CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 326 of 2012

(Arising out of Order-in-Appeal No. YDB(269)Th-I/2011 dated 30.11.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai-I)

M/s. Commodity Trade International **Appellant**
B-28, MIDC, Additional Ambernath Indl. Area,
Anand Nagar, Ambernath, Dist. Thane

Vs.

Commissioner of Central Excise, Thane-I **Respondent**
4th Floor, Navprabhat Chambers,
Ranade Road, Dadar (W), Mumbai 400 028.

Appearance:

None for the Appellant
Shri Sanjay Hasija, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

Date of Hearing: 21.07.2022
Date of Decision: 21.07.2022

FINAL ORDER NO. A/85673/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against order in appeal number YDB (269) Th-I/2011 dated 30.11.2011 of the Commissioner (Appeals), Central Excise, Mumbai-I. By the impugned order, the Commissioner (Appeals) has upheld the order in original No 13/VA-03/TH-I/2011 dated 10.03.2011 of the Additional Commissioner Central Excise Thane - I holding as follows:

I. I confirm the demand of Rs. 25,57,326/- (Rupees Twenty Five Lakhs Fifty Seven Thousand Three Hundred and Twenty Seven only) under section 11 A (2) of the Central Excise Act. 1944 and ordered its recovery from M/S, Commodity Trade International.

II. *I ordered recovery of interest at appropriate rate on the above amount from them under the provisions of section 11 AB Central Excise Act, 1944.*

III. *I impose penalty of Rs.25,57,326/- (Rupees Twenty Five Lakhs Fifty Seven Thousand Three Hundred and Twenty Seven only) on M/S, Commodity Trade International, B28 MIDC Additional Ambernath Industrial Area, Anand Nagar, Ambernath (E) under section 11 AC of the Central Excise Act 1944.*

2.1 Apply manufacture and clear various goods lip gloss, lip definer, eye pencil which are makeup preparations classifiable under chapters heading 3304 1000 of the First Schedule to Central Excise Tariff Act, 1985. Appellant was affixing maximum retail price on these goods. These goods where required to be assessed to duty on after determining the value as per section 4A as per notification No 2/2005 CE (NT) dated 07.01.2005 & 2/2006-CE (NT) dated 01.03.2006 superseded by the Notification No 14/2008 -CE (NT) dated 0.03.2008, providing for abatement @ 40% from MRP upto 29.02.2008 and 38% thereafter.

2.2 On scrutiny of the returns filed by the appellant it was observed that instead of determining the value as per section 4A appellant cleared these goods by determining the value under Section 4 and paying the duty accordingly. A show Cause Notice dated 17th May 2010 was thus issued to them calling them to show cause as to why:

1. *An amount of central excise duty to the tune of Rs. 25,57,326/- (Rupees Twenty Five Lakhs Fifty Seven Thousand Three Hundred and Twenty Six Only) should not be demanded and recovered from them under section 11 A (1) of the Central Excise Act 1944*
2. *Interest should not be charge and recovered from them under section 11AB of the Central Excise Act, 1944*
3. *Penalty should not be imposed upon them under section 11 AC of the Central Excise Act, 1944.*

2.3 The show Cause Notice was adjudicated by the Additional Commissioner as per the order referred to in para 1 above. In appeal filed by the appellant, the Commissioner (Appeal) upheld the order of the original authority by the impugned order. Hence this appeal.

2.4 This matter was listed on the dates as indicated in the table below and following has been recorded on the order sheets by the bench hearing the matter:

Date	Bench Order
21.02.2020	At the request of Authorized representative hearing is adjourned to 8th April 2020.
08.032021	Matter is adjourned at the request of advocate. Next date of hearing is fixed as 30.03.2021.
30.03.2021	Adjourned to 10.05.2021 at the request of the learned Advocate.
14.07.2021	Appellant filed adjournment request and conducting counsel filed withdrawal memo. Matter is adjourned to 13.09.2021 to enable appellant to engage new counsel.
13.09.2021	Matter is adjourned to o1.11.2021 at the written request of learned Advocate.
01.11.2021	The matter is adjourned to 17.12.2021.
17.12.2021	None appeared for appellant, Adjourned to 01.02.2022
01.02.2022	None for appellant. The matter is adjourned to 17.03.2022. Registry is directed to issue notice to the department.
17.03.2022	Appellant is absent. Adjourned to 05.05.2022.
05.05.2022	No Court on this day. Matter is adjourned to 08.07.2022.

