

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

Excise Appeal No. 790 of 2012

(Arising out of Order-in-Appeal No. US/147/M-II/2012 dated 28.02.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-II)

M/s. Dynamic Beverages Pvt. Ltd.

Appellant

G-12, Ansa Indl. Estate,
Saki Vihar Road, Andheri (E),
Mumbai 400 072.

Vs.

Commissioner of Central Excise, Mumbai-II

Respondent

9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaug,
Parel, Mumbai 400 012.

Appearance:

Shri H.G. Dharmadhikari, Sr. Advocate with Ms. Lalita Phadke,
Advocate, for the Appellant
Shri Dharendra Kumar, Joint Commissioner, Authorised Representative
for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 03.11.2022

Date of Decision: 03.11.2022

FINAL ORDER NO. A/86077/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against Order-in-Appeal No. US/147/M-II/2012 dated 28.02.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-II. By the impugned order, the Commissioner (Appeals) has upheld Order-in-Original No. 8-9/PMG/AC/10-11 dated 31.08.2010 passed by the Assistant Commissioner, Powai Division, Mumbai-II, by which the following has been held:-

"ORDER

1. I confirm the duty amount of Rs.4,32,298/- and Rs.8.646/- Education Cess and Rs.4,323/- S&H Ed. Cess totally amounting to Rs. 4,45,267/- (Rupees Four Lakhs Forty Five thousand Two Hundred and Sixty Seven Only) short paid during the period

June 2007 to November 2008. under proviso to Section 11A(1) of Central Excise Act, 1944;

2. I confirm the duty amount of Rs.33.613/- and Rs.672/- Education Cess and Rs.336/- S&H Ed. Cess totally amounting Rs.34.621/-(Rupees Thirty Four Thousand Six Hundred and Twenty one only) short paid during the period of Dec. 2008 to January, 2009 under the proviso to Section 11A of Central Excise Act, 1944.

3. I also order the assessee to pay the interest on the above said short paid duty under Section 11AB of Central Excise Act, 1944;

4. I impose equivalent penalty amounting to Rs. 4,45,267/- under Section 11AC of Central Excise Act, 1944 and Rs.34,621/- under Rule 25 of Central Excise Rules, 2002 totally amounting to Rs.4,79,888/- (Rupees Four Lakhs Seventy Nine Thousand Eight Hundred and Eighty Eight Only) upon the Noticee. I order the Noticee to pay the penalty imposed forthwith."

2.1 Appellant is registered for manufacture of packaged drinking water under Chapter Heading No. 22019090 of Central Excise Tariff. This product has been classified under Section 4A of the Central Excise Act, 1944. Accordingly the appellant has been declaring MRP/RSP of the product and paid duty accordingly.

2.2 Revenue entertained the view that since the appellant was clearing the goods for sale only at snack bars owned by Coffee Day or Amalgamated Coffee Bean Trading Co. (ABCTC). The goods were sold to institutional buyers and hence they were not required to pay duty as per Section 4A but the duty was required to be determined in terms of Section 4. Accordingly a show cause-cum-demand notice was issued to the appellant asking them to show cause as to why:-

i) an amount of Rs.34,621.00 including education cess (Rupees Thirty four thousand Six hundred twenty one only) as detailed in Annexure 'A' short paid during the period December,2008 to

January, 2009 should not be demanded under Section 11A of Central Excise Act, 1944.

ii) interest on the differential duty should not be recovered from them under the provisions of Section 11AB of the Central Excise Act, 1944.

iii) Penalty should not be imposed upon them under Rule 25 of Central Excise Rules, 2002."

2.3 The show cause notice was adjudicated by the order-in-original referred in para 1 above. Appeal filed by the appellant before the Commissioner (Appeals) has been rejected. Aggrieved appellant has filed this appeal.

3.1 We have heard Shri H.G. Dharmadhikari, Sr. Advocate with Ms. Lalita Phadke, Advocate for the appellant and Shri Dharendra Kumar, Joint Commissioner, Authorised Representative for the Revenue.

