CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

CUSTOMS APPEAL No. 86734 of 2017

(Arising out of Order-in-Original No. 181/2016-17/CC/NS-I/JNCH dated 02.03.2017 passed by Principal Commissioner of Customs, JNCH, Nhava Sheva-I, Nhava Sheva.)

Fine Equipments (India) Private Limited **.....Appellants**
Fine Centre, S. No. 15, Behind Shroff Shrushti
Off Mumbai-Bangalore Highway,
Mhalunge, Pune – 411045.

VERSUS

Principal Commissioner of Customs **.....Respondent**
Jawaharlal Nehru Customs House (JNCH)
Nhava Sheva-I Commissionerate
Nhava Sheva, District Raigad
Maharashtra - 400 707.

and

CUSTOMS APPEAL No. 86735 of 2017

(Arising out of Order-in-Original No. 181/2016-17/CC/NS-I/JNCH dated 02.03.2017 passed by Principal Commissioner of Customs, JNCH, Nhava Sheva-I, Nhava Sheva.)

Neeraj Gaur **.....Appellant**
Director, Fine Equipments (India) Private Limited
Fine Centre, S. No. 15, Behind Shroff Shrushti
Off Mumbai-Bangalore Highway,
Mhalunge, Pune – 411045.

VERSUS

Principal Commissioner of Customs **.....Respondent**
Jawaharlal Nehru Customs House (JNCH)
Nhava Sheva-I Commissionerate
Nhava Sheva, District Raigad
Maharashtra - 400 707.

APPEARANCE:

Shri T. Vishwanathan a/w Shri Akhilesh Kangsia & Ms Apoorva Parihar, Advocates for the Appellants
Shri Adeeb Pathan, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87592-87593/2023

Date of Hearing: 12.12.2023
Date of Decision: 12.12.2023

PER : M.M. PARTHIBAN

These appeals have been filed by M/s Fine Equipments (India) Private Limited, Pune and Shri Neeraj Gaur, Director of the aforesaid company (herein after, referred together as 'the appellants'), assailing Order-in-Original No. 181/2016-17/CC/NS-I/JNCH dated 02.03.2017 (herein after, referred to as 'the impugned order')passed by Principal Commissioner of Customs, JNCH, Nhava Sheva-I, Nhava Sheva.

2.1 The facts of the case, leading to this appeal, are summarised herein below:

2.2 The appellants herein, had imported 'Hydraulic Rock Breakers' through Jawaharlal Nehru Customs House (JNCH) and for this purpose have filed Bill of Entry (B/E) No. 4960970 dated 20.03.2014, classifying it under Customs Tariff Item 8431 4930 and self-assessed the customs duty payable thereon by availing preferential trade agreement concession under Notification No.152/2009-Customs dated 31.12.2009for imports from Korea and by paying the additional duty of customs (CVD) on the basis of Retail Sale Price (RSP/MRP). The said B/E was assessed by the proper officer of customs on second check basis; upon examination of the cargo by the customs officers, it was found that the appellants had declared the RSP and paid the applicable duty thereon, however there was no labels pasted, affixed or printed on the package, providing the mandatory declarations to be made under the provisions of Legal Metrology Act, 2009 and Legal Metrology (Packaged Commodities) Rules, 2011. Accordingly, the Department had initiated investigation proceedings and upon completion of the same have issued Show Cause Notice (SCN) dated 14.10.2015, demanding differential additional duty of customs in respect of the subject B/E, as well as such duty involved in respect of the clearances made in the past, under Section 28(4) the Customs Act, 1962 along with interest, and proposing for confiscation of impugned goods and for imposition of penalty on the appellants under provisions the Customs Act, 1962. The said SCN was adjudicated by the learned Principal Commissioner of Customs in the impugned order by confirming the proposals made in the SCN. Feeling aggrieved with the impugned order, the appellants have filed these appeals before the Tribunal.

