Between The Heavy Weights

Legal Metrology (Packaged Commodities) Rules, 2011
Read With
Legal Metrology (Packaged Commodities) (Amendment) Rules, 2015

Vs

Valuation & Taxation Rules

WHAT IS METROLOGY

It is a science of weights and measures; a system of measurement. In other words, it represents the determination of conformance to specification or technical requirements and development of standards based on scientific study of measurements.

In India, the erstwhile Standards of Weights and Measures (Packaged Commodities) Rules, 1977 has been replaced by Legal Metrology (Packaged Commodities) Rules, 2011 under Legal Metrology Act, 2009; to be read with amendments thereof. LMA (PC) Rules, 2011 was recently amended through notification issued under F.No. WM-9(86)/2014 dated May 14, 2015 by the Ministry of Consumer Affairs, Food & Public Distribution. The amended rules will become effective January 01, 2016

APPLICABILITY PRINCIPLES

<table>
<thead>
<tr>
<th>Taxation Angle</th>
<th>LMA (PC) Rules, 2011</th>
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<tr>
<td>As per section 4A(2) of Central Excise Act, Central Government has to issue a notification in Official Gazette specifying the commodities to which the provision is applicable and the abatements permissible.</td>
<td>Section 18(1) of Legal Metrology (PC) Rules, 2011say: “No wholesale dealer or retail dealer or importer shall sell, distribute, deliver, display or store for sale any commodity in the packaged form unless the package complies with in all respects, the provisions of the Act and these rules”</td>
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All cumulative requirements must be satisfied -

a. Provisions of Legal Metrology Act and Rules should be applicable to those goods,
b. The goods should be as such sold in packed / packaged form, and
c. Central Government should issue a notification specifying commodities to which the provisions are applicable.

In other words, no person shall manufacture, pack, sell, import, distribute, deliver, offer, expose or possess for sale any pre-packed commodity unless such package is in such standard quantities or number and bears thereon such declarations and particulars in such manner as may be prescribed.

SCOPE OF REGULATORY COMPLIANCES

A. Central Excise Act, 1944 and amendments thereof
B. Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008

As of now, Rule 3 and Rule 26 of Legal Metrology (Packaged Commodities) Rules, 2011 read with Legal Metrology (Packaged Commodities) (Amendment) Rules, 2015 cover applicability of these rules vis-à-vis taxation under Central Excise / Custom statutes.
INCLUSIVE CLAUSE - Who Are Covered?

The provisions of Legal Metrology (Packaged Commodities) Rules, 2011 read with Legal Metrology (Packaged Commodities) (Amendment) Rules, 2015 apply to every person who manufacture, pack, sell, import, distribute, possess to sell, offer, expose, deliver any pre-packed commodity only to retail package intended for retail sale; unless such quantities or numbers have been excluded or depicts a declaration as may be prescribed to such effect.

EXCLUSIVE CLAUSE - Who Are Not Covered

General exclusions are covered under Rule 3(a) and (b) of Legal Metrology (Packaged Commodities) Rules, 2011

(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. This exclusion is regardless of weight or volume of package.

Exemptions are provided under Rule 26 of the LMA (PC) Rules, as under:

(a) the net weight or measure of the commodity is ten gram or ten millilitre or less, if sold by weight or measure;
(b) any package containing fast food items packed by restaurant or hotel and the like;
(c) it contains scheduled formulations and non-scheduled formulations covered under the Drugs (Price Control) Order, 1995 made under section 3 of the Essential Commodities Act, 1955 (10 of 1955);
(d) agricultural form produces in packages of above 50 kg.

Therefore, the applicability of LMA (PC) Rules can be summed up as:

<table>
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<tr>
<th>Applicable To</th>
<th>Not Applicable To</th>
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<tbody>
<tr>
<td>1. All packaged commodity</td>
<td>1. Unpacked commodities or goods sold in bulk</td>
</tr>
<tr>
<td>2. Retail packages only, intended for retail sale</td>
<td>2. Packed commodity for industrial or institutional consumers</td>
</tr>
<tr>
<td></td>
<td>3. Products that can be sold unpacked</td>
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</tbody>
</table>

Further, it may be noted that there are varying opinions pronounced by different courts where largely it has been held that electronic gadgets, consumer durables sold in one piece after checking and inspection are not covered under LMA (PC) Rules.

