A PROCTER & GAMBLE HYGIENE & HEALTH CARE LTD.

*v.*

COMMISSIONER OF CENTRAL EXCISE, BHOPAL.

NOVEMBER 28, 2005

B [ASHOK BHAN AND S.H. KAPADIA, JJ.]

*Central Excise Act, 1944/Central Excise Tariff Act, 1985; Chapter 34 of the Schedule to the Act with amendment; Ss. 2(f), 3, 4(4)(d)(i) and 11A(1): Valuation—Detergent powder—Repacking in sachets from bulk packs—Levy of differential amount of duty—Justification of—Held: Taxable event took place when detergent powder manufactured—Tribunal ought to have decided the assessable value of bulk packs of the product in question as at the factory gate—Since repacking in sachets did not amount to manufacture at the relevant time, tribunal ought to have decided the justification of assessing the value of bulk packs based on retail price of sachets for the purpose of levying of excise duty by the Revenue—Tribunal also erred in not considering the defence of the assessee in the context of suppression of facts and also on invocation of extended period of limitation—Hence, the matter remitted to the Tribunal for decision afresh in the light of the principle laid down.*

**The question which arose for determination in this appeal was as to whether, on the facts and circumstances of this case, cost of repacking of the product Ariel Micro System (AMS), detergent powder into 20 gms. and 30 gms. Sachets from the bulk packs of the product, which did not amount to manufacture at the relevant time, was includible in the assessable value of the product in question which was manufactured and cleared by the assessee/ appellant in bulk packs of 25 kgs. and engaged another firm for repacking of the product into sachets from bulk packs.**

**Appellant-assessee contended that the show-cause notice issued by the Revenue did not contain allegations regarding valuation of 25 kgs. bulk packs and the demand of differential amount of duty was made only on the basis of the price of 20 gms. and 30 gms. Sachets; that since repacking did not constitute "manufacture" at the relevant time, the demand for differential amount of duty only on the basis of the price of the sachets was untenable in law; that the value of the bulk packs was approved by the Revenue as declared**

in the price list for captive consumption and, therefore, there was no question of suppression of facts; that since the clearance of the bulk packs was for captive consumption and not for sale, the concept of "normal price" was not applicable; and that the tribunal has not at all gone into the question of valuation, particularly, when the entire case related to the scope of section 4(4)(d)(i) of the Act; A

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Revenue submitted that during the relevant period, the product in question was manufactured by the assessee and not by the firm engaged in manufacturing sachets, and therefore, the authorities were right in demanding the differential duty on the price of the sachets; that the assessee removed the detergent powder in bulk packs from the factory gate with the sole intention of getting it repacked into sachets; that the assessee had deliberately declared only the cost of the bulk packs but suppressed the price of the product; that the firm engaged in repacking was an independent job worker and was not an extended arm of the assessee; that the retail packs were in fact cleared through the depots of the assessee and in the circumstances, the authorities were right in coming to the conclusion that there was a wilful suppression on the part of the assessee. C D

Allowing the appeal, the Court

HELD: 1.1. The levy of excise duty is on the "manufacture" of goods. The excisable event is the manufacture. The measure or the yardstick for computing the levy is the "normal price" under Section 4(1)(a) of the Central Excise Tariff Act. [503-E] E

*Union of India & Ors etc.* v. *Bombay India International Ltd. etc.*, AIR (1984) SC 420 and *Sidhartha Tubes Ltd.* v. *Collector of Central Excise*, (2000) 115 ELT 32, referred to. F

1.2. The concepts of "manufacture" and "valuation" are two different and distinct concepts. The present case is concerned with valuation. Value is the function of price under section 4(1)(a) of the Central Excise and Tariff Act. The taxable event took place when detergent powder was manufactured by the assessee. The said powder was packed into bulk packs of 25 kgs. They were cleared from the factory of the assessee on payment of excise duty. [504-C] G

1.3. Two key questions were required to be decided by the tribunal in the present case. Firstly, whether "repacking" amounted to manufacture. Secondly, if "repacking" amounted to manufacture, was the department H

**entitled to include the retail price of smaller packs into the value of the "bulk packs". It may be noted that in this case the issue was regarding valuation of bulk packs. These questions were required to be decided by the tribunal, particularly, in the light of the provisions of Section 4(4)(d)(i) of the Act. Hence, the matter is remitted to the tribunal for decision afresh in accordance with the principles enunciated in the Judgment. [505-A-E]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3844 of 2000.

