sans* which the components that make up ‘manufacture’ in section 2(f) of Central Excise Act, 1944 are irrelevant in determining excisability. It was pointed out that

*‘Cleansing or facial tissues, handkerchiefs and towels of paper pulp, paper, cellulose wadding or webs of cellulose powders’*

intended to be covered by section 2(f)(iii) of Central Excise Act, 1944 at serial no. 55 of the Third Schedule, is but that part of the description corresponding to heading no. 4818 of the Schedule to Central Excise Tariff Act, 1985 which is

*‘Toilet paper and similar paper, cellulose wadding or webs of cellulose fibres, of a kind used for household or sanitary purposes, in rolls of width not exceeding 36 cm, or cut to size or shape; handkerchiefs, cleansing tissues, towels, table cloths, serviettes, napkins for babies, tampons, bed sheets and similar household, sanitary or hospital articles, articles of apparel and clothing accessories, of paper pulp, paper,*

*cellulose wadding or webs of cellulose fibres'*

which does not touch upon the impugned goods corresponding to tariff item no. 4818 4010 and 4818 4090 and others besides. Further, reliance was placed on the decision of the Tribunal in *Kohinoor Tissue Converting Co. v. Commissioner of Central Excise, Pune [2014 (307) ELT 531 (Tri-Mumbai)]*, arising from an attempt on the part of Revenue to fasten differential duty following assessment under section 4A of Central Excise Act, 1944 by recourse to the description in notification no. 49/2008-CE(NT) dated 24<sup>th</sup> December 2008, in which the specific items of the heading were held to be excluded from the description that entailed 'retail sale price' assessment.

4. In support of the impugned order, Learned Authorized Representative submitted that the appellants had not disputed either the imposition of the levy on the impugned goods with effect from 27<sup>th</sup> February 2010 or that the goods imported, in bulk by M/s Godrej Hygiene Products Ltd, were repacked into retail units by M/s Y & Associates. Reliance was placed on the decision of the Hon'ble High Court of Calcutta in *Naffar Chandra Jute Mills Ltd and another v. Assistant Collector of Central Excise [1993 (66) ELT 574 (Cal)]*.

5. We find that dispute has its origins in the inclusion of the impugned goods, with effect from 27<sup>th</sup> February 2010, in notification

no. 4/2006-CE dated 1<sup>st</sup> March 2006 prescribing effective rates of duty and the undisputed fact that ‘baby diapers’ and ‘sanitary napkins’, imported in bulk, are repacked for the retail market. The definition of ‘manufacture’, which includes any process

*‘(iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer, ...’*

in section 2(f) of Central Excise Act, 1944, by the reference to Third Schedule, implies that ‘deeming’ for taxability arises despite the ‘input’ and ‘output’ being described identically by this fictional contrivance. It is the essence of such manufacture that goods supplied to M/s Y & Associates and goods emanating from the process are described similarly. According to the adjudicating authority, the process undertaken by M/s Y & Associates was crucial for the marketing strategy of M/s Godrej Hygiene Products Ltd and, in the absence of discountenancing by the appellants, while that may well be so, the impugned order has not undertaken the pre-requisite of determining that the description at serial no. 55 of the Third Schedule to Central Excise Act, 1944 applied before and after processing. On the contrary, the submission on behalf of the appellants that the impugned goods are specifically described, and appended to

classification, in notification no. 4/2006-CE with coverage under specific description of 'baby and clinical diapers', corresponding to tariff item no. 4818 4010 and within the description of 'sanitary towels and tampons, napkins and napkin liners for babies and similar sanitary articles' corresponding to sub-heading no. 4818 40 of the Schedule to Central Excise Tariff Act, 1985 while the goods referred to in serial no. 55 of the Third Schedule to Central Excise Act, 1944 are covered by an entirely different residuary tariff item of the Schedule to the Central Excise Tariff Act, 1985 within another categorization at the level of sub-headings, does not appear to have been given due evaluation by the adjudicating Commissioner.

