

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Excise Appeal No.463 of 2012

(Arising out of Order-in-Appeal No.271/APPL/Noida/11 dated 23/11/2011
passed by Commissioner (Appeals) Customs & Central Excise, Noida)

M/s Videocon Industries Ltd.,
(1D, Udyog Vihar, Industrial Area, Noida-201301)
VERSUS

.....Appellant

Commissioner of Central Excise, Noida
(C-56/42, Sector-62, Noida-201307)

....Respondent

APPEARANCE:

A letter on record, for the Appellant
Shri Manish Raj, Authorised Representative for the Respondent

**CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

FINAL ORDER NO.70157/2024

DATE OF HEARING : 18 January, 2024
DATE OF PRONOUNCEMENT : 02 April, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.271/APPL/NOIDA/11 dated 23.11.2011 of the Commissioner (Appeal) Customs and Central Excise, Noida. By the impugned order, Order-in-Original No.29-30/N-IV/2004 dated 30.11.2005 holding as follows has been upheld:-

"ORDER

- 1. I confirm demand of Central Excise duty amounting to Rs 6,96,172/- (Rs 4,80,728/- +Rs 2,15,444/-) (Rs Six Lakh Ninety Six Thousand One Hundred and Seventy Two only) short paid on the goods cleared in combination packs during the period from April 04 to October 04 and order for recovery of the same from M/s Videocon International Ltd,*

- 1-d Udyog Vihar, Greater Noida under Section 11A of Central Excise Act, 1944.*
- 2. I demand interest on above amount in terms of Section 11Ab of the Central Excise Act, 1944.*
- 3. I also impose a penalty of Rs 6,96,172/- (Rs Six Lakh Ninety Six Thousand One Hundred and Seventy Two only) upon M/s Videocon International Ltd, 1-d Udyog Vihar, Greater Noida under Section 11AC of Central Excise Act, 1944."*

2.1 Appellant was engaged in manufacture of Color Television, Washing Machines, Refrigerator, Air Conditioners etc., classifiable under CETH 8528, 8450, 8418 and 8415 of the First Schedule to Central Excise Tariff Act, 1985.

2.2 During course of scrutiny of the ER-1 returns for the relevant period it was observed that the appellant cleared "refrigerator with Washing Machine" and "Refrigerator with VCD" as combination pack on "combination MRP" rather than combined MRP of the individual items, which resulted in short payment of Central Excise duty, contravening the provisions of Rule 4, 6 and 8 of Central Excise Rules, 2002 read with Section 4A of the Central Excise Act, 1944.

2.3 Two show cause notices as detailed in table below were issued to the appellant:

S No	Show Cause Notice Date		Period	Amount `Rs
	No	Date		
1	V(30)Dem/Videocon/N-IV/308/05/3434	05.05.2008	April to July 04	4,80,728/-
2	V(30)Dem/Videocon/N-IV/681/05/6143	29.08.2005	August to October 04	2,15,444/-
	Total			6,96,172/-

2.4 Both the show cause notices were adjudicated as per the Order-in-Original referred in para-1 above.

2.5 Aggrieved appellant preferred an appeal before first appellate authority, which has been dismissed as per the impugned order.

2.6 Aggrieved appellant have filed this appeal.

3.1 This matter has been listed for hearing 21.08.2023, 05.10.2023, 05.12.2023 and on 18.01.2024. Appellant has failed

to cause appearance in the matter on any of the above occasions. Section 35 C (1A) reads as follows:

"Section 35C. Orders of Appellate Tribunal. –

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

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

3.2 As the matter has been adjourned for maximum number of times at the instance of appellant, no further adjournment can be allowed in the matter. Moreover, appellant has not attended any of hearing or have made any request showing his lax attitude in pursuing this appeal.

3.3 Appeal has been taken up for consideration, after hearing Shri Manish Raj learned Authorized Representative for the revenue.

3.4 Learned authorized representative submits that the issue in the appeal has been decide in appellants own case as per the order reported at [2013 (295) ELT 624 9T-Del)]. Following the said decision 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 Impugned order records following findings:

"4.4 The main issue that arises is that even though "combination package" is recognized in the P.C.Rules, does the scheme of Valuation under Section 4A incorporate the valuation of such combination packages.