08.07.2022	None for the appellant. The matter is adjourned to 21.07.2022.

3.2 When the matter was called for hearing on 21.07.2022, appellant was found to be not represented again as had been the case on most occasions in past as per the table above.

3.3 Accordingly Shri Sanjay Hasija, Superintendent, Authorized Representative was heard in the matter, who pointed out that in terms of proviso to Section 35 C (1A) of the Central Excise Act, 1944, appellant is permitted to ask for adjournment in his appeal only thrice. Any further adjournment will be in contravention of this provision. As the appellant has constantly sought to evade from the hearing, this appeal should be dismissed as per Rule 20 of the CESTAT Procedure Rules, 1982.

4.1 We have considered the impugned order, along with the submissions made in appeal and during the course of arguments.

4.2 Section 35 C (1) and 35 C (1A) of the Central Excise Act, 1962 provides as under:

Section 35C. Orders of Appellate Tribunal. -

(1) The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

(1A)The Appellate Tribunal may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

4.3 Hon'ble Apex Court has in case of Ishwarlal Mali Rathod vs Gopal & Others vide order dated 20.09.2021 [in Special Leave

Petition (Civil) Nos.14117-14118 OF 2021], condemning the practice of seeking repeated adjournments and courts granting the same mechanically has observed as follows:

"5.5 Today the judiciary and the justice delivery system is facing acute problem of delay which ultimately affects the right of the litigant to access to justice and the speedy trial. Arrears are mounting because of such delay and dilatory tactics and asking repeated adjournments by the advocates and mechanically and in routine manner granted by the courts. It cannot be disputed that due to delay in access to justice and not getting the timely justice it may shaken the trust and confidence of the litigants in the justice delivery system. Many a times, the task of adjournments is used to kill Justice. Repeated adjournments break the back of the litigants. The courts are enjoying upon to perform their duties with the object of strengthening the confidence of common man in the institution entrusted with the administration of the justice. Any effort which weakens the system and shake the faith of the common man in the justice dispensation has to be discouraged. Therefore the courts shall not grant the adjournments in routine manner and mechanically and shall not be a party to cause for delay in dispensing the justice. The courts have to be diligence and take timely action in order to usher in efficient justice dispensation system and maintain faith in rule of law. We are also aware that whenever the trial courts refused to grant unnecessary adjournments many a times they are accused of being strict and they may face displeasure of the Bar. However, the judicial officers shall not worry about that if his conscience is clear and the judicial officer has to bear in mind his duties to the litigants who are before the courts and who have come for justice and for whom Courts are meant and all efforts shall be made by the courts to provide timely justice to the litigants. Take an example of the present case. Suit was for eviction. Many a times the suits are filed for eviction on the ground of bonafide requirements of the landlord. If plaintiff who seeks eviction decree on the ground of personal bonafide requirement is not getting the timely justice and he

ultimately gets the decree after 10 to 15 years, at times cause for getting the eviction decree on the ground of personal bonafide requirement may be defeated. The resultant effect would be that such a litigant would lose confidence in the justice delivery system and instead of filing civil suit and following the law he may adopt the other mode which has no backing of law and ultimately it affects the rule of law. Therefore, the court shall be very slow in granting adjournments and as observed hereinabove they shall not grant repeated adjournments in routine manner. Time has now come to change the work culture and get out of the adjournment culture so that confidence and trust put by the litigants in the Justice delivery system is not shaken and Rule of Law is maintained.

5.6 In view of the above and for the reasons stated above and considering the fact that in the present case ten times adjournments were given between 2015 to 2019 and twice the orders were passed granting time for cross examination as a last chance and that too at one point of time even a cost was also imposed and even thereafter also when lastly the High Court passed an order with extending the time it was specifically mentioned that no further time shall be extended and/or granted still the petitioner – defendant never availed of the liberty and the grace shown. In fact it can be said that the petitioner – defendant misused the liberty and the grace shown by the court. It is reported that as such now even the main suit has been disposed of. In view of the circumstances, the present SLPs deserve to be dismissed and are accordingly dismissed."

