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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 3649/2014, CM No. 7413/2014 & CM No. 29211/2015

**INDIAN BEAUTY & HYGIENE ASSOCIATION
& ANR.**

..... Petitioners

Through: Mr Rahul P. Dave with Mr Amit
Dhingra, Mr Vikramaditya Rai and Mr Amandeep
Bawa, Advocates.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr Akshay Makhija, CGSC with Mr
Siddharth Thakur and Ms Mahima Bahl,
Advocates for UOI.

Mr Satish Kumar, Senior Standing counsel for
Respondent No.2.

**CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU**

**ORDER
07.04.2016**

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Dr.S.Muralidhar,J.:

1. This is a writ petition filed by the Indian Beauty & Hygiene Association ('IBHA') (Petitioner No. 1) and M/s Elca Cosmetics Private Limited (Petitioner No. 2) seeking a declaration that Notification No.16/2013 – Central Excise (N.T.) dated 31st December, 2013 issued by Respondent No.1 has no application to retail packages which are exempted under the provisions of Rule 26 of the Legal Metrology (Packaged Commodities) Rules, 2011 ('LMPC Rules') from the requirement of having the retail sale

price ('RSP') printed on the package. A mandamus is also sought to direct the Central Board of Excise & Customs ('CBEC') to issue a necessary clarification/direction to the above effect under Section 37B of the Central Excise Act, 1944 ('CE Act').

2. Another relief sought is to restrain the Customs and Excise authorities from applying the aforementioned Notification to retail packages which are exempted under Rule 26 of the LMPC Rules and in the alternative "to declare and strike down" the aforementioned Notification as *ultra vires*, illegal, null and void.

3. The members of the IBHA including the Petitioner No. 2 are stated to be supplying to their wholesale customers in India various imported cosmetics products each of which is of a weight or measure of 10 gm or 10 ml or less. It is, accordingly, contended that the consignments of cosmetic products thus imported and subsequently sold are exempted under Rule 26 of the LMPC Rules from the requirement of having the RSP displayed in the package. It is further stated that, contrary to the plain language of the aforementioned Notification No. 16/2013, the Customs authorities have been insisting on assessing the packages on the basis of their ultimate RSP and requiring the members of the IBHA including the Petitioner No.2 to disclose the RSP.

4. In terms of Section 3 of the Customs Tariff Act, 1975 (CT Act) any article which is imported into India shall, in addition to the regular customs duty, be also liable to a duty "equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty

on a like article is leviable at any percentage of its value, the additional duty to which the impugned article shall be so liable shall be calculated at that percentage of the value of the imported article.” This additional duty is also called as countervailing duty (CVD). For determining the CVD, the excise duty that could be levied and collected on an article if it was produced in India, will have to be ascertained.

5. Section 3(2) of the CE Act provides that the Central Government may, by notification in the Official Gazette, fix, for the purpose of levying the excise duty “tariff value of any article enumerated, either specifically or under general headings, in the First schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as chargeable with duty *ad valorem* and may alter any tariff values for the time being in force.” Further, Section 3(3) of the CE Act talks of the different kinds of tariff value that may be fixed depending on the classes or description of excisable goods.

6. Section 4A of the CE Act talks of valuation of excisable goods with reference to the RSP. Under Section 4A(2), the value of the excisable goods would be deemed to be the RSP displayed on such goods in terms of the Legal Metrology Act, 2009 (LM Act or the Rules made thereunder). As far as the present case is concerned, the admitted position is that the consignments imported by the members of the IBHA, including Petitioner No. 2, forming the subject matter of the present petition, are not covered under the LM Act or the Rules thereunder as they are cosmetics products each of which is of a weight or measure of 10 gram or 10 ml or less and, therefore, Section 4A of the CE Act is not applicable.

7. It is in the above context that the impugned Notification No.16/2013 dated 31st December, 2013 requires to be examined. The said Notification reads as under:

"G.S.R.813(E).- In exercise of the powers conferred by sub-section (2) of section 3 of the Central Excise Act, 1944 (1 of 1944), the Central Government hereby fixes tariff value in respect of the excisable goods, falling under heading 3304 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), in retail packages, and in respect of which the provisions of section 4A of the Central Excise Act, 1944 (1 of 1944) do not apply, equivalent to the retail sale price declared on such goods less such amount of abatement from such retail sale price as specified for such goods in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.49/2008-Central Excise (N.T.), dated the 24th December, 2008 *vide* number G.S.R. 882(E), dated the 24th December, 2008.

Explanation 1. – For the purposes of this notification ‘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. – For the purposes of this notification, ‘retail package’ means a package which is intended for retail sale to the ultimate consumer for the purpose of consumption of the goods contained therein and includes an imported package;

Provided that for the purposes of this *Explanation*, the expression ‘ultimate consumer’ shall not include industrial or institutional consumers.”