4.5 The basic provision for valuation of all excisable goods with reference to their value is laid down under Section 4. Section 4A is a overriding (non obstante) provision which states that valuation would not be done by the general method of valuation in relation to those goods

that have been notified under this section, and which are goods covered under the provisions of the Standards of Weights and Measures Act, 1976. It follows that if any excisable goods has to be valued under the non obstante provision then two conditions have been specified, namely:

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- (i) it should have been notified by the Central Government under Section 4A of the Act,*
- (ii) It should also be an item which is subject to the provisions of the Standards of Weights and Measures Act 1976.*

4.6 There is no doubt that the impugned goods are subject to the provision of Standards of Weights & Measures Act. The statutes has clarified this provisions by providing a separate definition for "combination package" under Rule 2 (c) of the P.C.Rules. Rules 5 to 13 lays down the manner in which declarations must be made on every retail package. Rule 15 stipulates some additional declarations that should be made in respect of combination packages. There is therefore no doubt that the impugned goods are covered under Standards of Weights & Measures Act.

4.7 The issue that arises is whether such combination packages have been notified under Section 4A. The Central Government has been issuing notification under Section 4A in which they specified the goods mentioned in a table contained within the notification. The table specifies the chapter heading or chapter sub heading the description of the goods and the abatement which is a percentage of retail sale price, that should be allowed from the printed retail sale price for arriving at the assessable value Refrigerators availing under tariff heading 8418.10 is a separate entry in this notification and is allowed abatement at 40%. Washing machine falling under 8450.10 is a separate item in the said notification and the abatement

allowed for this item is 40% of the retail sale price. Coincidentally the abatement allowed for both the items is 40% but there are other consumer durables for which abatement allowed is 35%. There is no entry in which the combination of different commodities has been mentioned in this notification nor the abatement prescribed for such combination

4.8 The implication of the fact that combination packages have not been mentioned in the notification has to be analyzed both in the legal terms and the system of accounting on the basis of which MRP based valuation has been instituted in the Central Excise law

4.9 In accounting terms, the notification under Section 4A of the Act determines the average quantum of post clearance costs and profits, and this quantity expressed in the form of a percentage of the retail sale price, has to be abated from the retail sale price declaration, made by the manufacturer on the package, for arriving at the assessable value. Each commodity has its own market and this percentage would depend on the prevailing condition in the market under which costs are incurred or profit margins generated in the trading down stream between the manufacturer and the retailer. It is not open to an assessing or adjudicating authority to adopt the level of abatement for any item that is not specifically mentioned in the notification. Since abatement for goods sold in combination packages have not been specified in the notification issued under section 4A of the Act, such combination packs cannot be valued under the said Section by adopting the abatement level for any individual commodity. It is possible that an account analysis may indicate a different abatement level for a "combination package" even though the individual commodities on the package attract a uniform abatement level. In the net result, in the scheme of notification issued under Sec-4A of

the Act, it is not possible to assess "Combination package" under MRP based valuation procedure laid down under Sec.4A of the Act.

4.10 In legal terms it must be appreciated that there are laws with the widest scope and application, which for sake of simplicity may be called general laws. And there are non- obstinate provisions for specific circumstances or individuals under which the general law gets specifically excluded. The non-obstante provision operates only by way of exception from the general rule. It will be therefore necessary to make a strict construction of the provisions of non-obstinate clause so that situations, persons or things are not treated as exempted from the mischief of the general rule till they have been specifically excluded by virtue of non- obstinate clause. Combination packages of refrigerators, washing machines televisions etc are not mentioned in the notification issued under Section 4A of the Act. I therefore do not find any substance in the appellant's argument that their "combination package" should be valued on the basis of retail sale price declarations made for such combination package under the PC Rules

4.11 The issue that arises from the above determination is whether the goods would then be valued on its transaction value under Section 4 of the Act or the retail sale price of the different commodities packed in the "combination package". Neither of the two options is free from legal perplexities. If Section 4 is applied, then the goods would have to be valued on some subsidiary rule as there is no transaction for the different commodities. The problem in applying MRP based valuation for individual commodities is that under the PC Rules, the manufacturer do not have to declare the price of an individual commodity in a combination package.

