CASE NO.:
Appeal (civil) 2819 of 2002

PETITIONER:
Jayanti Food Processing (P) Ltd

RESPONDENT:
Commissioner of Central Excise, Rajasthan

DATE OF JUDGMENT: 22/08/2007

BENCH:
Ashok Bhan & V.S. Sirpurkar

JUDGMENT:
J U D G M E N T
WITH

CIVIL APPEAL NOS.2150-2151 OF 2004

Commissioner of Central Excise, Calicut \005. Appellant

Versus

ITEL Industries Pvt. Ltd. \005. Respondent

WITH

CIVIL APPEAL NO.1144 OF 2004

Commissioner of Central Excise, Calicut \005. Appellant

Versus

BPL Telecom Private Limited \005. Respondent

WITH

CIVIL APPEAL NO.1738 OF 2004

Nestle India Limited \005. Appellant

Versus

Commissioner of Central Excise, Goa \005. Respondent

WITH

CIVIL APPEAL NO.1385 OF 2005

Commissioner of Central Excise, Chandigarh \005. Appellant

Versus

Himachal Exicom Communication Ltd. \005. Respondent

WITH

CIVIL APPEAL NO.2877 OF 2005

Commissioner of Central Excise, Nagpur \005. Appellant

Versus

Electrolux Kelvinator Ltd. \005. Respondent

WITH

CIVIL APPEAL NO.3847 OF 2005

The Commissioner of Central Excise, Noida \005. Appellant

Versus

Uniword Telecom Ltd. \005. Respondent

WITH

CIVIL APPEAL NO.6168 OF 2005

Commissioner of Central Excise, Nagpur \005. Appellant

Versus

Electrolux India Ltd. \005. Respondent

WITH

CIVIL APPEAL NO.6425 OF 2005

Commissioner of Central Excise, Calicut \005. Appellant

Versus

ITEL Industries \005. Respondent

WITH

CIVIL APPEAL NOS.6559-60 OF 2005

The Commissioner of Central Excise, Ghaziabad \005. Appellant

Versus

Explicit Trading & Marketing (P) Ltd. \005. Respondent

WITH

CA 498 OF 2006

Commissioner of Central Excise, New Delhi \005. Appellant

Versus

Ramani Power Cables Pvt. Ltd. \005. Respondent

WITH

CIVIL APPEAL NO.4754 OF 2006

Commissioner of Central Excise & Customs, Calicut \005. Appellant

Versus

BPL Telecom Ltd. \005. Respondent

WITH

CIVIL APPEAL NO.5840 OF 2006

Commissioner of Central Excise, Nagpur \005. Appellant

Versus

Electrolux Kelvinator Ltd. \005. Respondent

V.S. SIRPUKAR, J

1. This judgment will dispose of in all 15 appeals. They can be classified in two groups. Two appeals are filed by the Assessees challenging the order of Customs, Excise & Gold (Control) Appellate Tribunal (hereinafter referred to as \023the Tribunal\024), they being CA 2819/2002 filed on behalf of Jayanti Food Processing (P) Ltd., for sale of Ice-creams and CA 1738/2004 filed on behalf of Nestle India Limited pertaining to KITKAT Chocolates. The remaining appeals are filed by the Commissioners of Central Excise from various places and they are CA 2150-51/2004 and CA6425/2005 against ITEL Industries, CA 1144/2004 and CA 4754/2006 against BPL Telecom Ltd., CA 1385/2005 against Himachal Exicom Communication Ltd. These appeals by themselves formulate into one group relating to the sale of telephone instruments by the assesses. CA 2877/2005, CA6168/2005 and CA5840/2006 against Electrolux Kelvinator and Electrolux India relate to the sale of Refrigerators. Further CA6559-6560/2005 against Explicit Trading and Marketing Pvt.Ltd., pertain to the sale of bottled mineral water. Lastly CA498/2006 against Ramani Power Cables Pvt., Ltd. relate to the sale of Electric Filament Lamps.