4.4 About Rs.25,57,326/- (Rupees Twenty Five Lakhs Fifty Seven Thousand Three Hundred and Twenty Seven only) of Central Excise Duty with interest and equivalent amount of penalty is involved in the appeal of the main appellant. Against the above amounts appellant have got the stay as per order No S/1394/12/EB/C-II dated 18.07.2012. Now they seem to be in no urgency and are seeking only adjournments when so ever the matter is listed for hearing. This practice of seeking adjournments mechanically and being allowed by the courts/

tribunals have been condemned by the Hon'ble Apex Court in the decision referred above.

4.5 Rule 20 of the CESTAT Procedure Rule, 1982 reads as under:

RULE 20. Action on appeal for appellant's default. *— Where on the day fixed for the hearing of the appeal or on any other day to which such hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may, in its discretion, either dismiss the appeal for default or hear and decide it on merits :*

Provided that where an appeal has been dismissed for default and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called on for hearing, the Tribunal shall make an order setting aside the dismissal and restore the appeal."

4.6 In our view the appeal needs to be dismissed on for non prosecution in terms of Rule 20 of CESTAT procedure Rules, 1982. However on merits also we find that the decision of the Hon'ble Apex Court in case of Krafttech Products [2008 (224) ELT 504 (SC)] relied upon by the appellant at the time of hearing of stay application, and followed by the bench for granting the stay has been considered by the Delhi Bench in case of Arora Product [2012 (276) ELT 77 (T-Del)] and bench distinguished the said decision staging as follows:

"15. In the case of Kraftech Products (2008 (224) ELT 504 SC) hair dye in 3 grm sachets packed into multi-piece package of three such sachets was under dispute. The Apex Court did not accept the argument that the goods were sold in numbers and accepted the contention of the assessee that the goods were sold by weight. In para 23 the Apex Court observed as under:

"23. We have noticed hereinbefore that each package offered to sell to the customer contains three sachets. Net weight of all the three sachets are stated thereon. It is a "multi-piece package" which is capable of being offered to sell as such only because a package is a "multi-piece package", the same cannot be taken

out of the umbrage of exemption clause contained in Rule 34 of the Rules. Why the commodity cannot independently be sold either by weight or measure is beyond our comprehension particularly when Rule 12(2) permits the same. The illustration appended to Rule 2(j) bring out a clearer picture. It states that the combined net weight shall be taken into consideration for the purposes mentioned therein. After combined weight is taken into consideration for the purpose of applicability of the Rules, there is no reason as to why the said purpose shall not be considered to be a relevant factor for applying the exemption provision. Assuming Rule 2(j) was otherwise vague or unambiguous, illustration appended thereto brings out the true meaning and purport thereof. The reasoning adopted by the Madras High Court in Varnica Herbs (supra) does not appeal to us.

It was rendered per incuriam. It was held to be so in Urison Cosmetics Ltd. (supra) by a Larger Bench of the Customs, Excise and Service Tax Appellate Tribunal. We agree with the said opinion of the Tribunal."

16. The argument that goods are sold by numbers can be raised in respect of commodities like cakes of toilet soap, or tins of talcum powder. But any customer would see the weight of the soap cake or the weight of the contents in a tin of talcum powder before being satisfied about the price for the item. So the argument that such commodities are sold by number is not an acceptable argument. Moreover the Apex Court has specifically overruled the decision of the Madras High Court as explained above. So there is no merit in the argument that the commodity is not sold by weight.

17. In the case of CCE Vs. Kraftech Products Inc -2005 (179) ELT 43 (Tri.-Mum) = (2004-TIOL-439-CESTAT-MUM), cachets of hair dye containing 3 grms each was packed into muti-piece package of 3 such units and in this case also the weight of the muti-piece package also was less than the exemption limit prescribed under Rule 34 of the Packaged Commodities Rules.

