

POSTHUMOUSLY YOURS...

(By S. Jaikumar & G. Natarajan, Advocates)

Reference is drawn to the latest Circular from CBEC vide CIRCULAR NO: 843/1/2007-CX., Dated: January 17, 2007, wherein, the Board has clarified that the bulk sale of ice cream in packages to hotel/catering industry etc. is required to comply with the provisions of Standards of Weight & Measures (Packaged Commodities) Rules, 1977, and accordingly, the assessee is required to declare the retail sale price on such packages.

Way back in 2002, on the same issue, the Board had issued a Circular No. 625 /16 /2002-CX, dated 28th February, 2002. In Para 4 of the said Circular, an example was given, whereby it was clarified that, in respect of bulk sale of ice-cream to hotels/restaurants, which are not meant for retail sales as such, the provisions of the Standards of Weights and Measures Act will not apply.

The reason for this reversal is stated to be a response received from the Weights & Measure Unit, Department of Consumer Affairs, Director (Legal Metrology), wherein it has been clarified that the bulk sale of ice-cream in packages to hotel/catering industry etc., is not covered under Rule 34(a) of the Standards of Weight & Measures (Packaged Commodities) Rules, 1977 as ice cream cannot be treated as raw material. Thus the present Circular has clarified that the provisions of the Standards of Weights and Measures Act and Packaged Commodities Rules, 1977 shall apply to the ice cream cleared in bulk to the hotel/catering industry.

The present Circular has also tried to justify this U-Turn stand, contrary to the earlier Circular, by placing reliance on Para 7 of its earlier Circular *supra*, wherein, there had been a passing remark that, in case of any dispute between the department and assessee as to whether the assessee is exempted from declaring the retail price or not, a clarification may be obtained from the concerned Deptt. (generally the Metrology Deptt.) of the State Government.

Citing this Para 7, the present Circular has reversed its stand and has thus concluded that the provisions of the Standards of Weights and Measures Act and Packaged Commodities Rules, 1977 shall apply to the ice cream cleared in bulk to the hotel/catering industry.

Kind attention is drawn to the Notification No. G.S.R 425(E) dated 17/7/2006, issued by the Ministry of Consumer Affairs and Public Distribution (Department of Consumer Affairs), whereby, significant amendments had been incorporated to the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 (SWMPCR). As per the said amendment, Rule 2A of SWMPCR which deals with the applicability of the provisions has undergone a sea-change. As per the present Rule 2A (b) of SWMPCR, the provisions of the chapter is not applicable to the packaged commodities meant for industrial consumers or institutional consumers. As per Explanation (a) to this Rule 2A of SWMPCR, "Institutional consumer" means those consumers who buy packaged commodities directly from the manufacturers/packers for service industry like transportation (including airways, railways), **hotel or any other similar industry**. Further as per the present amendment, the Rule 34(a) of SWMPCR itself (based on which the present Circular has been issued) has been omitted from the statute!

In view of the above, the ice creams cleared in bulk to the hotel/catering industry would be totally outside the purview of the provisions of SWMPCR and hence need not be assessed based on MRP under Section 4A of the Central Excise Act. If so, what is the need and significance of this present Circular? For the reasons stated above, it has no application for the future. The past clearances shall be immuned by the earlier circular as it is a settled legal position that the department is bound by its Circulars and any fresh circular can only have a prospective effect. Thus the present circular has nothing but a stationa(e)ry value!

Before parting...

The present amendment to SWMPCR comes into force exactly after 180 days from the date of its publication in the Official Gazette, which means on 17/1/2007. Ironically the present CBEC Circular is also dated 17/1/2007! What a great coincidence!