3.2 Arguing for the appellant, learned counsel submits that:-

- Packaged drinking water is specified as per Notification No. 2/2006 (NT) dated 01.06.2006 as amended from time to time and has to be valued as per the provisions of Section 4A of the Central Excise Act, 1944 on the basis of the declared MRP/RSP.
- Appellant has followed the said procedure and paid the duty accordingly.
- This issue has been settled by the Hon'ble Supreme Court in the case of Jayanti Foods Processing (P) Ltd. [2007 (215) ELT 327 (SC)] and the decisions as follows:-
 - HPL Electric & Power Ltd. [2018 (12) GSTL 36] affirmed by Hon'ble Supreme Court as reported at [2018 (12) GSTL 33 (SC)]
 - Liberty Shoes Ltd. [2015 (326) ELT 422 (SC)]
 - Arvind Footwears Pvt. Ltd. [2017 (348) ELT 510 (Tri.-Mumbai)]
 - India Laboratories Pvt. Ltd. [2007 (213) ELT 20 (Tri.-LB)]

- The contention of Revenue that they were not to be assessed under the said provisions but under Section 4A is without any basis. The basic reason for seeking that the goods be assessed as per Section 4 is that the appellant has been receiving certain performs from ABCTC for manufacture of the bottles to be filled with the packaged drinking water. Secondly, ABCTC is not an institutional buyer. Both these contentions cannot be held to be correct in view of the case laws referred above.
- Further, as per Circular No. 625/16/2002-CX dated 28.02.2002, in case Revenue officer entertained any doubt with regard to the applicability of the provisions of Standards of Weights and Measures Act and the rules made thereunder, they should have referred the matter to the concerned authorities for their opinion before proceeding against them. No such opinion was ever taken. Accordingly in view of this circular also, the demand cannot be sustained.
- Even if it is held that valuation was to be done as per Section 4, then for the reason that appellant was receiving certain inputs from their customer, then also valuation should have been done as per the principles laid down by the Hon'ble Supreme Court in the case of Ujagar Prints and not in the manner as proposed in the show cause notice or the impugned order.
- In view of the above, appeal be allowed.

3.3 Arguing for the Revenue, learned AR submits that:-

- ABCTC is a hotel and an institutional buyer as per Rule 2A of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977.
- Since the sale is to the institutional buyer, the valuation should have been done as per the provisions of Section 4 and not as per Section 4A.
- He relies upon the decision in the case of Bajaj Food Products (P) Ltd. [2015 (317) ELT 116 (Tri.-Del.)] and submits that this decision has been upheld by Hon'ble Supreme Court as reported at [2017 (345) ELT A138 (SC)].

- Reliance is also placed on the decision of Hon'ble Supreme Court in the case of Hotel and Restaurant Associations of India [2018 (359) ELT 97 (SC)].
- Accordingly he submits that the appeal should be dismissed.

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

4.2 Commissioner (Appeals) has in his order observed as follows:-

"It was held by the adjudicating authority that the principal manufacturer was an institutional customer and under Rule 2A of Standard of Weight and Measures (Packaged Commodities) Rules, 1977 read with Rule 34 ibid, M.R.P. was not required to be declared on the packages. The said Rule 2A as amended vide GSR 425(E) dated 17.7.06 is as follows.

"2A. Applicability of the Chapter-

The provisions of this chapter shall not apply to,-

(a) packages of commodities containing quantity of more than 25 kg or 25 litre excluding cement and fertilizer sold in bags up to 50 kg; and

(b) packaged commodities meant for industrial consumers or institutional consumers.

Explanation:- For the purpose of this rule,-

'a) Institutional consumer-Means those consumers who buy packaged commodities directly from the manufacturers/packers for service industry like transportation including airways. railways, hotel or any other similar service industry.

b) Industrial Consumer-Means those consumers who buy packaged commodities directly from the manufacturers/packers for using the product in their industry for production, etc.

It was held by the Hon'ble Supreme Court in the case of Jayanti food Processing (P) Ltd. v/s CCE -2007(215)ELT 327(SC) that the assessment of the goods in Section 4A of the Central Excise Act depends on the following conditions.

(a) The goods should be excisable goods and the Central Government must specify such goods by notification in the official gazette.

(b) The goods should be such as are sold in the packages.

(c) There should be a requirement in the Standard of Weight and Measures Act or the Rules made thereunder or any other law, to declare the retail price of such goods on their package.