A general interpretation to read the purpose of the rules must be seen in context whether any goods can be sold without the purchaser being present and without opening, checking, inspecting and / or verifying the contents within.

LEGISLATIVE INTENT

From time to time, courts have held that PC Rules & Act are consumer welfare legislations. The objective of such legislation is to protect the rights of the ultimate consumer.

If the intention of the legislature was to include every commodity which is packed, then the rule itself could have stated that every commodity which is packed, in other words they come to the retailer in packed condition; will be considered as pre-packed.

It is on this note that we find the law with reference to packaged commodities is far from settled.
SETTLED POSITION OF LAW (WITH REGARD TO PACKAGED COMMODITIES)

• For the purpose of taxation, “When all the above are cumulatively met only then would section 4A be applicable.” (as shown above, in Taxation Angle under applicability principles)

*State of Maharashtra vs. Subhash Arjudas Kataria 2012 (275) ELT 289 (SC)*

• If an article is not covered under provisions in respect of marking MRP, provisions of duty payable on basis of MRP do not apply and in those cases, duty will be payable on ad valorem basis as per section 4.

*Jayanti Food Processing vs. CCE (2007) 10 STT 375 = 215 ELT 327 (SC).*

• To determine whether televisions, video and audio players would qualify as “Packaged Commodity”, definition of pre-packed commodity would have no application to packages which are packed only for convenience of customers for transportation and for protection during storage & handling.

*Philips India Ltd. vs. Union of India, [(2002)1 Mad L.W. (Cri) 211]*

• “… those commodities which intrinsically require to be packed and without being packed they cannot be sold, and merely because they are removed from the package for testing will not cease to be pre-packed commodity. It does not mean that a package, merely because it is packed for protection or safety in the course of conveyance by virtue of the explanation becomes pre-packed commodity. The test would be whether by the very nature of the goods, whether it can be sold without being pre-packed.”

*Titan Industries Ltd. vs. Union Of India (AIR 2006 Bom 336), Bombay High Court*

• “Even if the MRP would be different depending upon the area in which it is being sold, that cannot absolve the manufacturer from displaying the price, i.e., the MRP on the package in which the Refrigerator is packed. A Refrigerator is a "packaged commodity" and thus is covered under the Act and the Rules and therefore, the notification dated 1.3.2000 cannot be faulted on that ground. The appellant has not otherwise challenged the validity of the Notification on any other ground. Once the Notification included the Refrigerator, unless the validity of the notification was challenged, the appellant cannot get out of the scope of the notification. The notification cannot be faulted merely because the appellant feels that the Refrigerator is not a packaged commodity.”

*Whirlpool of India Ltd vs. Union of India & Ors (AIR 2008 SC 397), Supreme Court of India*

Point to remember in above case:

There are various types of packages defined under the Rules and ultimately Rule 3 of Standards of Weights and Measures (Packaged Commodities) Rules, 1977 specifically suggests that the provisions of Chapter II would apply to the packages intended for "retail sale" and the expression “package” would be construed accordingly. Once the position that the Refrigerator is not covered under the ‘retail sale’ is clear, Rule 6 would specifically include the Refrigerator and would carry along with it the requirements by that Rule of printing certain information including the sale price on the package. Thus it is clear that by being sold by the manufacturer in a packaged form, the Refrigerator would be covered by the provisions of the Act and the Rules and it would be imperative that the MRP has to be printed in terms of Rule 6.

• “We fully agree that the sunglasses are tested by the buyer for his suitability, and therefore, sunglasses whether it be a frame or glass is not a pre-packed commodity within the definition of the expression “pre-packed” under Rule 2(1) of the Rules…”

*State of Maharashtra vs. Subhash Arjudas Kataria 2012 (275) ELT 289 (SC)*
• MRP is required to be printed on footwear, accessories or garments sold in retail packing. This would be so even if product is not sold by weight or measure or where pre-packed commodity has to be opened and shown to customer at retail counter

*Reebok India Co  vs. UOI (2011) 270ELT 513 (Karn HC) & Reebok India Co vs. UOI (2009) 242 ELT 207(Cal HC)*

In short, the test to determine whether a commodity qualifies as a packaged commodity should be whether they can be sold without being pre-packed, by very nature of the goods. The provision applies to all pre-packaged commodities. Specific notification indicating classes of goods is not required.