6. It is apparent from the schema of 'deemed' manufacture that emergence of goods of another description from any process to which the enumerated goods are subjected to would take it outside the scope of 'deemed' and requiring conformity with the general comprehension of 'manufacture' or be 'incidental or ancillary to the completion of a manufactured product' in section 2(f) of Central Excise Act, 1944. It is not the case of Revenue that the impugned goods, before or after re-packing, are not 'baby diapers' or 'sanitary napkins' but that they do correspond to the description in serial no. 55 of the Third Schedule to Central Excise Act, 1944. As 'baby diapers' or 'sanitary napkins' are not enumerated in the Third Schedule to Central Excise Act, 1944, their incorporation in notification no. 4/2006-CE dated 1<sup>st</sup> March 2006

does not suffice for excisability under 'deemed' manufacture to be invoked.

7. It offends the validity of a tax demand to be founded on a judgement except for the dispute that it purports to resolve; only the relevant statute, subject to judicial interpretations of such, can save a demand. Even less so is a random culling in which the issue, as well as the resolution, has been carefully obscured. The reliance placed by the adjudicating Commissioner on the decision of the Tribunal in *re Lakme Lever Ltd* is akin to placing the cart before the horse. Doubtlessly, the Tribunal did emphasize certain expressions as intended to assist in concluding the goods could be 'deemed' to have been 'manufactured' but were made in the context of the proposition that that such process must inevitably restrict itself to altering the threshold of marketability with any processing thereafter being mere embellishment that does attract excisability once again. For the impugned order to appropriate that logic for the proposition that the essence of marketability afforded by a process suffices, and to the exclusion of any or all other conditions in a statute, for goods to be deemed to have been 'manufactured' is but semantic contortion for enabling overreach by the tax administrator.

8. The decision of the Tribunal in *re Kohinoor Tissue Converting Co*, in relation to enumeration of goods that are required to be assessed under section 4A of Central Excise Act, 1944 and, though

not in the context of comparison of the relevant heading in the Schedule to Central Excise Tariff Act, 1985 with description in Third Schedule of Central Excise Act, 1944, holding that

*‘4.2 From a reading of the tariff, it is abundantly clear that the tariff itself distinguishes toilet paper and cleansing or facial tissues. While toilet paper falls under CETH 4818 10 00, cleansing or facial tissues fall under 4818 20 00. Further, the description of goods under serial No. 55 of Notification No. 49/2008 matches exactly the tariff description of goods falling under CETH 4818 20 00. If the intention of the Legislature was to cover toilet paper also under Section 4A, then the toilet paper would have been specifically mentioned in the Notification No. 49/2008.....We also observe that wherever the Legislature wanted to cover all goods falling under a particular heading, they have stated so in the Notification No. 49/2008. .... This also supports the contention of the appellant that what is covered under Serial No. 55 is only cleansing or facial tissues falling under CETH 4818 20 00 and not toilet paper which is classifiable under 4818 10 00.’*

is, by the near similarity, with obvious reason, in the two enumerations, of assistance with the finding that a partial inclusion within the Third Schedule to Central Excise Act, 1944 does not justify the entire heading, of which such extraction is, undeniably, a part, to being legislatively intended as the extent to which ‘deemed’ manufacture can be stretched. Thus ‘baby diapers’ and ‘sanitary napkins’ are not ‘cleansing or facial tissues, handkerchiefs and towels of paper pulp, paper, cellulose wadding or webs of cellulose fibres’ in

the Third Schedule to Central Excise Act, 1944. We find that decision of the Hon'ble High Court of Calcutta in *re Naffar Chandra Jute Mills Ltd* is of no avail in constructing an alternative opinion.

9. From the discussion *supra*, we entertain no doubt that impugned order has erred in not considering the scope of the legislative intent of 'deemed' manufacture of goods enumerated in the Third Schedule to Central Excise Act, 1944 and, on that fragile sustenance, the demand of duties and imposition of penalties does not have the wherewithal to survive.

10. The impugned order is set aside and appeals allowed.

*(Pronounced in Open Court on 18/06/2021)*

**(Ajay Sharma)**  
***Member (Judicial)***

**(C J Mathew)**  
***Member (Technical)***