(d) The valuation of such goods would be as per the declared retail sale price on the packages, less the amount of abatement.

There is no dispute that the goods in the instant case were supplied to institutional consumer and there was no legal requirement to declare the retail price of the goods on their package. The Labels of the product produced by the appellants along with their reply to the Show Cause Notice had no MRP printed on it. The inputs for the manufacture of bottles were supplied to the appellants by their customer and the bottles filled with mineral water were supplied to their customer who had no manufacturing premises of its own.. Therefore, in the light of the law laid down by the Hon'ble Supreme Court the goods should have been assessed as per Section 4(1)(a) of the Central Excise Act, 1944 read with Rule 10A (i) of the Central Excise Valuation (Determination of price of excisable goods) Rules, 2000, as the appellants were manufacturing the goods on job work basis on behalf of their customer. The contention of the appellants that there transaction was on principal to principal basis was contrary to the factual position.

The appellants had also contended that the valuation is to be carried out as per guidelines set out by Apex Court in case of M/s. Ujagar Prints v/s UOI [1988(38) ELT535(SC) and 1989(39ELT493(SC)] etc. and not under Rule 10A(1) of the

Central Excise Valuation (Determination of price of excisable goods) Rules, 2000. However, I do not find any merit in the said contention. In terms of the explanation given in respect of a Job worker under Rule 10A of Central Excise (Valuation) Rules, 2000 a person who manufactures or produces goods for or on behalf of principal is a job worker. The contention that they were sub-contractors and the transaction was not one of job work, is devoid of any merit. In the circumstances valuation of the goods was required to be made to be made under Section 4(1)(a) of the Excise 1944 read with Rule 10A of Valuation Rules, 2000."

4.3 We do not find the decision relied upon by the Revenue to support the case of the Revenue. In the case of Bajaj Food Products (P) Ltd. [2015 (317) ELT 116 (Tri.-Del.)], the decision of Hon'ble Supreme Court in the case of Jayanti Food Processing Pvt. Ltd. [2007 (215) ELT 327 (SC)] stating as follows:-

"6. The appellants have referred to the case of Jayanti Foods Pvt. Ltd. in their support. The facts obtaining in that case were entirely different. The goods involved in that case carried proper MRP as per the requirements of the SWM (PC) Rules. Similar was the situation in the case of P.G. Electro Plast Ltd. cited by them in their favour. The letter dated 4-9-2003 from the Metrology Department is not relevant because that letter was written by Metrology Department in response to their general query in which they had not stated the full facts including the fact of free supply of wheat by MCD. In any case it has already been demonstrated [and also supported by the High Court decision in case of Australian Foods Ltd. (supra)] that MRP was not required to be printed on the impugned goods, and also that the price printed by the appellants was not MRP.

7. From the foregoing there remains no doubt that the biscuits supplied to MCD are not eligible for assessment in terms of Section 4A and consequently the demand of differential duty is clearly sustainable. As regards the allegation of suppression of facts, it is evident that they had nowhere declared that they were getting free supply of wheat from MCD and in spite of being fully aware of this fact, they deliberately and misleadingly claimed that Rs. 2/- printed on each of the packages was the

correct MRP and that too for all packages ranging in weight from 61 gms. to 71 gms to 100 gms each. This shows that they were just printing a price in the name of MRP for the sake of making a claim for assessment under Section 4A and thereby evade duty by hoodwinking Revenue. Thus the suppression of facts and intent to evade duty are more than evident in this case. Both Shri Bajaj and Shri Maheshwari by virtue of their position knew of and allowed this modus operandi and thus abetted the evasion of duty which made the impugned goods liable to confiscation. In the circumstances mens rea on the part of the appellants is clearly evident making them liable to penalties adjudged by the adjudicating authority."

4.4 From the above it is quite evident that the goods in question were not meant for retail sale but were for the consumption of MCD for their various schemes. MCD was an institutional buyer and thereafter no retail sale was ever envisaged.

4.5 Commissioner (Appeals) has recorded that the goods were meant for retail sale through the customer only at snack bars owned by ABCTC. There being so, the goods were not being consumed by ABCTC themselves but further sold in retail and as such in terms of Standards of Weights and Measures (Packaged Commodities) Rules, 1977 the goods were required to be sold on the declared and printed MRP only. As we have pointed out earlier, where the goods were actually sold in retail, Section 4A of the Central Excise Act will become applicable as has been held by Hon'ble Supreme Court in the case of Jayanti Food Processing (P) Ltd. [2007 (215) ELT 327 (SC)] as follows:-

"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.