3.1 Learned Advocate for the appellants submitted that the imported goods in the present case are not pre-packed commodities as defined under Section 2(l) of the Legal Metrology Act, 2009, since the goods as imported is not found in a packing, but wrapped in plastic sheet for protection from rusting. He further stated that this does not qualify as pre-packed commodity, since the plastic wrapping of the imported goods is for safe transportation and for protecting from rust, which can never be equated with packages meant for retail sale as understood in the Legal Metrology Act. Further, he claimed that the imported goods are not intended for retail sale, therefore, Rule 3 of Packaged Commodity Rules will not apply to their case. In addition to this, he stated that the imported goods having a weight of more than 350 kg. per piece and the weight of goods individually ranging upto 1850 kg. clearly stands excluded from the scope of packaged commodity, in terms of Rule 2A *ibid*. The said Rule 2A excludes goods weighing more than 25kg. and those commodities, meant for sale to industrial or institutional consumers from the scope of application of chapter II of the Rules of 2011, which prescribe the mandatory declaration on the package.

3.2 He further submitted that there is no provision under the Customs Act, 1962 and/or in the Customs Tariff Act, 1975, enabling the Customs Department to determine the Retail Selling Price, in the absence of declaration displaying the RSP on the imported goods, by multiplying the CIF prices predetermined factor to arrive the same or by conducting market survey etc. As there is no such powers granted to the customs officer either under Section 4A of the Central Excise Act 1944, or under Section 3 of the Customs Tariff Act, 1975, determination of additional duty of customs payable as confirmed in the impugned order does not have any legal basis, and therefore on this ground alone, the adjudged demands are liable to be set aside. Learned Advocate also stated that interest under Section 28AA ibid and penalty under the Section 112 *ibid* are also not sustainable, as these are not applicable to additional duty of customs leviable under Section 3 of the Customs Tariff Act, 1975, in the absence of specific legal provisions enabling for application of such Section to CVD.

3.3 In support of their stand, the appellants had relied upon the following judicial pronouncements:

(i) ABB Ltd., Vs. Commissioner of Customs, Bangalore – 2011 (272) E.L.T. 706 (Tri. – Bang.)

(ii) Commissioner of Customs, New Delhi Vs. V.J. Traders - 2019 (366) E.L.T. 909 (Tri. – Del.) and upheld by the Hon'ble Supreme Court in 2019 (366) E.L.T. A188 (S.C.)

(iii) Jayanthi Food Processing (P) Ltd. Vs. Commissioner of C, Ex., Rajasthan 2007 (215) E.L.T. 327 (S.C.)

(iv) Mahindra & Mahindra Ltd. (Automotive Sector) Vs. Union of India – 2022-VIL-690-BOM-CU

4. On the other hand, learned Authorised Representative for Revenue reiterated the findings of the Principal Commissioner in the impugned order, and submitted that the fact of the imported goods having been covered under the entry at Sl. No. 109 of Notification No.49/2008-C.E. (N.T.) dated 24.12.2008, as amended by Notification No.19/2010-C.E. (N.T.), dated 29.04.2010 prescribing the levy of additional duty of customs on the basis of RSP/MRP is not in dispute. Hence, the factors such as weight of the impugned goods, mode of its sale, do not change the measure of levy of such goods on RSP basis. The appellants have taken the plea that the imported goods are not liable to CVD on the basis of RSP based valuation, after the Department had started the investigation; this is in the nature of retraction and such claim is not duly supported by any evidence. Therefore, he prayed that the appeals preferred by the appellants are liable to be set aside.

5. Heard both sides and perused the records of the case.

6. The short issue for consideration before the Tribunal in this case is,-

(i) whether theimported 'Hydraulic Rock Braker' is liable to additional duty of Customs (CVD) on the basis of Retail Sale Price (RSP/MRP) under Section 3(1) of the Customs Tariff Act, 1975, or not?

(ii) whether the re-determination of MRP/RSP of the imported goods on the basis of market survey report, and demand of differential additional duty of customs, as confirmed in the impugned order is legally sustainable or not?

7. In order to address the above issues, we would like to refer the relevant legal provisions contained in Customs Tariff Act, 1975; Central Excise Act, 1944; and Legal Metrology Act, 2009 read with Legal Metrology (Packaged Commodities) Rules, 2011, for determination of proper additional duty of Customs (CVD) applicable on the subject goods under dispute. The disputed period in the present case relates to 30.10.2010 to 10.06.2015.

Customs Tariff Act, 1975

Section 3. Levy of additional duty equal to excise duty, sales tax, local taxes and other charges.