4.12 In resolving this issue, I take guidance from the decision of CEGAT in the matter of M/s G.S. Enterprises Vs. CCE, 2002 (144) ELT 387 (Tri. Del.) (GSE case in short) in which the facts of the case are different, but the ratio has relevance. In the GSE case too, there was a combination package but all the commodities in the package were not notified individually under Section 4A of the Act, whereas in the present case all the separate commodities have been notified under Section 4A even though the notification has not been made for combination of different commodities. The CEGAT ordered the valuation of razors on the basis of MRP of such razors even though the said razors were being cleared along with blades with a combined retail sale price of razors and blades. The manufacturers in the G.S. Enterprises case had argued that MRP valuation cannot be made on notional basis but on the other hand, the department argued that the MRP being adopted for the assessment of the razors was the same as is declared on the razors when they are not removed in combination package. The Tribunal held that the razors in the combination package should be valued on the basis of the MRP declaration made on individual packaged of razors

4.13 I find that the G.S. Enterprises decision (supra) which has been upheld by Supreme Court has great relevance for deciding the present case. The appellants have been removing the different commodities involved in individual packages and the retail sale prices are declared on such packages. Following the CEGAT's Decision in G.S. Enterprises case, I find that the original adjudicating authority has correctly adopted the individual price declarations of the different commodities contained in the combination package for assessing the goods under Section 4A of the Act."

4.3 We find that the issue is no longer res-integra. In the appellants own case Delhi Bench of this Tribunal as reported at [2013 (295) ELT 624 (T-Del)] has held as follows:

"1.1 The appellant manufacture various consumer durables like viz. different models of colour T.V. sets, VCDs, washing machines, refrigerators and water purifiers. All these items during the period of dispute i.e. during December, 2002 to May, 2003 and Feb. 2003 to Jan. 2004 were notified under Section 4A of the Central Excise Act, 1944 for determination of their assessable value on the basis of their MRP and accordingly the assessable value of these items, when cleared in packaged form for retail sale, were required to be determined on the basis of their MRP declared on the packages i.e. MRP minus abatement, as notified by the Central Government under by notification issued under Section 4A. During December, 2002 to May, 2003 the appellant cleared a refrigerators of model S-166, NE SI67 and S 170 and washing machines of models 60 T, 36 TDC and 45 T as "combination packs" under a combined MRP which was less than the sum of their individual MRPs. During Feb. 03 to Jan. 04 they cleared "combination pack" of certain models of refrigerators with washing machines of certain models, "combination pack" of certain models of refrigerators with water purifiers and "combination pack" of certain models of colour T.V. sets with VCD players under combined MRP and each of MRP of the 'combination pack' was less than the sum of the individual MRPs of the items in the combination pack. These "combination packs" consisting of items individually packed were not further packed in a bigger package and according to the Appellant were delivered to the customers together tied by a ribbon. The appellant while clearing the combination packs of refrigerators with washing machines, refrigerators with water purifier and CTV with VCDs, instead of paying duty separately on each item of the combination packs on the basis of its MRP, paid duty on

the assessable value determined on the basis of combined MRP of the combo pack. The department being of the view that in case of combination pack of dissimilar items, each notified under Section 4A, the duty liability has to be discharged separately on each items and accordingly,

5. We have considered the submissions from both the sides and perused the records. The undisputed facts are that all the items which are being cleared in combination pack are notified under Section 4A for assessment of the duty on the basis of their MRP. There is also no dispute that each of the items in the combination pack was individually packed and while the individual items of the combination pack were not carrying individual MRP on them, there was MRP for the combination. There is also no dispute that the combination packs were not further packed in a bigger pack and according to the Appellant were being delivered together tied by a ribbon. The point of dispute is that as to whether in respect of clearances of such "combination packs", duty liability is to be determined in respect of each item in the combination on the basis of its individual MRP or duty is to be calculated by treating the combination as one item on the basis of its combined MRP.