From the Judgment and Order dated 19.6.2000 of the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi in F.O. No. 513/2000-A in A. No. E/529 of 1998-A.

V. Lakshmikumaran, Alok Yadav, Ms. Ruby Singh Ahuja, Ms. Saloni Gupta and Mrs. Manik Karanjawala for the Appellant.

Mohan Parasaran, Additional Solicitor General, Ravinder Agarwal, Arijit Prasad, Gaurav Dhingra, Senthilvelan, Chaidanand D.L. and P. Parmeswaran for the Respondent.

The Judgment of the Court was delivered by

**KAPADIA, J.** This is a statutory appeal under section 35-L (b) of the Central Excise Act, 1944 (hereinafter referred to as "the said Act") against the judgment and order dated 19.6.2000 passed by the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi ("tribunal" for short).

A short question which arises for determination in this civil appeal is - whether, on the facts and circumstances of this case, cost of repacking of detergent powder into 20 gms. and 30 gms. sachets, which did not amount to manufacture at the relevant time, was includible in the assessable value of "ariel micro-system" (AMS) cleared by Procter & Gamble ("assessees" for short") in bulk packs of 25 kgs. at its factory gate at Mandideep, Bhopal.

Assessees - appellants are engaged in the manufacture of detergent powder (AMS) falling under chapter 34 of the schedule to the Central Excise Tariff Act, 1985 (for short "the 1985 Act") at their factory at Mandideep, Bhopal within the jurisdiction of the Commissioner of Central Excise, Indore. On 8/10.6.1994, a show-cause notice was issued by the collector in which it was alleged that during the period December, 1992 to December, 1993, the appellants had removed AMS in bulk packs of 25 kgs. for further repacking

in 20 gms. and 30 gms. sachets by M/s. Industrial Enterprises (Detergent), Kanpur ("IED" for short); that, the said IED was an extended arm of appellants; that, the appellants had cleared 25 kgs. bulk packs of AMS on pricing, based on the cost method, and thereby did not pay the appropriate amount of duty on AMS in the condition in which it emerged after repacking by IED, Kanpur; that, the appellants did not pay duty on the prices of the sachets; that, the appellants had failed to disclose to the department the particulars of the agreement with IED for the repacking of the detergent powder (AMS); that, the appellants had removed the AMS in 25 kgs. packs with the sole intention of getting it packed in 20 gms. and 30 gms. sachets by IED Kanpur; that, the entire *modus operandi* on the part of the appellants was to deliberately declare only the cost of 25 kgs. bulk packs for payment of excise duty; and, consequently, there was suppression of the true price of AMS in the condition in which it was removed after packing in the sachets of the above dimensions. In the show-cause notice, it was further alleged that the appellants had wilfully suppressed the facts; that the 20 gms. sachets in blue and green colours were sold through the depots of the appellants at a price of Rs.2.50 and Rs.2.00 per piece. That the said sachets were supplied by IED to the appellants, who in turn sold the same through their depots. Consequently, the department issued the above show-cause notice as to why differential duty of Rs.1,10,40,613/- should not be levied on the appellants. By the said show-cause notice, the department invoked the extended period of limitation in terms of the proviso to section 11A(1) of the said Act.

In its reply to the show-cause notice, the appellants denied that the IED, Kanpur was the extended arm of the appellants. According to the appellants, effective from January 1993, they had started clearing AMS in 25 kgs. bulk packs, on payment of duty to IED, Kanpur for repacking into 20 gms. and 30 gms. sachets; that, the repacking in sachets was undertaken by IED on job work basis; that, such repacking was not a manufacturing activity under the said Act and consequently, no duty was payable by IED on the repacking of AMS 25 kgs. packs into 20 gms. and 30 gms. sachets till 1.3.1994, when chapter note 6 was introduced in chapter 34 making such repacking activity a "manufacture" in terms of section 2(f) of the said Act. After 1.3.1994, IED had applied and obtained registration under the Act. They are since then paying duty on 20 gms. and 30 gms. sachets repacked by them. In their reply, the appellants further pointed out that prior to the period in question, IED used to manufacture AMS; and that, vide letter dated 26.11.1992, IED had informed the Assistant Collector, Kanpur that it had entered into a contract with the appellants for repacking AMS from bulk packing into sachets,