14. *It was tried to be suggested, relying on the language of the unamended Rule 2A, that the four litres pack of ice-cream would be appropriately covered under Rule 2A. Rule 2A before the amendment was as under :*

"2A. The provisions of this Chapter shall apply to all pre-packed commodities except in respect of grains and pulses containing quantity more than 15 kg."

It is true that if the unamended section is to be made applicable, the ice-cream pack of four litres would certainly be covered under Section 2A. However, Rule 3 explains that provisions of Chapter II would apply to packages intended for "retail sale" and expression "package" wherever it occurs in the chapter shall be construed accordingly. It is, therefore, clear that the "package" which was sold by the assessee could not be termed as "retail package" nor the sale thereof be termed as a "retail sale" and as such there was no requirement of mentioning the "retail sale price" on that package. All this has been completely missed in the order of the Tribunal.

15. *On the other hand the package in question would certainly come within the definition of "wholesale package" as defined in Rule 2(x)(ii) as it contained the commodity (ice-cream) and was sold to intermediary (Hotel) for selling the same to the consumer in small quantities. Then Rule 29 would apply to such package which does not require the price to be displayed on the package. What is required to be stated is (a) name and address of the manufacturer (b) identity of commodity and (c) total number of*

retail packages or net quantity. Shri Ravindra Narain is quite justified in relying on Rule 2(x) and Rule 2(q). The Tribunal does not refer to these vital Rules.

16. *There is one more substantial reason supporting the appellant. Shri Ravinder Narain invited our attention to Rule 34 in Chapter V of SWM (PC) Rules which provides for exemptions. We have quoted Rule 34 earlier. The Rule has now been amended. However, under the unamended Rule there is a specific declaration that the SWM (PC) Rules shall not apply to any "package" containing a commodity if the marking on the package unambiguously indicates that it has been specially packed for the exclusive use of any industry as a raw material or for the purpose of "servicing any industry, mine or quarry". Learned Counsel points out that the "package" which is sold by the assessee mentions that it is specially packed for the exclusive use of the catering industry. Learned Counsel further argues that such "package" was for the purposes of "servicing the hotel industry or catering industry" as the case may be. Learned Counsel is undoubtedly right when he seeks to rely on Rule 34 which provides for exemption of the "packages" which are specially packed for the exclusive use of any industry for the purposes of "servicing that industry". Shri Subba Rao supported the view expressed by the Tribunal that the words "servicing any industry" could not cover the present case and he further suggested that ice-cream cannot be a "raw material" for any industry. He is undoubtedly right that the ice-cream cannot be termed as "raw material" for any industry. However, the words "or for the purposes of servicing any industry" are broad enough to include the transaction in question, i.e., the sale of a pack of ice-cream to the retail industry. Hotel does not manufacture the ice-cream and is depended entirely upon the sale of ice-cream to it by the assessee for ultimately catering the commodity in the package, i.e. ice-cream to the ultimate consumer. In our view this can be squarely covered in the term "servicing any industry". The word "service" is a noun of the verb "to serve". This Court in Coal Mines Provident Fund Commissioner v. Ramesh Chander Jha [AIR 1990 SC 648] in a different context, observed as under :*

*The word "service" in Section 2(17)(h) must necessarily mean something more than being merely subject to the orders of Government or control of the Government. **To serve means 'to perform functions; do what is required for'.**" [Emphasis supplied]*

A hotel is a hospitality industry and undoubtedly supplies food and eatables to the consumers. Therefore, to supply the ice-cream to such a hotel would be doing what is required for the hotel. In that sense the supply by way of sale of ice-cream which is ultimately sold to the 'ultimate consumers' would, no doubt, be covered in the term "servicing the hotel industry". Even otherwise the word "service" as per Concise Oxford English Dictionary means :

- (i) perform routine maintenance or repair work on (a vehicle or machine);*
- (ii) provide a service or services for;*

It is an act of helpful activity - help, aid or to do something. It also includes supplying of utilities or commodities. In that view we are not prepared to give a narrow interpretation to the term "service any industry". We, therefore, accept the arguments advanced by Shri Ravinder Narain that the "package" sold by the assessee to the hotel was, apart from being for the exclusive use of the hotel was, also "for the purpose of servicing that industry". If that is so, then the SWM (PC) Rules would not apply at all.