(1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article;

xxx xxx xxx xxx

(2) For the purpose of calculating under sub-sections (1) and (3), the additional duty on any imported article, where such duty is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962 (52 of 1962), be the aggregate of-

(i) the value of the imported article determined under sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and

(ii) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962 (52 of 1962), and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include—

(a) the duty referred to in sub-sections (1), (3), (5), (7) and (9);

xxx xxx xxx

***Provided** that in case of an article imported into India, --*

(a) in relation to which it is required, under the provisions of the Legal Metrology Act, 2009 (1 of 2010) or the rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such article; and

(b) where the like article produced or manufactured in India, or in case where such like article is not so produced or manufactured, then, the class or description of articles to which the imported article belongs, is—

(i) the goods specified by notification in the Official Gazette under sub-section (1) of section 4A of the Central Excise Act, 1944 (1 of 1944), the value of the imported article shall be deemed to be the retail sale price declared on the imported article less such amount of abatement, if any, from such retail sale price as the Central Government may, by notification in the Official Gazette, allow in respect of such like article under sub-section (2) of section 4A of that Act; or

Explanation: Where on any imported article more than one retail sale price is declared, the maximum of such retail sale price shall be deemed to be the retail sale price for the purposes of this section;

Provided further that in the case of an article imported into India, where the Central Government has fixed a tariff value for the like article produced or manufactured in India under sub-section (2) of section 3 of the Central Excise Act, 1944 (1 of 1944), the value of the imported article shall be deemed to be such tariff value

Explanation: Whereon any imported article more than one retail sale price is declared, the maximum of such retail sale price shall be deemed to be the retail sale price for the purposes of this section.

Central Excise Act, 1944

"Section 4A.Valuation of excisable goods with reference to retail sale price.
(1) The Central Government may, by notification in the Official Gazette, specify any goods, in relation to which it is required, under the provisions of the Legal Metrology Act, 2009 (1 of 2010) or the rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such goods, to which the provisions of sub-section (2) shall apply.

(2) Where the goods specified under sub-section (1) are excisable goods and are chargeable to duty of excise with reference to value, then, notwithstanding anything contained in section 4, such value shall be deemed to be the retail sale price declared on such goods less such amount of abatement, if any, from such retail sale price as the Central Government may allow by notification in the Official Gazette.

(3) The Central Government may, for the purpose of allowing any abatement under sub-section (2), take into account the amount of duty of excise, sales tax and other taxes, if any, payable on such goods.

(4) Where any goods specified under sub-section (1) are excisable goods and the manufacturer—

> *(a) removes such goods from the place of manufacture, without declaring the retail sale price of such goods on the packages or declares a retail sale price which is not the retail sale price as required to be declared under the provisions of the Act, rules or other law as referred to in sub-section (1); or*
>
> *(b) tampers with, obliterates or alters the retail sale price declared on the package of such goods after their removal from the place of manufacture,*

then, such goods shall be liable to confiscation and the retail sale price of such goods shall be ascertained in the prescribed manner and such price shall be deemed to be the retail sale price for the purposes of this section.

xxx xxx xxx xxx:

LEGAL METROLOGY ACT, 2009

"Definitions

Rule 2. *In this Act, unless the context otherwise requires-—*

xxx xxx xxx xxx

(l) "pre-packaged commodity" means a commodity which without the purchaser being present is placed in a package of whatever nature, whether sealed or not, so that the product contained therein has a pre-determined quantity;

Legal Metrology (Packaged Commodities) Rules, 2011

"Definitions

Rule 2. *In these rules, unless the context otherwise requires-—*

xxx xxx xxx xxx

(l) retail sale", in relation to a commodity, means the sale, distribution or delivery of such commodity through retail sales shops, agencies or other

instrumentalities for consumption by an individual or a group of individuals or any other consumer;

(m) retail sale price" means the maximum price at which the commodity in packaged form may be sold to the consumer inclusive of all taxes;

Chapter II

PROVISIONS APPLICABLE TO PACKAGES INTENDED FOR RETAIL SALE

Rule 3 with effect from 06.06.2013
***Rule 3. 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.

