

::आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,

द्वितीय तल, आ एस टी भवन / 2nd Floor, GST Bhavan,

रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

Tele Fax No. 0281 - 2477952/2441142 Email: cexappealsrajkot@gmail.com



सत्यमेव जयते

रजिस्टर्ड ड्राफ्ट ए.डी.द्वारा :-

क	अपील / फाइल संख्या/ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/117 & 118/RAJ/2019	AC/JAM-I/C.Ex/11 to 12/2019- 20	28/06/2019

ख अपील आदेश संख्या (Order-In-Appeal No.):

RAJ-EXCUS-000-APP-019-TO-020-2020

आदेश का दिनांक / Date of Order:	29.01.2020	जारी करने की तारीख / Date of issue:	29.01.2020
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**श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित/
Passed by Shri Gopi Nath, Commissioner (Appeals), Rajkot**

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/ वस्तु एवं सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST,
Rajkot / Jamnagar / Gandhidham. :

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता / Name & Address of the Appellants & Respondent :-**

M/s Swan Sweets Pvt Ltd, Survey no. 126, VASAI, Jamnagar- Khambhaliya highway, Jamnagar-361006.

इस आदेश (अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है।/
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को जानी चाहिए।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016 को जानी चाहिए।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रूपए 5 लाख या उससे कम, 5 लाख रूपए या 50 लाख रूपए तक अथवा 50 लाख रूपए से अधिक है तो क्रमशः 1,000/- रूपये, 5,000/- रूपये अथवा 10,000/- रूपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रूपए का निर्धारित शुल्क जमा करना होगा।/
The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/- Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रूपए 5 लाख या उससे कम, 5 लाख रूपए या 50 लाख रूपए तक अथवा 50 लाख रूपए से अधिक है तो क्रमशः 1,000/- रूपये, 5,000/- रूपये अथवा 10,000/- रूपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रूपए का निर्धारित शुल्क जमा करना होगा।/
The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fee of Rs. 1,000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2a) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकती एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उसमें से एक प्रतियाँ प्रामाणिक होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपील न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। /
The appeal under sub section (2) and (2A) of the section 86 of the Finance Act 1994, shall be filed in Form ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.
- (ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेक्टर) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्त यह कि इस धारा के प्रावधान, वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होगा। /
For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,
Under Central Excise and Service Tax, "Duty Demanded" shall include :
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.
- (C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid.
- (i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। /
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse
- (ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
- (iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
- (iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इयूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समयावधि पर या बाद में पारित किए गए हैं। /
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
- (v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the O.I.O and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहां संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
- (D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O.-as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.
- (F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
- (G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER IN APPEAL ::

M/s Swan Sweets Pvt. Ltd., Plot No. 126, Jamnagar-Khambalia Highway, at Post Vasai, Jamnagar-361006. (hereinafter referred to as '**the appellant**') filed the present appeals against OIO Nos. AC/JAM-I/C.Ex/11 to 12/2019-20 dated 28.06.2019 (hereinafter referred to as the '**impugned orders**') passed by the Assistant Commissioner, GST & Central Excise, Division-I, Jamnagar (hereinafter referred to as the '**adjudicating authority**').