2. All these appeals pertain to the interpretation of Section 4 and 4A of the Central Excise Act, 1944 (hereinafter referred to as \023the Act\024) and the provisions of Standards of Weights & Measures Act, 1976 (hereinafter referred to as \023the SWM Act\024) as also the Standards of Weights & Measures (Packaged Commodities) Rules, 1977 (hereinafter referred to as \023the SWM (PC) Rules\024). In the appeals filed by the Assessees, Jayanti Foods and Nestle India the Tribunal has accepted the contention of the Department that these Assessees should be assessed under Section 4A while the contention of the Assessees is that they should be assessed and taxed under Section 4 of the Act. In the appeals filed by the Department pertaining to sale of Telephone Instruments, the contention of the Department is that they should also be taxed and assessed under Section 4 and not under Section 4A of the Act as ordered by the Tribunal. Similar is the case in respect of appeals pertaining to the sale of Refrigerators where the Tribunal has ordered the assessment under Section 4A of the Act. In the case of sale of Bottled Mineral Water while the Tribunal has ordered the assessment under Section 4, the Department suggests that the assessment should be under Section 4A of the Act. Lastly CA 498/2006 pertain to the sale of Electric Filament Lamps where the assessment is ordered under Section 4A of the Act. In short unless an authoritative interpretation is handed out, it will not be possible to settle the issues between the assessees and the Department. In respect of some of the items, as the assessment under Section 4A is less, the same is being insisted upon by the Assessee while in some cases the assessment being more beneficial under Section 4, the Assessees insisted on the assessment under Section 4 of the Act. Eventually the stand of the Department is to the contrary. All these appeals, therefore, would depend upon the interpretation of the scope of Section 4A which is inextricably connected with the provisions of PC Rules under the SWM Act. We would, therefore, first explain the interpretation and scope of Section 4A more particularly sub-sections (1) and (2) thereof. Section 4A was added by Section 82 of the Finance Act, 1997 (Act 26 of 1997) which amendment was with effect from 14.5.1997. Section 4A, as it originally stood, and relevant for

our purposes, is as under:
\023Section 4A. Valuation of excisable goods with reference to retail sale price \026 (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, \023retail sale price\024 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 purpose 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 prices shall be the retail price for the purposes of valuation of the excisable goods intended to be sold in the area to which the retail sale price relates.\024

This Section was introduced with the sole idea to end the uncertainty caused in determining the value of the goods under Section 4 and then assessing the duty under that Section. Section 4 was the basic formula for valuation of excisable goods and for the purposes of charging of the duty of excise. It provided the mechanism of determining the valuation of the goods under various circumstances, e.g., in the matter of wholesale trade or in the matter of sales being at the different prices for different places of removal or in case where the assessee sold the goods only to related persons, etc. Section 4A of the Act, as would be clear from the language of sub-section (1), linked the valuation of the goods to the provisions of SWM Act or the Rules made thereunder by firstly providing that it would be for the Central Government to specify any goods in respect of which the declaration of price on the package was required under the provisions of SWM Act, Rules made thereunder or any law for the

time being in force. In short sub-section (1) was linked with the packages of the goods in respect of which the retail sale price was required to be printed under SWM Act and the Rules made thereunder or any other law. Sub-section (2) then provides that such specified goods where they are excisable goods would be valued not on any other basis but on the basis of the retail sale price declared on such packages. The Section also provides that the assessee would be entitled to the deduction from such valuation the amount of abatement provided by the Central Government by a notification in the Official Gazette. In short after introduction of Section 4A, the nature of sale lost its relevancy in the sense that the valuation did not depend upon the factor whether it was a wholesale or sale in bulk or a retail sale. The whole section covered the goods which were packaged and sold as such with the rider that such package had to have a retail price thereupon under the provisions of SWM Act, Rules made thereunder or under any other law. Thus, viewed from the plain language of the Section, where the goods are excisable goods and are packaged and further such packages are required to mention the price thereof under the SWM Act, Rules made thereunder or under any other law and further such goods are specified by the Central Government by notification in the Official Gazette, then the valuation of such goods would be on the basis of the retail sale price of such goods and only to such goods the provisions of sub-section (2) shall apply whereby it is provided that the value of such goods would be deemed to be the such retail price declared on the packages. Of course, the assessee shall be entitled to have a reduction of abatement as declared by the Central Government by the notification in the Official Gazette. Even at the cost of repetition the 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 thereunder 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.