17. *The Tribunal has given very narrow meaning to Rule 34 by firstly holding that ice-cream is not a "raw material". There the Tribunal was right but the Tribunal was not right by holding that the words "servicing any industry" were not applicable to such "package". We, therefore, accept the arguments of the learned Counsel and reject the contention raised by Shri Subba Rao. If that is so, the appeal would have to be allowed and it would have to be held that Section 4A will not apply to the ice-cream sold by the assessee."*

Same view has been expressed by Hon'ble Supreme Court in the case of Liberty Shoes Ltd. [2015 (326) ELT 422 (SC)] wherein the Hon'ble Supreme Court following its earlier decision in Jayanti Food has held as follows:-

"10. *A perusal of the order of the CESTAT shows that the Commissioner (Appeals), while allowing the appeal of the respondent-assessee, had recorded specific findings to the effect that the shoes in question which were supplied in packages to the aforesaid customers had MRP affixed on them. It was further found that clearances were not under Rule 34 of the Rules which exempts supplies of materials in bulk from the operation of Weights and Measures Act, meaning thereby it was obligatory and essential on the part of the respondent to affix MRP on the goods supplied.*

11. *It is also a matter of record that footwear is an item which is specified under Section 4A of the Act.*

12. *Once we find that the footwear is an item which is specified under Section 4A, which is covered by Weights and Measures Act and Rules, and MRP was affixed on the products supplied, which were not exempted under Rule 34 of the Rules, the provision of Section 4A of the Act shall stand attracted.*

13. *The issue is no more res integra and has been elaborately dealt with by this Court in 'Jayanti Food Processing (P) Ltd. v. Commissioner of Central Excise, Rajasthan' [2007 (8) SCC 34 = [2007 \(215\) E.L.T. 327](#) (S.C.)] in the following terms :-*

"32. *It is true that if the unamended section is to be made applicable, the ice cream pack of four litres would certainly be covered under Section 2-A. However, Rule 3 explains that provisions of Chapter II would apply to packages intended for "retail sale" and expression "package" wherever it occurs in the Chapter shall be construed accordingly. It is, therefore, clear that the "package" which was sold by the assessee could not be termed as "retail package" nor the sale thereof be termed as a "retail sale" and as such there was no requirement of mentioning the "retail sale price" on that package. All this has been completely missed in the order of the Tribunal.*

33. *On the other hand the package in question would certainly come within the definition of "wholesale package" as defined in Rule 2(x)(ii) as it contained the commodity (ice cream) and was sold to intermediary (hotel) for selling the same to the consumer in small quantities. Then Rule 29 would apply to such package which does not require the price to be displayed on the package. What is required to be stated in (a) name and address of the manufacturer, (b) identity of commodity, and (c) total number of retail packages or net quantity. Shri Ravinder Narain is quite justified in relying on Rule 2(x) and Rule 2(q) (sic 29). The Tribunal does not refer to these vital Rules.*

34. *There is one more substantial reason supporting the appellant. Shri Ravinder Narain invited our attention to Rule 34 in Chapter V of the SWM (PC) Rules which provides for exemptions. We have quoted Rule 34 earlier. The Rule has now been amended. However, under the unamended Rule there is a specific declaration that the SWM (PC) Rules shall not apply to any "package" containing a commodity if the marking on the package unambiguously indicates that it has been specially packed for the exclusive use of any industry as a raw material or for the purpose of "servicing any industry, mine or quarry". Learned counsel points out that the "package" which is sold by the assessee mentions that it is specially packed for the exclusive use of the catering industry.*