2. Briefly stated facts of the case are that during the course of audit, it was noticed that the appellant was manufacturing sugar confectionery viz. candy, toffee, chocolate and bubble gum weighing less than 10 gms. per piece, falling under the chapter heading No. 1704.90 and 1804.90 of the Central Excise Tariff Act, 1985. The appellant was packing those items in cartons/jars/boxes and cleared the same containing number of pieces and not by weight of the excisable goods, on payment of Central Excise duty on the basis of valuation adopted under Section 4 of the Central Excise Act (hereinafter referred to as the '**Act**'). The audit officers observed that valuation of the goods under Section 4 of the Act was not correct in respect of the goods having such pattern of packing and should be assessed under Section 4A of the Act. Thus, the goods manufactured by the appellant and packed in multi pieces packages viz. cartons / jars / boxes were ultimately sold in small retail packing to the actual consumers and therefore, it was alleged that the exemption envisaged under the provisions contained in Rule 34(1)(b) of Standards of Weights and Measures (Packaged Commodities) Rules, 1977, and now Rule 26(a) of Legal Metrology (Packed Commodities) Rules, 2011 was not applicable to them. Further, the appellant had claimed exemption under the proviso to erstwhile sub-rule (1)(b) of Rule 17 of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 which was omitted in Legal Metrology (Packed Commodities) Rules, 2011. CBEC vide circular No. 492/58/99-CX dated 02.11.1999 had clarified that multi pieces packages of commodities intended for retail sale notified under Section 4A shall be assessed to Central Excise duty under the provision of Section 4A of the Act. The appellant cleared their goods by affixing the MRP of Rs. 0.50 Paise and Rs. 1.00 per piece on the wholesale packages of their respective products which were notified under Section 4A and the said goods were sold in numbers and cleared from the factory gate in multi-piece packages. Accordingly, the appellant was required to assess their goods under the provision of Section 4A instead of provision of Section 4 of the Act. Thus, it was alleged that the appellant had cleared excisable goods by indulging into

wrong assessment under Section 4 of the Act, thereby contravened the provisions of Section 4A of the Act and Rule 4 & 6 of the Central Excise Rules, 2002, with an intention to evade payment of Central Excise Duty. The above observations led to issuance of two show cause notices as detailed below:

Sr. No.	Show Cause Notice No.	Date	Amount (in Rs.)	Period
1	V.74(4)48/Demand/2016-17	31.07.2017	40,44,128	April-2016 to December-2016
2	V.17(4)-09/Demand/2017-18	06.11.2017	17,64,867	January-2017 to June-2017

The adjudicating authority confirmed the duty amount alongwith interest vide the impugned orders.

3. Aggrieved, the appellant filed the present appeals on the following grounds:

(i) that each confectionery produced by them is of a Net Weight of less than 10 grams per piece; that each Package cleared by the appellant on payment of Central Excise duty under Section 4 of the Act contained the expression, "Wholesale Pack" on the body of the Package; such pieces were put into a jar and then cleared for sale to various dealers who sell each confectionery in retail; that the confectioneries ultimately cleared in jars or boxes, which was first bought by intermediary and not consumer and thereafter, they were finally sold as individual pieces by the shopkeeper to the consumers.

(ii) that each confectionery being less than 10 gms. the provisions of Standards of Weights and Measures Act, 1976 and the provisions of Rule 34(1)(b) of the Packaged Commodities Rules, 1977, would not be applicable and therefore, the goods, do not fall under Section 4A of the Act; that as the said goods were cleared in wholesale package and not retail package the question of declaring MRP on the packages or assessing goods under the provisions of Section 4A of the Act is out of place and hence, the provisions of Notification No. 13/2002-CE(N.T.) dated 01.03.2002 are not necessary.

(iii) that the lower adjudicating authority has placed reliance on amended Rule 2(p) and Rules 2(k) of the Legal Metrology (Packaged Commodities) Rules, 2011; that these rules are not applicable to them as the same pertains to retail package; that they rely on Rule 2(x) of the Packaged Commodity Rules, 1977 and Rule 2 (q) of the Legal Metrology (Packaged Commodities) Rules, 2011 pertaining to Wholesale Package; that they sold confectioneries to distributors,

who further sold to sub-distributors or to shopkeepers, who finally open the Jar or Box and sell to the Individual Customers. Such activity satisfied the provision of Rule 2(x) of the Packaged Commodities Rules, 2007. They sold the Jar or Carton on whole sale package to distributor, therefore the provisions of Retail Packages on declaration of MRP on packages or Assessing Goods under Section 4A of the Act is out of place in view of the Rule 2(x) read with Rule 34 (1) (b) of Packaged Commodities Rules, 1977.They requested to set aside the impugned order. They relied upon the following citations:

- CCE, Rajkot Vs Makson Confectionery Pvt. Ltd. - 2010 (259) ELT 5 (S.C.)
- Swan Sweets Pvt. Ltd. Vs CCE, Rajkot - 2006 (198) ELT 565 (Tri. - Mumbai)
- Central Arecanut & Cocoa Marketing & Processing Co-Op. Ltd. Vs CCE, Mangalore - 2008 (226) ELT 369 (Tri.- Chennai)
- CCE Vs. Central Arecanut & Cocoa Marketing & Processing Co-Op. Ltd. - 2008 (232) ELT. A-107 (S.C.)

3. In Hearing, Shri Paresh A. Bosamiya appeared on behalf of the appellant and reiterated the submission of appeal memo for consideration.

4. I have carefully gone through the facts of the cases, the impugned orders, and memorandums of appeal. The issue to be decided in the present two appeals is whether the confectionery products, like candy/toffee/chocolate etc. manufactured by the appellant merit valuation under Section 4A of the Act or Section 4 of the Act.

5. I find that the appellant has contended the valuation of goods for purpose of charging Excise duty. Duty is to be charged under Section 4A of the Central Excise Act only in respect of those goods which are mandatorily required to declare the MRP under the Legal Metrology Act and Rules. It has been claimed by the appellant that the clearances made to an intermediary on wholesale basis and such clearance has been made in wholesale packing to which the provisions of Legal Metrology Act and rules will not be applicable.

5.1 I find that during the period of dispute, the impugned goods were covered by Notification No. 49/2008-CE(NT) dated 24.12.2008, as amended issued by the Government under Section 4A of the Central Excise Act, 1944 which reads as under:

“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.”

[Emphasis supplied]

5.2 I find that the goods are packed in retail packing weighing less than 10 gms. per piece in packages ranging from 100 pieces or more in cartons, jars or boxes. These retail packages are also labelled with MRP of 50 paise and Rs. 1/- per piece. From this, it is evident that the goods are manufactured and packed for retail sale. Even if such goods packed in retail containers are further packed in bigger wholesale packages, I am of the view that the goods are liable to duty in terms of MRP based assessment under Section 4A. My view is supported by the decision of the Hon'ble CESTAT, New Delhi in the case of Commr. of. C.Ex. & S.Tax, Indore Vs Harshavardhan Laboratories P. Ltd. as reported in 2019(365) E.L.T 598(Tri.-Del) decided on 24.04.2018 wherein it has been held that –

“11. Next we turn to valuation of goods for purpose of charging Excise duty. Duty is to be charged under Section 4A of the Central Excise Act only in respect of those goods which are mandatorily required to declare the MRP under the Legal Metrology Act and rules. It has been claimed by the appellant that the clearances made to M/s. Pfizer Animal Health India Ltd. are on wholesale basis and such clearance has been made in wholesale packing to which the provisions of Legal Metrology Act and rules will not be applicable.

12. It is seen that the goods are packed in retail packing in packages containing 10, 20, 50 or 100 tablets. These retail packages are also labelled with MRP. From this, it is evident that the goods are manufactured and packed for retail sale. Even if such goods packed in retail containers are further packed in bigger wholesale packages, we are of the view that the goods are liable to duty in terms of MRP based assessment under Section 4A.”