A hence, there was no suppression on the part of the appellants as alleged. By the said reply, IED further pleaded that "repacking did not amount to manufacture and, consequently, the department had erred in including the repacking charges into the assessable value. Similarly, by another letter dated 5.3.1994, IED had informed the department that it had stopped carrying out manufacturing operations and that it had surrendered L-4 license. Further, B vide letter dated 11.11.1991, addressed by the Assistant Collector, Kanpur, clarification was given that "repacking" of the detergent powder did not amount to "manufacture". The appellants relied upon the aforestated circumstances in support of their contention that there was no wilful suppression on their part and, therefore, the department was not entitled to C invoke the extended period of limitation, as was sought to be done vide the above show-cause notice. In reply to the show-cause notice, the appellants further submitted that the demand for differential duty was proposed by the department on the ground that the duty was payable on the price of the sachets, which were sold. In reply, the appellants contended that 25 kgs. bulk packs were cleared at their factory's gate at Mandideep, Bhopal; that, they D were not sold; that, 25 kgs. bulk packs were sent by the appellants to IED for repacking in sachets and since such repacking did not constitute "manufacture", the department was not entitled to levy differential duty on the price of the sachets. According to the appellants, the demand for differential duty was not on the value of 25 kgs. bulk packs but on the price E at which 20 gms. and 30 gms. sachets were sold. According to the appellants, at the relevant time, "repacking" did not amount to "manufacture" under section 2(f) of the said Act, and, therefore, the cost of repacking or the repacking charges were not includible in the assessable value of the bulk packs. According to the appellants, the clearance of 25 kgs. bulk packs on payment of duty was known to the department. They had filed a price list in F which they had indicated such clearance. These bulk packs were not sold in the market. They were cleared for subsequent repacking into retail packs at IED Kanpur and, therefore, even assuming that IED was an extended arm of the appellants, the department was not entitled to demand differential duty because "repacking" did not constitute "manufacture" and since "repacking" G did not amount to "manufacture" at the relevant time, the department had erred in demanding differential duty on the price of the sachets. According to the appellants, since the clearance at the factory gate at Mandideep was not by way of sale, the appellants were entitled to value the bulk packs on the basis of costing under rule 6(b) of the Valuation Rules, 1975. According to the appellants, the impugned demand was not legally sustainable because H the department had demanded duty on the price at which the retail packs were

sold. Lastly, they contended that the impugned show-cause notice has proceeded on the basis that the detergent powder cleared in bulk packs and subsequently repacked into sachets and sold at a higher price in wholesale resulted in loss of revenue. However, vide Finance Bill, 1994, which was not retrospective, note 6 was added in chapter 34 of the schedule to the 1985 Act, by which repacking amounted to "manufacture" and, therefore, there was no suppression on the part of the assessees, as alleged by the department. According to the appellants, the subsequent change in the law itself indicated that there was some confusion on the aforestated point which was clarified vide Finance Bill, 1994 and, therefore, under any circumstances, wilful suppression cannot be alleged against the appellants.

By the adjudication order dated 10.12.1997, passed by the Commissioner, Indore, it was held that IED was an extended arm of the appellants; that, under the contract between the appellants and the IED, activity of IED was not disclosed by the appellants; that, the appellants had removed the AMS in 25 kgs. packs with the sole intention of getting it packed in 20 gms. and 30 gms. sachets by IED, Kanpur; that, the appellants had deliberately declared only the cost of 25 kgs. bulk packs for payment of excise duty; and, that, the appellants had suppressed the true price of AMS in the condition in which the said AMS was removed after repacking in 20 gms. and 30 gms. sachets on which the appellants failed to pay duty and, consequently, the demand raised by the department was legal and justifiable. Consequently, the commissioner confirmed the show-cause notice.

Being aggrieved by the order of the commissioner dated 10.12.1997, the assessees carried the matter in appeal to the tribunal. By the impugned judgment, the tribunal came to the conclusion that the IED was an extended arm of the appellants; that, the entire dispute was about under-valuation of the 25 kgs. bulk packs cleared from Mandideep and, therefore, the commissioner of central excise at Indore had jurisdiction to decide the issue of valuation. According to the tribunal, the appellants had cleared the AMS in 25 kgs. by bulk packs at Mandideep. They had valued the clearance at Mandideep on cost basis. According to the tribunal, every assessee was required to give reasons as to why "normal price" was not ascertainable under section 4(1)(a) of the Act or the Valuation Rules, 1975. According to the tribunal, although, the appellants were fully aware that 25 kgs. bulk packs were cleared in order to be repacked by IED into sachets, the details of repacking were deliberately suppressed by the appellants and, therefore, the department was right in invoking the extended period of limitation. In the circumstances, the tribunal

A dismissed the appeal filed by the assessee. Hence, this civil appeal.