[1]Rule 3 with effect from 01.01.2018
Rule 3. Application of Chapter.
The provisions of this chapter shall not apply to—
(a) packages of commodities containing quantity of more than 25 kilogram or 25 litre;
(b) cement, fertilizer and agricultural farm produce sold in bags above 50 kilogram; and
(c) packaged commodities meant for industrial consumers or institutional consumers.

[2]Rule 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.'.”

Notification No.49/2008-C.E. (N.T.) dated 24.12.2008

MRP based valuation:
“In exercise of the powers conferred by sub-sections (1) and (2) of section 4A of the Central Excise Act, 1944 (1 of 1944) the Central Government, in supersession of the notification of the Government of India in the Ministry

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[1]Substituted by G.S.R. 629(E), dated 23rd June, 2017, for rule 3 (w.e.f. 1-1-2018). Earlier rule 3 was amended by G.S.R. 359(E), dated 6th June, 2013 (w.e.f. 6-6-2013). Rule 3, before substitution, stood as given in that paragraph, just prior to that.

[2]Notification*G.S.R. 425(E) dated 17.07.2006, providing Section 2A as it existed in the erstwhile Standards of Weights and Measures (Packaged Commodities) Rules, 1977, before introduction of the current Legal Metrology (Packaged Commodities) Rules, 2011.*

of Finance (Department of Revenue) No. 14/2008-Central Excise (N.T.), dated the 1st March, 2008, published in the Gazette of India Extraordinary, vide number G.S.R. 147(E) of the same date, except as respects things done or omitted to be done before such supersession, hereby specifies the goods mentioned in Column (3) of the Table below and falling under Chapter or heading or sub-heading or tariff item of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) mentioned in the corresponding entry in column (2) of the said Table, as the goods to which the provisions of sub-section (2) of said section 4A shall apply, and allows as abatement the percentage of retail sale price mentioned in the corresponding entry in column (4) of the said Table.

S. No.	***Chapter, heading, sub-heading or tariff item***	***Description of goods***	***Abatement as a percentage of retail sale price***
(1)	*(2)*	*(3)*	*(4)*
xxx	*xxx*	*xxx*	*xxx*
109.	*Any Chapter*	*Parts, components and assemblies of automobiles*	*30".*

and

Notification No.19/2010-C.E. (N.T.) dated 29.04.2010

MRP based valuation for parts, components and assemblies of specified earth moving equipments, forklift trucks, etc.

"In exercise of the powers conferred by sub-section (1) and (2) of section 4A of the Central Excise Act, 1944 (1 of 1944), the Central Government hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 49/2008-Central Excise (N.T.), dated the 24th December, 2008, published in the Gazette of India, Extraordinary, vide number G.S.R. 882(E), dated the 24th December, 2008, namely :-

In the said notification, in the Table, after S. No. 108 and the entries relating thereto, the following shall be inserted, namely :-

(1)	*(2)*	*(3)*	*(4)*
"109.	*Any Chapter*	*Parts, components and assemblies of goods falling under tariff item 8426 41 00, headings 8427, 8429 and sub-heading 8430 10*	*30".*

8.1 On careful perusal of the above legal provisions, it transpires that the Additional Duty of Customs (CVD) is leviable on any imported goods under Section 3 of the Customs Tariff Act, 1975. The value for the purpose of determining CVD is provided under sub-section (2) of Section 3 *ibid*, is the transaction value or the tariff value, as determined under Section 14 of the Customs Act, 1962. In terms of the proviso to Section 3(2) ibid, the value of the imported goods shall be determined on the basis of RSP/MRP declared on the package thereof, if such imported goods fulfill both the following two legal requirements. These are, firstly (i) there shall be a requirement under the Legal Metrology Act, 2009 or the rules made thereunder, for declaration of RSP/MRP on the packages thereof; and secondly (ii) the excise duty on like article produced or manufactured in India, to that of the imported goods, are subjected to RSP/ MRP based levy under Section 4A of the Central Excise Act, 1944.