6. I further observe that the appellant has contended that their case pertains to wholesale packages and therefore, they are not required to affix MRP as per law. I would like to extract the definition of 'wholesale package' under Rule 2(r) of Legal Metrology (Packaged Commodities) Rules, 2011 which reads as under:

“Rule 2(r) - “wholesale package” means a package containing-

- (i) a number of retail packages, where such first mentioned package is intended for sale, distribution or delivery to an intermediary and is not intended for sale direct to a single consumer; or***
- (ii) a commodity sold to an intermediary in bulk to enable such intermediary to sell, distribute or deliver such commodity to the consumer in smaller quantities; or,***
- (iii) packages containing ten or more than ten retail packages provided that the retail packages are labeled as required under the rules.”***

The above definition of 'wholesale package' comprises of more than one retail package. Hence, sale of only individual piece is retail sale is not in accordance with the definition of 'retail package'. The package i.e jar or box can be held as a retail package. No manufacturer or factory manufacturing sugar confectionary, like candy, toffee, chocolate and bubble gum will clear it individually in pieces. Therefore, I do not accept the contention of the appellant that their case pertains to wholesale package and therefore, they are not required to affix MRP as per law. Further, the mode of clearance of the products from the factory gate i.e wholesale packs would not affect the methodology of assessment under Rule 4 A of the Central Excise Act, 1944, as a wholesale pack is meant for the convenience of distribution in trade and are not intended for retail sale to the ultimate consumer.

6.1 The argument of the appellant that their case pertains to 'Wholesale Package' as defined in rule 2(x) of the Standard of Weights and Measures (Packaged Commodities) Rules, 1977 and therefore not required to affix MRP as per the law is untenable and incorrect. I find that it is clear from Rule 2(k) of Legal Metrology (Packaged Commodities) Rules, 2011 that the amended Rule 2(p) has brought a paradigm change in the concept of 'retail package' so as to mean that a package intended for retail sale to the ultimate customer for the purpose of consumption of the commodity contained therein and quite importantly also included the imported packages, which are normally huge and



bulk in size. The fall-out of the above change is that the aggregate weight of the package, i.e. jar/box/cartons has to be taken into consideration and not the weight of each toffee or candy as determinant fact for affixing MRP under Section 4A of the Act. Thus, the appellant is not entitled to exemption from provisions of Legal Metrology (Packaged Commodities) Rules, 2011 as claimed by them under Rule 26(a) of Legal Metrology (Packaged Commodities) Rules, 2011.

7. The appellant has further contended that the ratio of the judgment of laid down in their own case reported in 2006(198) E.L.T 565(Tri.-Mumbai) and affirmed by the Hon'ble Supreme Court in the case of M/s Makson Confectionery Pvt. Ltd. and others reported in 2010(259)E.L.T 5 (S.C.) no longer hold good in view of the altered legal position in the Standard of Weights and Measures Act and rules framed thereunder and therefore, the appellant was required to adopt the valuation as per the provisions of section 4A of the Central Excise Act, 1944, as held hereinabove.

8. I find that the Commissioner (Appeals), CGST, Rajkot vide OIA bearing No. RAJ-EXCUS-000-APP-333-2017-18 dated 21.03.2018 has decided the Departmental appeal on the same issue for the earlier period and allowed the Departmental appeal to which I am also in agreement.

9. In view of above discussions, I uphold the impugned orders and reject the appeals filed by appellant.

१०. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

10. The appeals filed by the Appellant is disposed off as above.

Nath
(Gopi Nath) 25/11/2020
Commissioner (Appeals)

By Regd. Post AD]

To,

M/s. Swan Sweets Pvt. Ltd.,
Plot No.126, Jamnagar-Khambhalia
Highway, At Post Vasai,
Jamnagar-361006.

मे. स्वान स्वीट्स पी. ली.,
प्लॉट नं. 126 जामनगर -खम्बालिया हाइवे,
पोस्ट वसई, जामनगर-३६१००६।

Copy to:

- 1) The Principal Chief Commissioner, CGST & Central Excise, Ahmedabad Zone, Ahmedabad.
- 2) The Commissioner, CGST & Central Excise Commissionerate, Rajkot.
- 3) The Deputy Commissioner, CGST & Central Excise, Division-I, Jamnagar.
- 4) Guard file.