8. By way of a further elucidation of the above Notification, the Tax Research Unit (TRU) of the Department of Revenue, Ministry of Finance on 2nd January, 2014 issued a communication addressed to the Excise and Customs officials, which reads as under:-

“Your attention is invited to notification No.16/2013-Central Excise (NT), dated 31.12.2013, prescribing tariff value under section 3(2) of the Central Excise Act, 1944 in respect of goods falling under tariff heading 3304 (beauty or make-up preparations and preparations for the care of the skin, etc.) of the Central Excise Tariff and in respect of which the provisions of section 4A of the Central Excise Act, 1944 do not apply. The tariff value shall be the retail sale price (RSP) less abatement as prescribed for such goods under notification No.49/2008-Central Excise (NT), dated 24.12.2008. Presently, the abatement rate in respect of goods falling under tariff heading 3304 is 35%. Thus, the tariff value under section 3(2) of the CEA, 1944 for such goods shall be 65% of RSP.

2. Difficulties faced, if any, in implementation of the said notification may be brought to the notice of the Board.”

9. It is submitted by Mr Rahul Dave, learned counsel for the Petitioners, that since they are importing commodities which are 10 gram or 10 ml or less there is an exemption from displaying the RSP on such packages in terms of Rule 26 of the LMPC Rules read with Rule 6 thereof. Their case is that if there is no requirement in law for the declaration of the RSP on such packages, then in terms of the aforementioned Notification, which fixes the tariff value of the said commodities equivalent to the RSP "declared on such goods", there cannot be any tariff value for such commodities. In other words, the Petitioners contend that since the packages do not have to display the RSP at which they are sold, there cannot be a tariff value equivalent to

such RSP.

10. The stand of the Respondents in the counter affidavit is that tariff value under Section 3(2) of the CE Act has been fixed “precisely on those goods which escape assessment under Section 4A” of the CE Act since they do not come under the preview of the LM Act and the LMPC Rules. It is stated that inasmuch as the goods imported by the Petitioners are in retail packages, they satisfy the requirement of Notification No.16/2013. It is stated that in such cases “the importer of the impugned goods is required to declare the RSP for the purposes of arriving at tariff value and assessment of excise duty/CVD.” It is further stated in the counter affidavit as under:

“the notification, however, does not mandate that the RSP has to be pasted on the goods, but the same has to be declared to the assessing officer for the purposes of arriving at the tariff value and calculating CVD. The Petitioner does not deny that the impugned goods are ultimately sold in retail with the RSP affixed on thereon.”

11. During the course of the submissions Mr Satish Kumar, learned Senior Standing counsel on behalf of the Respondents, further clarified that the Respondents are not insisting that the RSP be affixed on the package and that all that the Respondents require is for a declaration by the importer to the Respondents of the RSP at which the goods are ultimately sold.

12. In light of the above stand of the Department, it becomes clear that the expression “Retail Sale Price declared on such goods” occurring in the impugned Notification has to be read as not requiring any disclosure or declaration of the RSP on the packages in question subject to their fulfilling

the parameters of Rule 26 of the LMPC Rules. It only requires the importer to make a declaration to the Respondents of the RSP at which such goods, in packets of 10gm or 10ml, are to be sold. This has been further confirmed by the communication dated 2nd January, 2014 issued by the TRU which states that the tariff value shall be the RSP prescribed for such goods. Therefore, the RSP referred to in the Notification No. 16/2013 is the RSP disclosed by the importer to the Respondents. It is not denied by the Petitioners that they do have information about the RSP at which the imported goods are ultimately sold to the customer.

13. The Petitioners does not question the power of the Central Government under Section 3(2) of the CE Act to fix the tariff value. They also do not question the constitutional validity of Section 3 of the CT Act in terms of which the CVD can be levied and collected. The issue really is only about the apprehension of the Petitioners that they may be compelled to disclose the RSP on the packages contrary to the exemption granted under Rule 26 of the LMPC Rules. This apprehension has been laid to rest by the Respondents who have clarified that they will not insist on such disclosure of the RSP on the package as long as the Petitioners otherwise satisfy the requirement of Rule 26 of the LMPC Rules. What the Respondents ask is for a declaration made to them of the RSP at which such commodities are ultimately sold. Therefore, there is no illegality attaching to the impugned Notification. Consequently, the prayer that the said Notification should be held to be contrary the CE Act or the CT Act is hereby rejected.

14. Mr Dave sought to place reliance on the decision of the Supreme Court

in *Jayanti Food Processing (P) Ltd. v. Commissioner of Central Excise (2007) 8 SCC 34*. The said decision is distinguishable on facts. There the manufacturer of ice cream had voluntarily displayed the maximum retail price (MRP) on the package when in fact there was no such requirement in terms of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977. There was also a specific display on the said packages that the “pack was not meant for retail sale.” In the above circumstances the Supreme Court held that even if the manufacturer had voluntarily displayed the MRP that could not be acted upon for fixing the tariff value since in fact there was no retail sale of that package. In the present case, the impugned Notification No. 16 of 2013 makes it clear that it applies to commodities to which Section 4 A does not apply, a fact which is not in dispute. The Notification has been issued in exercise of the powers under Section 3 (2) CE Act which is not again questioned. Insofar as it only fixes the tariff value as the RSP which the importer has to declare to the Customs authorities, no illegality attaches to the said Notification or the subsequent clarification issued by the TRU on 2nd January 2014.

15. For the aforementioned reasons, the Court vacates the interim orders 29th August and 25th November, 2014 and disposes of the petition and pending applications in the above terms.

S. MURALIDHAR, J

VIBHU BAKHRU, J

APRIL 07, 2016/MK