3. It is not in dispute that all the goods with which we are concerned in these appeals are excisable goods and they are specified by the Central Government by issuing a notification in the Official Gazette.

4. Since the language of Section 4A(1) of the Act specifically mentions that there would be a requirement under SWM Act or Rules made thereunder or under any other law to declare on the package of the goods the retail sale price of such goods for being covered by the Section, it would be better to see the various provisions of the said Act and the Rules made thereunder. Section 83 of the SWM Act empowers the Central Government to make Rules on the subjects provided in Section 83(2). Accordingly, the Central Government framed the Rules called \023The Standards of Weights and Measures (Packaged Commodities) Rules, 1977\024. As would be suggestive from the title itself, Rule 1(3) provided that these Rules would apply to the commodities in packaged form which are, or are intended or likely to be sold, distributed, delivered or offered or displayed for sale, distribution or delivery, or stored for sale or for distribution or delivery in the course of inter-State trade and commerce.

Definition of \023retail dealer\024 under Rule 2(o) is as under:

\023retail dealer\024 in relation to any commodity in packaged

form means a dealer who directly sells such packages to the consumer and includes, in relation to such packages as are sold directly to the consumer, a wholesale dealer who makes such direct sale.\024

Definition of \023retail package\024 under Rule 2(p) is as under:

\023retail package\024 means a package containing any commodity which is produced, distributed, displayed, delivered or stored for sale through retail sales, agencies or other instrumentalities for consumption by an individual or a group of individuals\024.

Definition of \023retail sale\024 under Rule 2(q) is as under:

\023retail sale\024, in relation to a commodity, means the sale, distribution or delivery of such commodity through retail sales agencies or other instrumentalities for consumption by an individual or group of individuals or any other consumer.\024

Definition of \023retail sale price\024 under Rule 2(r) is as under:

\023retail sale price\024 means the maximum price at which the commodity in packaged form may be sold to the ultimate consumer and where such price is mentioned on package, there shall be printed on the packages the words \023maximum or max. retail price\005 inclusive of all taxes or in the form MRP Rs\005 incl., of all taxes\024.

Explanation: For the purposes of the clause \023maximum price\024 in relation to any commodity in packaged form shall include 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.\024

Definition of \023wholesale dealer\024 under Rule 2(w) is as under:

\023wholesale dealer\024 in relation to any commodity in packaged form means a dealer who does not directly sell such commodity to any consumer but distributes or sells such commodity through one or more intermediaries.

Explanation: Nothing in this clause shall be construed as preventing a wholesale dealer from functioning as a retail dealer in relation to any commodity, but where he functions in relation to any commodity as a retail dealer, he shall comply with all the provisions of these rules which a retail dealer is required by these rules to comply.\024

Definition of \023wholesale package\024 under Rule 2(x) is as under:

\023wholesale package\024 means a package containing \026

(i) 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

(ii) 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; or

(iii) packages containing ten or more than ten retail packages provided that the retail packages are labeled as required under the rules.\024

Chapter II of these Rules is applicable to the packages intended for retail sale. Rule 3 provides that the expression \023package\024 wherever occurring in the Chapter shall be construed as \023packages intended for retails sale\024. Rule 6(1) provides for the declaration to be made on every package and sub-rule (f) thereof is as under:
\023(f) the retail sale price of the package\024

Rules 15 and 16 pertain to the declarations required to be made on combination packages and group packages. A glance at these Rules suggests that the sale price is required to be mentioned on both. Rule 17 deal with multi-pieces packages also requiring to declare the sale price on the same. Rule 23(1) and (2) provide as under:
\02323. Provisions relating to wholesale dealer and retail dealer\024

(1) No wholesale dealer or retail dealer shall sell, distribute, deliver, display or store for sale any commodity in the packaged form unless the package complies within all respects, the provisions of the Act and these rules.