8.2 On careful perusal of the facts on record, and the entry appearing in Sl. No. 109 of Notification No.49/2008-C.E. (N.T.) dated 24.12.2008 as amended by Notification No.19/2010-C.E. (N.T.), dated 29.04.2010, it transpires that the imported goods falling under 'any chapter' of the First Schedule to the Central Excise Tariff, and covered by the description viz., "Parts, components and assemblies" of goods falling under tariff item 8426 41 00, headings 8427, 8429 and sub-heading 8430 10, are liable to be pay CVD/Central Excise duty on the basis of RSP/MRP, in terms of the above notification. The imported 'Hydraulic Rock Breaker' being parts, components and assemblies of Excavators classifiable under tariff item 8429 4030, are rightly covered under the scope of the entry under the above notification. Thus, we find that the second legal requirement is fulfilled in the present case.

8.3 As regards the first legal requirement, we find that the scope of the coverage of Legal Metrology Act and Rules made thereunder, has specifically provide for declaration of mandatory details including the RSP/MRP only in respect of "pre-packaged commodity" under Rule 6 *ibid*. The phrase, pre-packed commodity has also been defined to mean a commodity which without the purchaser being present is placed in a package of whatever nature, whether sealed or not, so that the product contained therein has a pre-determined quantity. In ascertaining the nature of the imported goods, whether these are in the pre-packed form or not, we may take the aid of the examination report of the Special Intelligence & Investigation Branch of the JNCH Customs Commissionerate, which is given in para 5 of the SCN dated 14.10.2015 and the impugned order, which is extracted and given below:

> *"The goods were again examined 100% by Shed staff, under SIIB supervision. On examination description & quantity of goods were found to be as per invoice & detailed packing list. The Hydraulic Rock Breakers were found to be packed in wooden crates and spares mentioned as item no. 6 to 19 of bill of entry were found packed in 10 wooden crates. These spare parts were found in bulk packing, not individually packed."*

From the factual position arising in the report of examination of the impugned goods conducted by the customs officers as above, it clearly transpires that the imported goods were not in a packaged form to constitute the same as pre-packaged commodity. Further, the learned Principal Commissioner in the impugned order had taken note of the fact that the imported goods viz., Hydraulic Rock Breaker was weighing approximately 350 Kg. each and the highest model Fine 23X weighing approximately 1850 Kg. In this regard we find that the packages of commodities containing quantity of more than 25 kilogram, are specifically excluded from the scope of coverage of Legal Metrology (Packaged Commodities) Rules in terms of Rule 2A/3 *ibid* and thus not fulfilling the first legal requirement for levy of CVD on MRP/RSP basis. In view of the aforesaid legal position, we have no hesitation to conclude that the imported Hydraulic Rock Breaker in the present case does not fall under the scope of coverage of Legal Metrology (Packaged Commodities) Rules, 2011. Inasmuch as, the essential legal requirements of declaration of RSP/MRP on the packages thereof under the Legal Metrology Act, 2009 or the rules made thereunder, having not been fulfilled in the present case, the demand of additional duty of customs (CVD) in the impugned order, on the basis of MRP/RSP based to levy is not legally sustainable.

9. We also find that the appellants have stated that the imported Hydraulic Rock Braker is meant for sale to industrial and institutional consumers. They supply these goods to the owners of excavator machines who gives such machines on lease basis for construction industry or for excavation service industry; these are not meant for sale or supply to individual consumer. Thus, they contended that the imported goods will qualify for supply to institutional or industrial consumer. Therefore, they stated that the imported goods do not fall within the purview of Packaged Commodities Rules by placing reliance on various judgements of the judicial forum such as Commissioner of Customs (Imports), Nhava Sheva Vs. King Kaveri Trading Co. – 2019 (370) E.L.T. 1049 (Tri. – Mumbai); Jayanthi Food Processing (P) Ltd. Vs. Commissioner of C. Ex., Rajasthan – 2007 (215) E.L.T. 327 (S.C.). Further, the appellants have also contended that the legal position in respect of goods sold in loose form, without packing, are not covered under the scope of the Packaged Commodities Rules, as has been clarified by the Legal Metrology Division of the Ministry of Consumer Affairs, Food and Public distribution vide Circular No. WM/10(5)/2016 dated 16.12.2016. The copy of the said circular is extracted and given below:

WM-10(5)/2016
Government of India
Ministry of Consumer Affairs, Food and Public Distribution
Department of Consumer Affairs
Legal Metrology Division

Krishi Bhawan, New Delhi
Dated: ..16.12.2016

To,

The Controllers of Legal Metrology,
All States/ UTs

Subject:-The Legal Metrology (Packaged Commodities) Rules, 2011 - Advisory for enforcement of provisions of Rules for Readymade Garments/ Hosiery products - regarding.