6. Under Section 3(1) read with Section 5A of the Central Excise Act, 1944, central excise duty is payable on the goods manufactured in India at the rates specified in the schedule to the Central Excise Tariff Act, 1985 read with exemption notification, if any issued, under Section 5A of the Central Excise Act. When the rate of duty is ad valorem, the value is taken as - (a) tariff value if the tariff value has been fixed under Section 3(2) of the Central Excise Act, 1944 in respect of that item, (b) MRP minus abatement, if the items are sold in packaged form for retail sale and in terms of the provisions of the Standard of Weights and Measures Act, 1976 (SWM Act) and the Rules

made thereunder or any other law in force, the maximum retail sale price is required to be declared on the their packages and the items are also notified by notification issued under Section 4A of the Central Excise Act for determination of assessable value on the basis of MRP and (c) on the transaction value determined under Section 4 in other cases, not covered by Section 3(2) or Section 4A. The scheme of assessment of duty under Section 4A is that the Central Government in respect of the items notified under this Section, has also by notification issued under this Section, notified the percentage of the abatement to be deducted from the MRP and the assessable value of the item is the MRP minus abatement. The quantum of abatement may be different for different items.

7. In terms of the provisions of the Central Excise Rules, the duty is payable on any excisable goods at the time of their clearance from the factory or bonded warehouse and the same is payable irrespective of whether the goods are cleared individually or in combination with other items being manufactured or are cleared on sale or are cleared for free distribution for the purpose of sale promotion. Thus, when a manufacturer is manufacturing two excisable goods A and B, the duty would be chargeable at the time of their clearance, irrespective of whether these items are cleared individually and thereafter are sold as combination pack or are cleared from the factory in a combination pack and since the rate of duty and assessable value of different items may be different, the duty payable would have to be determined in respect of each item separately. A combination pack of dissimilar items which are sold as a combination as a marketing strategy, have no separate identity in central excise law. In our view, therefore, if a manufacturer manufactures two products A and B, both notified under Section 4A and in respect of these products, there are separate MRP and the same are cleared as a combination pack, the duty has to be determined in

respect of each item separately on the basis of its individual MRP and it would not be correct to adopt the MRP of the combination pack, as the quantum of abatement notified for each item may be different and the rate of duty applicable for each item in the combination pack may be different. The judgment of the Tribunal in the case of Millenium Appliances India Ltd. (supra) has not considered these aspects and has gone only by the Board's Circular No. 673/64/2002-CX., dated 28-10-2002, which in our view, is applicable only in respect of the multi-piece package i.e. package containing two or more consumer items of the same kind and this circular, in our view, cannot be applied to a combination pack. Though combination pack are recognized in the SWM Rules, they have no recognition in the Central Excise Law. We are of the view that it is the judgment of the Tribunal in the case of G.S. Enterprises (supra) which has been affirmed by the Apex Court, which is applicable to the facts of this case and accordingly, the duty payable in respect of the clearances of the combination pack of dissimilar item, both of which notified under Section 4A have to be determined on the basis of their individual MRPs and not on the basis of MRP of the combination pack, which in our view, has no relevance for assessment of duty on the goods being sold as a combination pack.

10. There is one more reason as to why the combined MRP of the combo pack cannot be the basis for determining the assessable value under Section 4A. Rule 15 of the SWM Rules refers to the "combination pack" of dissimilar items which are actually packed in a bigger pack on which MRP is required to be declared. In this case, admittedly the combination packs of Refrigerator with water purifiers, Refrigerators with washing machines or CTVs with VCD players are not actually packed in a bigger package. The "combination packs" in this case have to be treated as combination sales as a marketing strategy

under which on purchase of two items refrigerator with washing machines, refrigerator with water purifier or CTVs with VCD players, the price charged is less than their individual MRP. Such combination sales, in our view, cannot be treated as "combination pack" or packaged commodity as understood in SWM Rules and have to be treated as sale of individually packed items at a combined price.