(2) No retail dealer or other person including manufacturer, packer and wholesale dealer shall make any sale of any commodity in packed form at a price exceeding the retail sale price thereof.

Explanation: For the removal of doubts, it is hereby declared that a sale, distribution or delivery by a wholesale dealer to a retail dealer or other person is a \023retail sale\024 within the meaning of this sub-rule.\024

Chapter III deals with the provisions applicable to wholesale packages. Rule 29 pertains to the declaration required to be made on every wholesale package. Chapter V deals with the exemptions. Rule 34 thereof is extremely important. It runs as under:
\02334. Exemptions in respect of certain packages

Nothing contained in these rules shall apply to any package containing a commodity if, -

(a) the marking on the package unambiguously indicates that it has been specially packed for the exclusive use of any industry as a raw material or for the purpose of servicing any industry, mine or quarry\024.

5. When we read these Rules along with provisions of Section 4A of the Act, it would be clear that where there is a general exemption like Section 34 under the SWM (PC) Rules such goods and/or packages of such goods shall not be covered by Section 4A (1) and (2) of the Act. However, all such packages which are covered under Chapter II, more particularly under Rule 6(1)(f), Rules 15, 16 and 17, would be governed under Section 4A as such packages are required to declare the retail sale price on the packages. The packages covered by Rule 29 would be outside the purview of the retail sales as under that Rule retail prices are not required to be mentioned on the package. However, again those packages which enjoy the exemption under Rule 34 shall also be outside the scope of Section 4A of the Act as the Rules do not apply to the said packages.

6. Shri Subba Rao, learned Advocate urged that where the goods are sold in bulk, Section 4A would not apply and the assessment would have to be done under Section 4 of the Act. We have already clarified above that it is not the nature of sale which is relevant factor for application of Section 4A but the applicability would depend upon five factors which we have enumerated in para 2 above.

7. It was tried to be argued by Shri Joseph Vellapally, Senior Counsel that Section 4A was introduced for simplification and to reduce complications in valuing and assessing under Section 4 of the Act. According to the learned Senior Counsel once the goods are specified under the notification, that itself will be a deciding factor, for such goods to be valued and assessed under Section 4A of the Act. We do not think that the question can be solved on such a broad proposition. We have already indicated the scope of Section 4A above. On that basis and in the light of the various provisions under the SWM (PC) Rules as also in the light of some of the circulars which were relied upon by the parties and referred to in the impugned orders of the Tribunal, we would now proceed to decide the individual cases.

8. We would first deal with the appeals filed by the assessees against the order of the Tribunal wherein the Tribunal has found that the valuation and assessment should be under Section 4A of the Act rejecting the contention of the assessee that it should be under Section 4 of the Act.

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9. The assessee is engaged in manufacturing of Ice-cream falling under Sub-heading 2105 of the Central Excise Tariff Act, 1985. It used to supply the ice-cream in four litres pack to the Catering Industry or as the case may be hotels, the hotel used to sell the said ice-cream in scoops. The assessee used to specifically display on the said packs that \023the pack was not meant for retail sale\024. The ice-cream contained in the said pack of four litres used to be sold in unpacked form by the hotel to which the said ice-cream used to be supplied. The contention of the assessee, therefore, was that since the pack which could be described as the bulk pack of four litres, was not meant to be sold in retail, it was bound to be treated as a wholesale transaction and as such the assessee was not required under SWM Act and the Rules made thereunder to print the Maximum Retail Price(\023hereinafter referred to as \023MRP\024) which was a pre-condition for application of section 4A of the Act for the purposes of valuation and assessment. The further contention of the assessee is that the assessee is entitled to exemption under Rule 34 of the SWM (PC) Rules. This stand was not accepted by the Assessing Authority or the Appellate Authority who held that the valuation would have to be under Section 4A and not under Section 4 of the Act (perhaps because that would yield more revenue). The Tribunal has upheld those orders dismissing the appeals filed by the present appellant. That is how the matter has come before us.