Briefly stated, Mr. V. Lakshmikumaran, learned counsel for the appellants submitted that the show-cause notice did not contain allegations regarding valuation of 25 kgs. bulk packs; and that, the said notice had worked out the demand only on the basis of the price of 20 gms. and 30 gms. sachets. Before B us, the learned counsel did not challenge the concurrent finding of fact, namely, that the IED was the extended arm of the appellants. Learned counsel however submitted that even according to the department at the relevant time, repacking did not constitute "manufacture" and, therefore, the demand for differential duty only on the basis of the price of the sachets was untenable C in law. Learned counsel also contended that the value of the 25 kgs. bulk packs was approved by the department as declared in the price list for captive consumption and, therefore, there was no question of suppression on the part of the appellants. Learned counsel further submitted that the price list filed by the appellants was prepared on the basis of costing because the clearance of 25 kgs. bulk packs was for captive consumption and not for sale and, D consequently, the concept of "normal price" was not applicable in the present case. Learned counsel further submitted that repacking at the relevant time did not amount to "manufacture" in terms of section 2(f) of the said Act, and consequently, the repacking charges, in any event, were not includible in the assessable value of the AMS. Learned counsel further urged that the tribunal E has not at all gone into the question of valuation, particularly, when the entire case related to the scope of section 4(4)(d)(i) of the said Act. Learned counsel also submitted that if repacking activity did not amount to "manufacture" at the relevant time then the cost of repacking cannot be included in the assessable value. Lastly, it was urged that repacking amounted to "manufacture" only after the Finance Act No.2 of 1994; that, after the said F 1994 Act, IED had obtained the requisite registration, and that IED has since been paying excise duty on the manufacture of retail packs. Consequently, it was urged that there was no suppression on the part of the appellants. Learned counsel submitted that none of these facts have been considered by the tribunal.

G Shri Mohan Parasaran, learned Additional Solicitor General submitted on behalf of the appellants that during the relevant period, AMS was manufactured by the appellants and not by the IED and, therefore, the department was right in demanding the differential duty on the price of the sachets. He submitted that the appellants removed the detergent powder in H 25 kgs. bulk packs from the factory gate at Mandideep, Bhopal with the sole

intention of getting it packed into sachets of the aforestated dimensions by IED, Kanpur. He contended that the appellants had deliberately declared only the cost of 25 kgs. bulk packs and they had suppressed the price of AMS in the condition in which the powder was removed after packing in 20 gms. and 30 gms. sachets. Learned counsel urged that in the entire proceedings before the adjudicating authority, the appellants contended that the IED was an independent job worker and that the IED was not an extended arm of the appellants, whereas the finding of the commissioner that IED was an extended arm of the appellants is not challenged. In this connection, learned counsel submitted that the retail packs were in fact cleared through the depots of the appellants and in the circumstances, the commissioner was right in coming to the conclusion that there was a wilful suppression on the part of the appellants under the proviso to section 11A(1). Learned counsel submitted that in the present case, the commissioner has categorically recorded a finding of fact to the effect that the appellants had suppressed the true price of AMS in the condition it was removed after packing in sachets. He submitted that even on valuation, the commissioner has recorded a finding that the appellants were required to pay duty on the assessable value of 20 gms. and 30 gms. sachets supplied by the IED to the depots of the appellants. Learned counsel submitted that this finding on valuation has been accepted by the tribunal and, therefore, no interference was called for in the present case.