Sir,

The undersigned is directed to refer to the references received from M/o Textiles and Industry Associations regarding the labeling requirements of readymade garments.

2. In this context, in continuation of this Department's letter No. WM-10(5)/2016 dated 16th September, 2016 it is further advised that:

(i) The mandatory labeling requirements under the Legal Metrology (Packaged Commodities) Rules, 2011 are applicable only for pre-packaged commodities, defined under Section 2(l) of the Legal Metrology Act, 2009.

(ii) The mandatory labeling requirements for pre-packaged commodities are therefore not applicable to garments sold in loose form.

(iii) The labeling requirements for garments sold in loose form in retail stores may include only the following declaration w.e.f. 1st July 2017:-

(a) Name/ Description of the product

(b) Size: Internationally recognizable size indicators - S, M, L, XL, etc. along with details in metric notation in terms of cm or m as case may be.

(c) MRP

(d) Name, Full address & Customer Care No. of the manufacturer

3. In the case of readymade garments sold to consumer in Pre-packaged form, declarations required under the Rules may be made. Further, the size of the garments needs to be mentioned in metres or centimetres, as the case may be, and any additional detail such as S, M, L, XL, XXL etc. may be treated as additional declaration.

4. This issues with the approval of the Competent Authority.

The above circular issued by Line Ministry dealing with the Legal Metrology (Packaged Commodities) Rules have clearly spelt out mandatory declaration on the packages thereof, including RSP/MRP is applicable only to the goods sold to the consumer in pre-packed form and this will not apply for those goods sold in loose form. Thus, it follows that when the competent authority in the line Ministry dealing with the parent statue administered by them, have clarified the correct legal position, the same is required to be followed by the other governmental authorities, including Customs field formations, for the purpose of uniformity in implementation of the law. Therefore, we are of the opinion, that a different view cannot be taken which is contrary to the clarification, in the circular issued by the Legal Metrology Division of the Ministry of Consumer Affairs. Accordingly, we find that the impugned order, insofar as it had concluded that the Hydraulic Rock Brakers imported by the appellants as subjected to RSP/MRP based levy of additional duty of customs is not legally sustainable.

10.1 In this regard, we find that on a similar set of facts, in the case of *King Kaveri Trading Co.* (supra), the Co-ordinate Bench of the Tribunal has dealt with the similar issue of levy of additional duty of customs on RSP/MRP basis in respect of import of trailer parts and have held that on account of the fact that the parts are of heavy weight, these are excluded from the scope of coverage of Packaged Commodity Rules and that the adoption of another price by the customs officer does not constitute proper assessment of duty. The relevant paragraphs of the said order is extracted and given below:

> *"3. Learned Counsel for the respondent contends that goods are not packed and that these parts are of heavy weight and thereby excluded under coverage of Rule 2B of Packaged Commodity Rules, 1977. It is also informed that the importer manufactures product out of these imported parts and that the trailer is not an automobile that can be covered under the said notification as claimed by the Learned Authorised Representative.*
>
> *4. We find that Sl. No. 97, which came into force from 1st June, 2006, pertains to the valuation for levy of additional duties of customs on 'parts, components and assemblies of automobiles. 'It is seen that the definition of 'commodity in packaged form' in Standards of Weights and Measures Act, 1976 covers any sort of packing if the commodity itself is distinguishable as units suitable for sale, whether wholesale or retail. The decision of the Tribunal in HPL Electric & Power Ltd. v. Commissioner of Central Excise, New Delhi [2018 (12) G.S.T.L. 36 (Tri- Del.)] cited by Learned Authorised Representative pertains to switchgears. It is an admitted fact that these are parts of trailers and trailers would need to be assembled before it can be put to use as product. In Rule 2A of Packaged Commodity Rules, 1977, 'industrial consumer' defined as -*
>
>> *'means consumers who buy packaged commodities directly from the manufacturers/packers for using the product in their industry for production, etc.'*

are privileged for exemption from the mandate of affixing 'maximum retail price'.