Keeping in mind the legislative intent, it is interesting to note that the word “consumer” specifically has not been defined in the Legal Metrology (Packaged Commodities) Rules.

Therefore, let us recap some of the definitions - literally and as prescribed under the rules:

<table>
<thead>
<tr>
<th>Definition</th>
<th>Description</th>
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<tr>
<td></td>
<td>One who consumes, especially one who use a product; person who buys or uses goods or services - Oxford English Dictionary</td>
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<tr>
<td>Ref:</td>
<td><em>Swan Sweets vs. CCE  2006 (198) ELT 565 (CESTAT)</em></td>
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<tr>
<td>Industrial consumer</td>
<td>The consumer who buys packaged commodities directly from the manufacturer or from an importer or from wholesale dealer for use by that industry and the package shall have declaration ‘Not for Retail Sale’</td>
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<tr>
<td>As amended in LMA</td>
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<tr>
<td>Institutional consumer</td>
<td>The institution who hires or avails of the facilities or services in connection with transport, hotel, hospital or other organisation which buy packaged commodities directly from the manufacturer or from an importer or from wholesale dealer for use by that institution, and the package shall have declaration ‘Not for Retail Sale’.</td>
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<tr>
<td>As amended in LMA</td>
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<tr>
<td>Wholesale Package</td>
<td>“Wholesale Package” means a package containing-</td>
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<tr>
<td>(i)</td>
<td>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</td>
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<tr>
<td>(ii)</td>
<td>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;</td>
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<td>(iii)</td>
<td>ten or more than ten retail packages provided that the retail packages are labeled as required under the rules.</td>
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<td>Remember -</td>
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<td>☑️ Construction is ‘industry’ and</td>
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<td>hence clearance for construction is</td>
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<td>covered under ‘industrial or</td>
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<td>institutional consumers’</td>
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<td><em>Vikram Cement vs. CCE (2009) 238 ELT 92 (CESTAT)</em></td>
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<tr>
<td><em>Heidelberg Cement vs. CCE (2015) 315 ELT 53 (CESTAT)</em></td>
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<tr>
<td>☑️ Institutional consumer includes</td>
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<tr>
<td>‘construction company’</td>
<td></td>
</tr>
<tr>
<td><em>Jaypee Sikandarabad Cement Grining Unit vs. CCE (2014) 300 ELT 105 (CESTAT)</em></td>
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TAX INTERPRETATIONS

The relevant section in the Excise Act deals with the following interpretation:

<table>
<thead>
<tr>
<th>Section</th>
<th>Heading</th>
<th>Interpretation</th>
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<tbody>
<tr>
<td>Section - 4</td>
<td>Valuation of excisable goods for purposes of charging of duty of excise</td>
<td>Invoice Based on Transaction Value</td>
</tr>
<tr>
<td>Section - 4A</td>
<td>Valuation of excisable goods with reference to retail sale price (RSP)</td>
<td>Invoice based on MRP / RSP transaction</td>
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As per Rule- 4 of Determination of Retail Sale Price of Excisable Goods Rules, 2008, “Retail Sale Price” of such goods shall be ascertained in the following manner, namely :-

i. if the manufacturer has manufactured and removed identical goods, within a period of one month, before or after removal of such goods, by declaring the retail sale price, then, the said declared retail sale price shall be taken as the retail sale price of such goods :

ii. if the retail sale price cannot be ascertained in terms of clause (i), the retail sale price of such goods shall be ascertained by conducting the enquiries in the retail market where such goods have normally been sold at or about the same time of the removal of such goods from the place of manufacture :

Provided that if more than one retail sale price is ascertained under clause (i) or clause (ii), then, the highest of the retail sale price, so ascertained, shall be taken as the retail sale price of all such goods.