10. Shri Ravinder Narain, the learned counsel appearing on behalf of the appellant contends that the Tribunal has wrongly given a finding that the four litres pack would come under the definition of term \023retail package\024 as it is produced and distributed for consumption by a group of individuals. Learned counsel further urged that the Tribunal had erred in holding that the appellant is not entitled to exemption under Rule 34 of SWM (PC) Rules. Learned counsel was at pains to point out that this pack which is manufactured by the appellant is also sold to Hindustan Lever Limited who in turn supplies the same to various dealers and ultimately from dealers the commodity reaches the consumers. According to the learned counsel the Tribunal erred in holding that the ice-cream is not supplied to the hotel industry for servicing it. Learned counsel criticized the order of the Tribunal and urged that after the order of the Tribunal was passed, the clarificatory Board Circular dated 28.2.2002 came into existence thereby binding the authorities under the Act and as such the appeal was liable to be allowed.

11. As against this Shri Subba Rao supported the order of the Tribunal and pointed out that actually the MRP was displayed on the four litres pack which suggests that even as per the assessee the pack was for retail sale itself. Learned counsel further submits that once the MRP was displayed on the pack, it was obvious that the pack was meant for retail sale and ice-cream having been included in the notification under Section 4A(2), the assessment would have to be under Section 4A as held by all the three authorities including the Tribunal. Learned counsel further supported the reasoning given by the Tribunal regarding non applicability of Rule 34 of SWM (PC) Rules. Lastly, the learned counsel contended that the said Board Circular dated 28.2.2002 was further clarified by Circular dated 17.1.2007 bearing No.843/1/2007-CX. Learned counsel very heavily relied on para 4 of the said circular and contended that since the lis was continuing, there was no question of any benefit being given under the Board Circular dated 28.2.2002 and the matters would have to be governed by the Circular dated 17.1.2007.

12. We have already referred to the facts appearing in the orders of the authorities below which suggest that at one point of time the assessee used to display the MRP on the four litres pack voluntarily. Shri Subba Rao very heavily relied on this fact. We do not think that merely because the assessee displayed the MRP on the four litres pack, that would negate the case of the appellant altogether. We have already shown in the earlier part of the judgment the conditions required for application of Section 4A. The plain language of Section 4A(1) unambiguously declares that for its application there has to be the \023requirement\024 under the SWM Act or the Rules made thereunder or any other law to declare the MRP on the package. If there is no such requirement under the Act and the Rules, there would be no question of application of Section 4A. Thus if the appellant is successful in showing that there is no requirement under the SWM Act or the Rules made thereunder for declaration of MRP on the package, then there would be no question of applicability of Section 4A(1) & (2) of the Act. Even if the assessee voluntarily displays on the pack the MRP, that would be of no use if otherwise there is no requirement under the SWM Act and the Rules made thereunder to declare such a price.