5. Learned Counsel for the respondent, while admitting that the demand of additional duties of customs were being effected under Section 4A of Central Excise Act, 1944, submits that the practice was given up from 9th July, 2009 after informing the Customs authorities. We also find from the decision of ABB Ltd. v. Commissioner of Customs, Bangalore [2011 (272) E.L.T. 706 (Tri.-Bang.)] that the fundamental issue is the correctness of application of the Rules framed under Section 4/4A of Central Excise Act, 1944 to an assessment of additional duties of customs under the Customs Tariff Act, 1975. It is seen from the provisions therein that, for the purpose of additional duties of customs, the default mechanism is

> *'SECTION 3. xxx*
> *(2) For the purpose of calculating under sub-sections (1) and (3), the additional duty on any imported article, where such duty is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962 (52 of 1962), be the aggregate of—*
> *(i) the value of the imported article determined under sub-section (1) of Section 14 of the Customs Act, 1962 (52 of 1962) or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and*
> *(ii) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962 (52 of 1962), and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include —*
> *(a) the duty referred to in sub-sections (1), (3) and (5);*
> *(b) the safeguard duty referred to in sections 8B and 8C;*
> *(c) the countervailing duty referred to in section 9; and*
> *(d) the anti-dumping duty referred to in section 9A:'*

However, the proviso requires that the value of the imported article be deemed to be the 'retail sale price' declared on the imported article less such amount of abetment, as by notification allowed. It is, therefore, apparent from Section 3 of the Customs Tariff Act, 1975 that no provision exists for ascertainment of 'retail sale price' in the same manner as provided for in Section 4A of Central Excise Act, 1944. The purpose of Section 4A of Central Excise Act, 1944 has been clearly articulated when it was incorporated in the statute. On the other hand, Section 3 of Customs Tariff Act, 1975 was intended to ensure that the valuation adopted for customs purpose, would have to conform to the price at which the goods are intended to be sold in packages that are statutorily required to carry such prices on them. Hence a declaration of 'retail sale price' would suffice for acceptance as value for computation of additional duties of customs.

6. The respondent herein has taken a position that the goods are not required, under the provisions of Standards of Weights and Measures Act, 1976 or the Rules made thereunder, to declare so on the packages of import. There is, therefore, no provision for determination of retail sale price in the event of disagreement by the proper officer of customs with the declaration. In these circumstances, and in the absence of declaration of retail sale price, the adoption of another price by the proper officer of customs does not constitute the appropriate assessment. For this reason, we find no merits in the appeal of Revenue, which is dismissed."

10.2 We further find that the Hon'ble Supreme Court in the case of *Jayanthi Food Processing (P) Ltd., (supra)* have held that if the appellant is successful in showing that there is no requirement under the Standards of Weights and Measures Act or the Rules made thereunder for declaration of MRP on the package, then there is no question of application of Section

4A(1)&(2) of the Act for MRP/RSP based levy. The relevant paragraphs of the said judgement is extracted and given below:

> *"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.*
>
> *xxx xxx xxx xxx*
>
> *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.

xxx xxx xxx xxx

28…… It was rightly contended before the Tribunal that the thrust of Section 4A is on the packages and not on the commodity and it is only where the goods are sold in the packages that the section would be attracted. The submission was undoubtedly right. The Tribunal, while rejecting this submission, has clearly ignored the language of Section 4A(1) of the Act."

11. In view of the foregoing discussions and analysis, and on the basis of the judgements of judicial forum referred above, we are of the opinion, that the imported 'Hydraulic Rock Braker' is not leviable to additional duty of Customs (CVD) on the basis of Retail Sale Price (RSP/MRP) under Section 3(1) of the Customs Tariff Act, 1975, but on the basis of transaction value as determined under the Customs Act, 1962. Therefore, we are of the considered view, that the impugned order passed by the learned Principal Commissioner of Customs in confirmation of the adjudged demands cannot

be sustained on merits. Accordingly, the impugned order is set aside and the appeals are allowed in favour of the appellants.

12. In the result, the impugned order dated 02.03.2017 is set aside and the appeals are allowed in favour of the appellants.

(Operative portion of the order pronounced in Court)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

(M.M. PARTHIBAN)
MEMBER (TECHNICAL)

Sinha