PURCHASER BEING PRESENT, SECTION 4A SHALL BE ABSENT!

(By Swamy Associates, Chennai)

Valuation under Central Excise is a complicated labyrinth and the judicial pronouncements settling the disputes are the ultimate exit. No doubt, proper advocacy is the search light in such a hazy maze.

The recent decision of the Hon'ble Tribunal in the case of M/s. ITEL Industries Pvt. Ltd., Vs Commissioner of C.Ex, Calicut as reported in 2004 (163) ELT 219 (Tri.Ban) is the feedstock of this article. To appreciate the issue better, we have fragmented this article into parts.

Part-1: The Issue:

The appellants are manufacturers of telephone instruments falling under chapter heading 8517 of Central Excise Tariff Act, 1985, which are specified for assessment under Section 4A of the Central Excise Act, 1944. The products are cleared to DOT and MTNL on a contract price. The appellants claimed 40% abatement from the contract price to arrive at the assessable value whereas the department contended that the goods have to be assessed under Section 4 and not under 4A of the Act. The goods are in turn provided by DOT and MTNL to their subscribers on rental basis. In other words, DOT / MTNL retained the ownership of the goods and there is no further sale by them.

Part-2: Arguments advanced:

The Appellants contended that:

1. They have not availed the abatement from the contract price but only from the MRP declared on the package.
2. The goods are notified under Section 4A of Central Excise Act, 1944.
3. Mere fact of bulk supplies to DOT / MTNL and retention of ownership by DOT / MTNL would not take away the assessment outside the purview of Section 4A.
4. The transactions are not exempted by Rule 34 (1) (a) of Standards of Weights and Measures Act, 1976 (PC Rules).

The Revenue pleaded that:

1. The decision of the Hon'ble Tribunal in the case of Bharati Systel Ltd. [2002 (145) ELT 626 (Tri.Del)] and CBEC Circular No.625/16/2002 dated 28.02.2002 are squarely applicable to the instant case.
2. Section 4A is not applicable to the transactions as there is no retail sale by DOT/ MTNL.
3. The decision of the Hon'ble Tribunal in the case of M/s.Trishul Research Lab Pvt. Ltd. [2002 (144) ELT 204 (Tri.Del)] also supports their plea.
4. The matter be referred to the Larger Bench, in case their arguments are not accepted.

Part-3: The Decision:

The Bench after careful consideration, split on their decisions.

Hon'ble Member (T), gave the following verdict:

1. In the case of telephones sold in bulk to DOT / MTNL, there is no exemption from the printing requirement of MRP under the Standards of Weights and Measures Act, 1976, (PC Rules)
2. Assessment under Central Excise Law cannot be regulated by any intended sale / use of the exigible goods.
3. The decision of the Hon'ble Tribunal in the case of M/s.Trishul Research Lab Pvt. Ltd. [2002 (144) ELT 204 (Tri.Del)] is distinguishable.

6. Abatement is not permissible from the contract price, if true on facts.

Hon'ble Member (J), gave the following verdict:

1. As the validity of the above said Board's Circular has been considered by the Hon'ble Tribunal in the case of Bharati Systel Ltd. [2002 (145) ELT 626 (Tri.Del)], in view of judicial discipline the pointed issue has to be resolved by the Larger Bench.

In view of difference of opinion between the two member of the Bench, the matter was placed before a third member to resolve the issue according to law.

The Hon'ble Third Member gave the following verdict:

1. A manufacturer is exempt from the provisions of Standards of Weights and Measures Act, 1976, (PC Rules), only if the packages satisfy the requirement cast under Rule 34 (1) (a) of the said rules and not otherwise and in the instant case, the clearances are not exempted by the above said rule.
2. The goods are sold in bulk under a contract cannot be a criterion to take them outside the purview of assessment under Section 4A.
3. The definition of "retail sale" under Rule 2 of Standards of Weights and Measures Act, 1976, (PC Rules), covers not only "sale" but also "distribution / disposal" other than through sale also.
4. The decision of the Hon'ble Tribunal in the case of M/s. Jayanti Food Processing Pvt. Ltd. [2002 (141) ELT 162] is applicable to the instant case.
5. Accordingly, the impugned transactions have to be assessed under Section 4A of Central Excise Act, 1944.

Thus, by majority, it is held that the clearances of telephone instruments to DOT / MTNL by the appellants have to be assessed under Section 4A and not under Section 4 of Central Excise Act, 1944.

Part-4: Arguments missed-out:

1. In the instant case, both the appellants as well as the Revenue have dwelt upon the issue based on their arguments as to the applicability of the Board's Circular, the Tribunal decisions, the exemptions contained under Standards of Weights and Measures Act, 1976, (PC Rules). No body, no where has gone to the basics of the issue – **the applicability** of the provisions of Standards of Weights and Measures Act, 1976, (PC Rules), for the impugned goods.
2. Needless to say, even though notified under Section 4A of the Act, excisable goods shall be assessed under Section 4A of the Act only if they are required to be affixed with the MRP, under the provisions of Standards of Weights and Measures Act, 1976, (PC Rules). (Reference is drawn to Board's Circular No.737/53/2003 dated 19.08.2003)
3. Chapter II of the Standards of Weights and Measures Act, 1976, (PC Rules), deals with the provisions applicable to packages intended for retail sale. Rule 2 A specifies the Scope and Rule 6 (1) (f) of the said rules requires the declaration of MRP on such packages.
4. Rule 2 A of the said rules reads as under:
   "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."

Thus, it is clear that, excisable goods shall be "pre-packed commodities" to be assessed under Section 4 A of the Act.

5. As per Rule 2 (l) of the said rules, "pre-packed commodities" with its grammatical variations and cognate expressions, means a commodity [or article or articles] which, **without the purchaser being present, is placed in a package of whatever nature**, so that the quantity of the product contained therein has a pre-determined value and such value cannot be altered without the package or its lid or cap, as the case

6. From the above, it is clear that, in order to qualify as a "pre-packed commodity", the commodity has to be packed **without the purchaser / buyer being present / known**. In other words, if packed for a specific buyer who is known at the time of packing, then such commodity cannot at all be called as a "pre-packed commodity".
7. In the instant case, as there is a contract between DOT / MTNL and the appellants, for the manufacture, sale and purchase of the telephone instruments, the impugned goods cannot be termed as "pre-packed commodities" and thus are outside the ambit and scope of Chapter II of Standards of Weights and Measures Act, 1976, (PC Rules) and Section 4 A of the Central Excise Act, 1944.
8. As a result, the valuation of the subject instruments shall be done only in terms of Section 4 of the Act and not under Section 4A.

Part-5: Possible Repercussion of this judgement:

The above said judgement has held that, despite a contract between the parties for sale and purchase, assessments have to be done under Section 4A of the Central Excise Act, 1944, (i.e. based on MRP) after allowing the necessary abatements. Even though, there is a passing reference in the said judgement that the abatement cannot be allowed on the contract price, there is no reason as to why the contract price itself cannot be affixed as the MRP on the commodity. In other words, a prudent manufacturer can always affix the contract price (the transaction value) as the MRP of the product and claim abatement therefrom, thus putting sword into the Revenue.

(S. JAIKUMAR, G. NATARAJAN & M.KARTHIKEYAN)