This case relates to valuation. At the outset, we would like to clarify certain concepts under the Excise Law. The levy of excise duty is on the "manufacture" of goods. The excisable event is the manufacture. The levy is on the manufacture. The measure or the yardstick for computing the levy is the "normal price" under section 4(1)(a) of the Act. The concept of "excisability" is different from the concept of "valuation". In the present case, as stated above, we are concerned with valuation and not with excisability. In the present case, there is no dispute that AMS came under sub-heading 3402.90 of the Tariff. There is no dispute in the present case that AMS was dutiable under section 3 of the Act. In the case of *Union of India & Ors etc.* v. *Bombay India International Ltd. etc.*, reported in AIR (1984) SC 420, this Court observed that the measure of levy did not conclusively determine the nature of the levy. It was held that the fundamental criterion for computing the value of an excisable article was the price at which the excisable article was sold or was capable of being sold by the manufacturer. It was further held that the price of an article was related to its value and in that value, we have several components, including those components which enhance the commercial value of the article and which give to the article its marketability

A in the trade. Therefore, the expenses incurred on such factors *inter alia* have to be included in the assessable value of the article up to the date of the sale, which was the date of delivery.

In the case of *Sidhartha Tubes Ltd.* v. *Collector of Central Excise,* reported in (2000) 115 ELT 32, this court held that the process of galvanization, B though did not amount to "manufacture", resulted in value addition and, therefore, the galvanization charges were includible in the assessable value of the M.S. black pipe.

The concepts of "manufacture" and "valuation" are two different and C distinct concepts. In the present case, we are concerned with valuation. Value is the function of price under section 4(1)(a) of the said Act. In the present case, the taxable event took place when detergent powder was manufactured by the appellants. The said powder was packed into bulk packs of 25 kgs. They were cleared from the factory of the appellants at Mandideep, Bhopal on payment of excise duty. The appellants followed self-removal procedure. D These bulk packs were sent to IED, Kanpur. The appellants contended that IED, Kanpur was their job-worker. The commissioner found on facts that IED, Kanpur was the extended arm of the appellants. The commissioner found price manipulation. According to the commissioner, the appellants had removed AMS in bulk packs from its factory gate at Mandideep, Bhopal with the sole intention of getting AMS packed in the sachets of 20 gms. and 30 gms. by E IED, Kanpur from where the sachets were taken to the depots of the appellants and cleared at the price list indicated in the show-cause notice. According to the commissioner, the appellants had suppressed the true price of AMS in the condition in which it was removed after packing in 20 gms. and 30 gms. sachets. Therefore, the commissioner took the price of the sachets at the F depots of the appellants as the basis for computing the assessable value of AMS cleared by the appellants in 25 kgs. bulk packs at Mandideep, Bhopal.

Unfortunately, when the matter came before the tribunal in the appeal preferred by the assessees, the tribunal has not adverted to the valuation of the bulk packs cleared by the appellants at Mandideep, Bhopal. Before the G tribunal, the appellants contended that the department had cleared the bulk packs on payment of duty by the appellants. According to the appellants, the activity of "repacking" did not amount to "manufacture" at the relevant time and if the said activity did not amount to manufacture, the department was not entitled to compute the assessable value of the bulk packs based on the H retail price of 20 gms. and 30 gms. sachets. The appellants contended that

even if IED was taken as an extended arm of the appellants, the department was not entitled to compute the assessable value based on the retail prices of the sachets, particularly, when the activity of "repacking" did not amount to "manufacture". The appellants also contended that they were not guilty of suppression because the activity of "repacking" amounted to "deemed manufacture" under section 2(f) only after introduction of note 6 in chapter 34 of the schedule to the Tariff Act vide Finance Bill, 1994.

The key question which was required to be decided by the tribunal in the present case was concerning determination of the "assessable value" of 25 kgs. bulk packs of AMS from the appellants' factory at Mandideep, Bhopal. If the activity of repacking did not amount to manufacture at the relevant time, was the commissioner justified in computing the assessable value of the bulk packs based on the retail price of 20 gms. and 30 gms. sachets sold through the depots of the appellants? This question has not been decided by the tribunal. Similarly, in the context of suppression and in the context of invocation of the extended period of limitation, the tribunal has not considered the argument of the appellants that they were not guilty of suppression as the law was amended vide Finance Bill, 1994, when the activity of "repacking" was treated as "manufacture" for the first time. In our view, these questions were required to be decided by the tribunal in the present case, particularly, in the light of the provisions of section 4(4)(d)(i) of the said Act. They have not been decided by the tribunal.

In the circumstances, this civil appeal filed by the assessees is allowed, the impugned judgment of the tribunal is set aside and the matter is remitted to the tribunal for its fresh decision in accordance with the principles enunciated hereinabove. There will be no order as to costs.

S.K.S. Appeal allowed.