Explanation: For the purposes of this rule, when retail sale price is required to be ascertained based on market inquiries, the said inquiries shall be carried out on sample basis.

It is a common knowledge that when goods are imported in India, Customs duty gets attracted of BCD, CVD and SAD along with education and higher education cess on BCD. CVD is levied in order to countervail the Excise Duty on like articles manufactured domestically. Therefore, in cases where the goods are valued on MRP abatement, the same principle is followed to compute the CVD.

RSP RIDDLE

There have been quite a few disputes between Revenue and assesses arising out of RSP (MRP) based pricing.

Hon‘ble Supreme Court in the case of Nestle India i.e. Jayanti Food Processing (P) Ltd. [2007 (215) E.L.T 327 (S.C.)] has laid down the law on the very same issue to settle the dispute. Excerpts of significance mentioned below:

... Even at the cost of repetition, following would be factors to include the goods in Section 4A(1) & (2) of the Act:
(i) The goods should be excisable goods;
(ii) They should be such as are sold in the package;
(iii) There should be requirement in the SWM Act or the Rules made there under or any other law to declare the price of such goods relating to their retail price on the package;
(iv) The Central Government must have specified such goods by notification in the Official Gazette;
(v) The valuation of such goods would be as per the declared retail sale price on the packages less the amount of abatement.

If all these factors are applicable to any goods, then alone the valuation of the goods and the assessment of duty would be under Section 4A of the Act.”

To understand the RSP conundrum, let us take some examples to understand how it works.
Riddle# 1: MRP is to be printed on package of items like hand tools. These are not notified under Central Excise Act. What will be the principle for valuation?

Solution: Provisions of section 4A of Central Excise Act would apply only if a particular product is notified with abatement under provisions of the Act. Hence valuation hand tools is done on basis of transaction value under section 4 of Central Excise Act.

Riddle# 2: Cookies are sold to airlines & hotels without MRP price. What will be the valuation rules?

Solution: Sale is being made to institutional customers, therefore valuation required to be done under Sec. 4 of CEA - (Australian Foods vs. CCE (2010) 254 ELT 392 (Mad HC))

Riddle# 3: Complimentary gifts (minor, without MRP marked) is distributed alongwith another product (major) as a marketing strategy (It is the case of Jayanti Food Processing (P) Ltd. selling KitKat chocolates to Nestle --[2007 (215) E.L.T 327 (S.C.)]). What will be the valuation rules?

Solution: Even if product (chocolate) is covered under MRP provisions, since the product was not to be sold in retail, MRP is not required. Hence, valuation should be on basis of section 4. However, if MRP is printed on such free samples, valuation has to be on basis of RSP / MRP (under Sec. 4A). RSP of the combo-pack would be the basis of valuation

Commissioner vs. Icon Household Products P. Ltd. 2009 (237) ELT A22 (SC)

Riddle# 4 Sale of car / scooter etc. What will be the valuation rules?

Solution: Provisions of Legal Metrology Act is not applicable on unpacked products, hence it does not apply to sale of a cars.

Mahindra and Mahindra vs. Director of Standards of Weights and Measures (2011) 272 ELT 488 (Ker HC)

Riddle# 5 When goods stock transferred from factory to depot / port but RSP label are affixed at the depot / port, what should be the value of goods for payment of excise duty at factory?

Solution: The stock transfer from factory to depot does not amount to sale; actual sale takes place at depot. Hence, the value of goods shall be RSP declared at the depot.

Sony India Ltd. vs. Commissioner 2008 (229) ELT A127 (SC)

Riddle# 6 When goods are not covered under Legal Metrology Act, 2009, but manufacturer affixed RSP on the goods; what valuation rule will apply?

Solution: The goods shall be valued Under Sec.4 (based on Transaction Value), NOT under section 4A.

Riddle# 7 What will be the valuation rules when goods are meant for export

Solution: MRP provisions do not apply to goods meant for export (even to Nepal or Bhutan). In such cases, valuation is required to be as per provisions of section 4. Such goods are not liable to confiscation if MRP is not printed on such goods.