11. In view of the above discussion, we do not find any infirmity in the impugned order. The appeal is dismissed."

4.4 Appeal was filed by the appellant challenging the above order of CESTAT before Hon'ble Supreme Court, which as reported at [2016 (340) E.L.T. A38 (S.C.)] has been allowed in their favour following, the decision in case of Himalaya Drug Company [2015 (324) ELT 9 (SC)]. In the case of Himalaya Drug Company following was held:

"2. *As can be seen from the aforesaid, the two items, viz., Face Wash Gel 50 gm. and Dandruff Shampoo 120 ml were bound together and sold as one product. Likewise, Face Wash Gel 100 gm. with Dandruff Shampoo 200 ml were bound together and sold. It is not in dispute that MRP of both the items sold were mentioned and the assessee had been clearing the goods by paying excise duty at the said MRP. The Revenue, however, was of the view that since the face wash gel is sold free along with dandruff shampoo, the value/price of face wash gel should also be included and raised demand in this behalf applying the provisions of Section 4A of the Central Excise Act.*

3. *The Customs, Excise and Service Tax Appellate Tribunal has set aside the said order and held that the MRP mentioned on the product would be the sole consideration in view of the provisions contained in Section 4A of the Act.*

Section 4A 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 Standards of Weights and Measures Act, 1976 (60 of 1976) 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) If any manufacturer removes from the place of manufacture any excisable goods specified under sub-section (1) without declaring the retail sale price of such goods on the packages, or declares a retail sale price which does not constitute the sole consideration for such sale, or tampers with, obliterates or alters any such declaration made on the packages after removal, such goods shall be liable to confiscation.

Explanation 1. - For the purposes of this section, "retail sale price" means the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement,

delivery, packing, forwarding and the like, as the case may be, and the price is the sole consideration for such sale.

Explanation 2. - (a) Where on the package of any excisable goods 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.

(b) Where different retail sale prices are declared on different packages for the sale of any excisable goods in packaged form in different areas, each such retail sale price shall be the retail sale price for the purposes of valuation of the excisable goods intended to be sold in the area to which the retail sale price relates."

4. *It is clear from the reading of sub-section (2) of Section 4 along with Explanation thereto that the MRP mentioned is to be the sole consideration in arriving at the transaction value at which the excise duty is payable. We are, therefore, of the view that the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as 'CESTAT') has rightly decided the issue. The discussion in the order of the CESTAT is contained in paragraph 7 which reads as under : -*

"We have gone through the records of the case carefully. The appellants receive the gel and the shampoo in bulk and repack them in retail packages. Thereafter, the shampoo along with the free gel is bound together and the label is fixed on the product. We agree with the contention of the appellant that this process amounts to manufacture as per Chapter Note 5 to Chapter 33. Further, it is seen that both the products are covered under Section 4A and Standards of Weights and Measures Act. The ratio of Oswal Fats and Oils Limited (supra) is squarely applicable, in that case binds were packed along with soaps for free supply to buyers of soap. It was held that the additional package of bindis had no connection to the price of soap, the price of bindis is not includable in the assessable value of soap. In

the Surya Foods Ltd. v. CCE (supra) and cited supra, it was held that when selling certain quantities of biscuits, the appellant supplied small quantities of certain other varieties free and in such situation the value of free supplies is not includable in the assessable value. The Asstt. Controller of Legal Metrology has informed the appellants regarding legal requirements in respect of combination packages but in order to decide this issue it is sufficient that the products are covered under Section 4A and also the Standards of Weights and Measures Act. Since the Revenue has not contested that the products in question are covered under Section 4A and Standards of Weights and Measures Act, we hold that the products are assessable under Section 4A. In view of the decided case laws, there will not be any duty liability on the gel supplied free, hence there is no merit in the impugned order. Therefore, we allow the appeal with consequential relief.”

5. *We find no merit in this appeal which is, accordingly, dismissed.”*

4.5 Respectfully following the above decision, we do not find any merits in the impugned order.

5.1 Appeal is allowed.

(Pronounced in open court on-02 April, 2024)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)