18. It is to be noted that in the present case the facts are different and the weight of the muti-piece package is not within *the exempted limit. So these case laws are not applicable to the facts of the present case.*

19. The next issue is whether the multi piece package is a Retail package or not. This matter has been examined at length by the larger Bench of the Tribunal in the case of Swan Sweets Pvt Ltd. In this case chocolates weighing 4 gms each was packed in a jar of 125 such chocolates. In that case the assessee had not affixed MRP for the jar as a whole. So it was very evident that the manufacturer did not intend the jar to be sold in Retail. Extracts from para 1.2 and para 2.5 of the order are relevant which are reproduced below:

Extracts from para 1.2 of the order :

"(e) The whole sale pack in which the individual Toffy Max Caramel/Chocolate are packed carries, inter alia, the following declaration on it :

Wholesale Package	
MRP	*50 paise per piece (inclusive of all taxes)*
Net Weight	*500 g (125 Units)*
Mfg.	*.....*
Batch No	*......*

Extracts from para 2.5 of the order:

"If the plastic jar or plastic bag, in which the Toffees are packed, are packages intended for retail sale, the law requires that the Maximum Retail Price (inclusive of all taxes) of the said jar or bag is to be printed on them. Since the appellants never intended the jar or bag to be sold to the retail consumers as such, the Maximum Retail Price for the bag or jar is not printed on the bag or jar. What is required to be printed on the bag or jar is the MRP for individual Toffee. Thus, the appellants are not printing any price for the whole package. The information given

on the bag or jar is only for the dealers or distributors, who handle the said bags or jars in the distribution channel. If the appellants had intended the bag or jar to be sold to the retail consumers, they would have printed the price of the bar or jar at one place in a "definite, plain and conspicuous" manner as Rule 6 requires. The PC Rules use the expression "intended for retail sale" at numerous places in order to define whenever and wherever a particular set of information is required to be given on a package. Whether a packaged commodity is intended for retail sale or not will depend on the persons who organize the distribution and sale of the product and on none else."

20. Thus the labels on the jar clearly indicated that the jar was not intended for retail sale. That is not the situation in the present case. In the present case MRP is indicated for the multi-piece package was indicated on the multi-piece package showing the clear intention that such multi-piece package also was intended for retail sale.

21. "Retail sale" has been defined under Rule 2 (q) of The Standards of Weights and Measures (Packaged Commodities) Rules, 1977. This definition reads as under:

"(q) "retail sale", in relation to a commodity, means the sale, distribution or delivery of such commodity through retail sales agencies or other instrumentalities or consumption by an individual or a group of individuals or any other consumer."

22. The declaration to be made on every package is prescribed in Rule 6 of the said Rules reads as under:-

"6. Declaration to be made on every package -

(1) Every package shall bear thereon or on a label securely affixed thereto a definite, plain and conspicuous declaration, made in accordance with the provisions of this Chapter as to -

(a) the name and address of the manufacturer, or where the manufacturer is not the packer, of the packer or with the written consent of the manufacturer;

(b) the common or generic names of the commodity contained in the package;

Explanation :- Generic name in relation to a commodity means the name of the genus of the commodity, for example, in the case of common sale, sodium chloride is the generic name.

(c) the net quantity, in terms of the standard unit of weight of measure, of the commodity contained in the package or where the commodity is packed or sold by number, the number of the commodity contained in the package;

(d) the month and year in which the commodity is manufactured or pre-packed.

(e) the retail sale price of package;

(f) where the sizes of the commodity contained in the package are relevant, the dimensions of the commodity contained in the package and if the dimensions of the different pieces are different, the dimensions of each such different piece;

(g) such other matters as are specified in these rules."

It is to be noted that as per Rule 2A of the said Rules the expression "package" in Rule 6 shall be construes as package intended for retail sale.

23. So in the case before us the Appellant was required under law to declare MRP on the multi-piece package and the Appellant was doing so. Further this commodity was notified for levy of excise duty based on valuation as per section 4A of the Central Excise Act. Thus both the legal requirements for applying section 4A were satisfied and hence Central Excise duty should have been paid adopting the value as per section 4A.

24. Consequently the Appeal fails and is accordingly rejected.”

4.7 Thus in view of the above decision of the Delhi Bench distinguishing the decision relied upon by the bench for granting stay to the appellant, we do not find much merits in the appeal.

5.1 The appeal is thus dismissed as per the Rule 20 of CESTAT Procedure Rules, 1982.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

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