Gillete India Ltd. vs. CCE 2006 (193) ELT 331 (CESTAT)
Riddle# 8 Valuation rules for cement bags of 50 kgs cleared to industrial and institutional consumers?
Solution: When sold in bulk is not for retail sale, goods/cement sold to industrial and institutional consumers are charged on transaction value u/s 4 of CEA, 1944

Riddle# 9 If goods are manufactured by job worker, and the goods covered under RSP, which type of valuation will be applicable?
Solution: If the product covered under RSP provisions and is manufactured on job-work basis, duty would be payable as per provisions of section 4A, i.e. based on RSP less abatement.

Riddle# 10 What is the basis of valuation for defective goods affixed with RSP?
Solution: Valuation will be based on Sec 4A, which is based on RSP less abatement. It can be subject to lower RSP value for defective goods but the valuation rules do not change.

Riddle# 11 For multi-packs, say a pack of 3, 4 or 5 plus in order to offer quantity discount as possible marketing strategy, what kind of valuation rule will be applicable?
Solution: The manner and merits of declaration will prevail to compute the valuation.
(a) If a declaration is printed on the multi-pack that they cannot be sold separately and RSP printed on the individual items are struck off, only then the MRP printed on the multi-pack will be considered for valuation less abatement, for payment of duty
(b) If no declaration is inscribed on the multi-pack packaging or if RSP printed on the individual items are not struck off, then aggregate of RSP corresponding to the number of packages will be considered for valuation of duty payment.
(c) If an individual item is supplied free in the multi-pack without any MRP printed on it, the MRP printed on the multi-pack will be taken for purposes of valuation under section 4A.

Aura Oil Industries vs. CCE 2009 (234) ELT 78 (Tri.)

Riddle# 12 Valuation rules for some of the situations where MRP cannot be printed? Say -
- Bulk supplies against contract
- Supplies to canteen store depots of defence
- bulk supplies for industrial use
- Item supplied free with another item / combo-packs
- Items meant for export.


Riddle# 13 Valuation of Wholesale Packages, say goods such as shampoo, dish drops, lotion, etc. in individual sachets and then these individual sachets packed in mono-cartons containing 20 or 30 sachets with marking as wholesale pack; which type of valuation rules will apply?
Solution: MRP is not required on wholesale package. Definition of “Wholesale Package” is mentioned under Rule 24 of Legal Metrology (Packaged Commodities) Rules, 2011

Even if a commodity is notified under Section 4A of Central Excise Act, 1944, if statutorily, it is not required to declare RSP, assessment should be done on the basis of transaction value and not on the basis of RSP.

Sarvotham Care Ltd. vs. Commissioner of Cus. & C. Ex., Hyderabad (2012) 286 ELT 357 (Tri.-Bang.)
Note:

Any Wholesale package must contain following declarations -
(a) name and address of manufacturer/ packer
(b) identity of commodity and
(c) number of retail packages contained in such wholesale package or net quantity -
Rule 24 of Legal Metrology (Packaged Commodities) Rules.

A package is ‘wholesale package’ only if it contains number of retail packages.

*Jayanti Food Processing vs. CCE (2007) 10 STT 375 = 215 ELT 327 (SC)*

**Riddle# 14**

Does bulk packaging made for the purpose of convenience, protection and safety of goods during transportation constitute a wholesale package?

**Solution**

Outer packaging for protection and safety during transportation is not a wholesale package. It does not necessarily require declaration of name / address, cost, month, year etc. Valuation of such packages will be done on the basis of section 4A i.e. RSP less abatement.

*State of Maharashtra vs. Raj Marketing (2011) 272 ELT 8 (SC)*

**Riddle# 15**

What are the valuation provisions of bulk packaging?