13. Learned counsel for appellant took us through the Rules extensively which Rules we have already quoted above. The thrust of the argument was that firstly the assessee could not be said to be a \023retail dealer\024 as contemplated in Rule 2(o) of the SWM (PC) Rules nor could the package be described as \023retail package\024 to be covered under Rule 2(p). Learned counsel firstly suggested that the assessee was not directly selling the package to the consumer, he was in fact supplying the package to the intermediary for being sold to the hotel industry. Learned counsel, therefore, argues that there was no connection in between the assessee and the consumer nor was the package meant to be sold as a \023package\024. The counsel is undoubtedly right as Rule 2(o) contemplates the sale of commodity in a packaged form directly to the consumer. The definition also includes a wholesale dealer provided again that the package is to be sold to the consumer directly as a package. That is not a case here as the 4 litre pack is not meant to be sold to the consumer directly. We would have to essentially go through to the definition of \023retail package\024 and one look at Rule 2(p) would show that in order to be covered under that definition such package must have been intended for retail sale for consumption by an individual or a group of individuals. In our view these two definitions would have to be read together to properly understand the scope thereof. In order that the package should be properly described as a \023retail package\024, the sale has to be through the \023retail sale\024 for consumption by an individual or a group of individuals. In the present case, admittedly, the sale of the package was only to the hotel. It may be that the hotel may ultimately sell the commodity therein, i.e., the ice-cream (not the package) to the individuals or the group of individuals. This was not a sale in

favour of an individual or group of individuals. We would have to understand the scope of the term \023consumer\024 used in Rule 2(o) to be the individual or group of individuals who consume the commodity. It is undoubtedly true that for a sale being a \023retail sale\024 it need not contain material for the consumption of a single individual only, it can be for a group of individuals also. However, a hotel to which the package is supplied cannot be covered in the term \023individual or group of individuals\024 as contemplated in Rule 2(p) defining \023retail package\024. We have already explained earlier that the nature of sale is of no consequence. The material consideration is that such sale should be in a \023package\024 and there should be a requirement in the SWM Act or the Rules made thereunder or any other law for displaying the MRP on such package. We find the requirement to be only under Rule 6(1)(f) which applies to \023retail package\024 meant for \023retail sale\024. What is required to be printed under Rule 6(1)(f) is the \023retail sale price\024 of the package. \023Retail sale price\024 is defined under Rule 2(r) and it suggests that the \023retail sale price\024 means the maximum price at which the commodity in packaged form may be sold to the ultimate consumer. The Rule further suggests the manner in which the \023retail sale price\024 shall be mentioned on the package. It is the case of the appellant that the four litres pack was not meant to be sold as the package to the ultimate consumer and the sale was only to the intermediary or as the case may be, to the hotel. If that was so, then there is no necessity much less under Rule 6(1)(f) to mention the \023retail sale price\024 on the package.

14. It was tried to be suggested, relying on the language of the unamended Rule 2A, that the four litres pack of ice-cream would be appropriately covered under Rule 2A. Rule 2A before the amendment was as under:

\0232A. The provisions of this Chapter shall apply to all pre-packed commodities except in respect of grains and pulses containing quantity more than 15 kg.\024

It is true that if the unamended section is to be made applicable, the ice-cream pack of four litres would certainly be covered under Section 2A. However, Rule 3 explains that provisions of Chapter II would apply to packages intended for \023retail sale\024 and expression \023package\024 wherever it occurs in the chapter shall be construed accordingly. It is, therefore, clear that the \023package\024 which was sold by the assessee could not be termed as \023retail package\024 nor the sale thereof be termed as a \023retail sale\024 and as such there was no requirement of mentioning the \023retail sale price\024 on that package. All this has been completely missed in the order of the Tribunal.

15. On the other hand the package in question would certainly come within the definition of \023wholesale package\024 as defined in Rule 2(x)(ii) as it contained the commodity (ice-cream) and was sold to intermediary (Hotel) for selling the same to the consumer in small quantities. Then Rule 29 would apply to such package which does not require the price to be displayed on the package. What is required to be stated is (a)name and address of the manufacturer (b) identity of commodity and (c) total number of retail packages or net quantity. Shri Ravindra Narain is quite justified inrelying on Rule 2(x) and Rule 2(q). The Tribunal does not refer to these vital Rules.