35. *Learned counsel further argues that such "package" was for the purposes of "servicing the hotel industry or catering industry" as the case may be. Learned counsel is undoubtedly right when he seeks to rely on Rule 34 which provides for exemption of the "packages" which are specially packed for the exclusive use of any industry for the purposes of "servicing that industry". Shri Subba Rao supported the view expressed by the Tribunal that the words "servicing any industry" could not cover the present case and he further suggested that ice cream cannot be a "raw material" for any industry. He is undoubtedly right that ice cream cannot be termed as "raw material" for any industry. However, the words "or for the purposes of servicing any industry" are broad enough to include the transaction in*

question i.e., the sale of a pack of ice cream to the hotel industry. Hotel does not manufacture the ice cream and is dependent entirely upon the sale of ice cream to it by the assessee for ultimately catering the commodity in the package i.e., ice cream to the ultimate consumer. In our view this can be squarely covered in the term "servicing any industry". The word "service" is a noun of the verb "to serve". This Court in Coal Mines Provident Fund Commr. v. Ramesh Chander Jha in a different context, observed as under : (SCC p.592, para 7)

"7. The word 'service' in Section 2(17)(h) must necessarily mean something more than being merely subject to the order of the Government or control of the Government. To serve means 'to perform function; do what is required for'."

4.6 Reliance placed by the Revenue on the case of Federation of Hotel and Restaurant Associations of India [2018 (359) ELT 97 (SC)] also does not help the case as the issue involved in the said case was not with reference to the provisions of Section 4A of the Central Excise Act. In the said decision Hon'ble Supreme Court has held that the sale of packaged mineral water by hotel to their clients is inclusive of the cost of bottle plus the services provided. Accordingly they have held that the sale at price higher than the affixed MRP is not in contravention of the provisions of Legal Metrology Act. Para 13 of the said decision reads as follows:-

"13. *On a reading of the said Act and the Rules made thereunder, it is clear that the position qua "sale" remains exactly the same as that contained in the 1976 Act, which now stands repealed. This being the case, we are of the view that the learned Single Judge was absolutely correct in his conclusion that despite the constitutional amendment having been passed, the definition of "sale" contained both in the 1976 Act and now in the 2009 Act would go to show that composite indivisible agreements for supply of services and food and drinks would not come within the purview of either enactment, and that this is for the very good reason that the object for both these enactments is something quite different - the object being, as has been pointed out above, to standardize weights and measures for*

defined goods so that quantities that are supplied are thus mentioned on the package and that MRPs are mentioned so that there is one uniform price at which such goods are sold."

4.7 Further we also take note of Circular No. 625/16/2002-CX dated 28.02.2002 wherein it has been clarified as follows:-

*"5. A somewhat similar issue was examined by the Board earlier vide letter **F. No. 341/64/97-TRU, dt. 11-8-97** [1997 (95) E.L.T. T3]. This clarification was issued in the context of certain assesseees printing MRP on packages even where there was no statutory requirement to do so under the Standards of Weights & Measures Act, 1976. It was clarified that in such cases duty will be charged u/s. 4 of C.E. Act, 1944 and not u/s. 4A (the clarification dt. 11-8-97 did not, however, specifically mention whether the disputed goods were notified u/s. 4A or not and whether it covered only non-notified goods).*

6. It is, therefore, clarified that, in respect of all goods (whether notified u/s. 4A or not) which are not statutorily required to print/declare the retail sale price on the packages under the provisions of the Standards of Weight & Measures Act, 1976, or the rules made thereunder or any other law for the time being in force, valuation will be done u/s. 4 of the C.E. Act, 1944 [or under Section 3(2) of the Central Excise Act, 1944, if tariff values have been fixed for the commodity]. Thus, there could be instances where the same notified commodity would be partly assessed on the basis of MRP u/s. 4A and partly on the basis of normal price (prior to 1-7-2000) or transaction value (from 1-7-2000), u/s. 4 of the C.E. Act, 1944."

While modifying the above circular, the Board has vide Circular No. 873/11/2008-CX dated 24.06.2008, specifically stated as follows:-

"I am directed to inform that the Board has decided not to file a review petition in the case of M/s. Jayanti Food Processing [Ref. [2007 \(215\) E.L.T. 327](#) (S.C.), dated 22-8-2007]. In this case, the Supreme Court has pronounced on the applicability of SWM (PC) Rules, 1977 in the context of assessment under Section 4 or Section 4A"

5.1 In view of the above, we do not find any merit in the impugned order.

5.2 The impugned order is set aside and the appeal allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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