**Solution**

Provisions under Rule-3 of LMA (PC) exclude packages or commodities of more than 25 Kg or 25 litre, excluding cement and fertilizer sold in bags upto 50 Kg – Rule 3(a) of Legal Metrology (Packaged Commodities)

This means that in case of cement and fertilizer, MRP provisions apply upto 50 Kg

Let’s review some more examples of bulk packaging:

☑️ MRP provisions do not apply to pack of 210 ltr of lubricating oil

*Castrol India vs. CCE (2008) 223 ELT 638 (CESTAT)*
*Castrol India vs. CCE (2009) 236 ELT 340 (CESTAT).*

☑️ If the goods are cleared to industrial/institutional consumer, even if MRP provisions apply to 50Kg package of cement bag, excise duty is payable on basis of transaction value under Section 4 of CEA.

*Grasim Industries vs. CCE (2009) 238 ELT 655 (CESTAT)*
*Heidelberg Cement vs. CCE (2015) 315 ELT 53 (CESTAT)*

This further implies that even when the quantity is 50 Kg or less but sold to industrial / institutional consumer, excise duty is payable on basis of transaction value under Section 4.

**Riddle# 16**

Why MRP is not shown on the domestic LPG gas cylinders?

**Solution**

Domestic LPG gas cylinders are covered under Administrative Price Mechanism of Government. Hence MRP is not shown on gas cylinders. Similarly, declaration of month and year is also not required on bottled LPG gas cylinders marketed by PSU Cos.

Rule-6 (c) of LMA (PC) Rules, 2011 apply
Riddle# 17 How is valuation done for small packages like glue-sticks or lipsticks whose weight is lower than 10gm which is excluded from the LMA (PC) Rules, 2011?

Solution Articles such as glue-sticks and lipsticks are not exempted from the purview of LMA (PC) Rules, 2011. These are sold in pieces and not by weight. Remember the rule that “number” is also a measure.

_Hindustan Unilever Ltd. vs. CC (2011) 273 ELT 137 (CESTAT)_

Riddle# 18 How is valuation done for series of 8ml sachets in a row with perforations between two sachets and such 60 strings i.e. 960 sachets are packed in one packet?

Solution Assistant Controller of Legal Metrology, Mumbai clarified that the packet is not a ‘multi-piece’ package but a wholesale package, which attracts Rule 29, i.e. MRP provisions do not apply. This was accepted, demand was dropped and matter was remanded to Commissioner (Appeals) for consideration on merit.

_Careless Beauty Products vs. CCE 2004 (164) ELT 53 (CESTAT)_

This view further confirmed in

_CCE vs. Urison Cosmetics Ltd. 2006 (198) ELT 508 (CESTAT 3 member bench)._

CONCLUSION

MRP / RSP less abatement based valuation under Section 4A (1) & (2) of Central Excise Act is applicable only to those packaged goods, which meet all the following factors:

1. The goods should be excisable goods;
2. They should be such as are sold in the package;
3. There should be requirement in the Legal Metrology Act or the Rules made thereunder or any other law to declare the price of such goods relating to their retail price on the package;
4. The Central Government must have specified such goods by notification in the Official Gazette;
5. The valuation of such goods would be as per the declared retail sale price on the packages less the amount of abatement.

The RSP based valuation has largely prevented tax advantages used to set-off marketing expenses that were not considered for purpose of valuation at the factory gate; giving rise to several disputes. While such disputes have reduced considerably; aberrations still remain where it has been held that MRP provisions apply even when goods are not for retail sale. Amended rules is a step further with the intent to reduce the number of disputes.

All along, the courts have held that the objective of the Legal Metrology Act is to protect consumers using the products for their personal use and not to extend any protection to a reseller of goods for commercial purposes, directly from the manufacturer or otherwise. Consumers procuring goods for use in their industry, but not directly from the manufacturer were also held to be industrial consumers. In broadening the scope of LMA (PC) Rules, 2011 now, seller includes a manufacturer, an importer or wholesale dealer for use by “industrial” and “institutional” consumers. Hon’ble Karnataka High Court in _CCE vs. Fosroc Chemicals (India) Pvt. Ltd. - 2014-1609-HC-KAR-CX_ has held that amendments by way of substitution are to be given retrospective effect. It remains to be seen how Revenue authorities handle past disputes where the packages do not bear declaration “Not for Retail Sale”.

All in all - between the heavy weights of law, CEA valuation rules vis-à-vis metrology for trade & industry is far from settled for the time being.

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9th Oct. 2015

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