16. There is one more substantial reason supporting the appellant. Shri Ravinder Narain invited our attention to Rule 34 in Chapter V of SWM (PC) Rules which provides for exemptions. We have quoted Rule 34 earlier. The Rule has now been amended. However, under the unamended Rule there is a specific declaration that the SWM (PC) Rules shall not apply to any \023package\024 containing a commodity if the marking on the package unambiguously indicates that it has been specially packed for the exclusive use of any industry as a raw-material or for the purpose of \023servicing any industry, mine or quarry\024. Learned counsel points out that the \023package\024 which is sold by the assessee mentions that it is specially packed for the exclusive use of the catering industry. Learned counsel further argues that such

\023package\024 was for the purposes of \023servicing the hotel industry or catering industry\024 as the case may be. Learned counsel is undoubtedly right when he seeks to rely on Rule 34 which provides for exemption of the \023packages\024 which are specially packed for the exclusive use of any industry for the purposes of \023servicing that industry\024. Shri Subba Rao supported the view expressed by the Tribunal that the words \023servicing any industry\024 could not cover the present case and he further suggested that ice-cream cannot be a \023raw material\024 for any industry. He is undoubtedly right that the ice-cream cannot be termed as \023raw material\024 for any industry. However, the words \023or for the purposes of servicing any industry\024 are broad enough to include the transaction in question, i.e., the sale of a pack of ice-cream to the retail industry. Hotel does not manufacture the ice-cream and is depended entirely upon the sale of ice-cream to it by the assessee for ultimately catering the commodity in the package, i.e. ice-cream to the ultimate consumer. In our view this can be squarely covered in the term \023servicing any industry\024. The word \023service\024 is a noun of the verb \023to serve\024. This Court in Coal Mines Provident Fund Commissioner vs. Ramesh Chander Jha [AIR 1990 SC 648] in a different context, observed as under:

\023The word \021service\022 in section 2(17)(h) must necessarily mean something more than being merely subject to the orders of Government or control of the Government. To serve means \021to perform functions; do what is required for\022.\024 [Emphasis supplied]

A hotel is a hospitality industry and undoubtedly supplies food and eatables to the consumers. Therefore, to supply the ice-cream to such a hotel would be doing what is required for the hotel. In that sense the supply by way of sale of ice-cream which is ultimately sold to the \023ultimate consumers\024 would, no doubt, be covered in the term \023servicing the hotel industry\024. Even otherwise the word \023service\024 as per Concise Oxford English Dictionary means:

(i) perform routine maintenance or repair work on (a vehicle or machine);

(ii) provide a service or services for;

It is an act of helpful activity \026 help, aid or to do something. It also includes supplying of utilities or commodities. In that view we are not prepared to give a narrow interpretation to the term \023service any industry\024. We, therefore, accept the arguments advanced by Shri Ravinder Narain that the \023package\024 sold by the assessee to the hotel was, apart from being for the exclusive use of the hotel was, also \023for the purpose of servicing that industry\024. If that is so, then the SWM (PC) Rules would not apply at all.

17. The Tribunal has given very narrow meaning to Rule 34 by firstly holding that ice-cream is not a \023raw material\024. There the Tribunal was right but the Tribunal was not right by holding that the words \023servicing any industry\024 were not applicable to such \023package\024. We, therefore, accept the arguments of the learned counsel and reject the contention raised by Shri Subba Rao. If that is so, the appeal would have to be allowed and it would have to be held that Section 4A will not apply to the ice-cream sold by the assessee.

18. This takes us to the last argument regarding the applicability of the Circular dated 28.2.2002. However, it is not necessary for us to delve on that issue in view of the findings which we have recorded earlier holding that the assessment would have to be under Section 4 of the Act and not under Section 4A. In fact the tenor of the notification is to the same effect. However, considering the fact that the notification came after the order of the Tribunal and further it was sought to be explained by the subsequent notification dated 17.1.2007, we are not going into that question.

19. In the result the Civil Appeal No.2819 of 2002 is allowed.

Civil Appeal No.1738 of 2004

20. This takes us to the next appeal which is filed by Nestle India Ltd. The appellant M/s.Nestle India Ltd., are engaged in the

manufacture of wafers covered with milk chocolate under the brand name \023KIT KAT\024 falling under Chapter 19 of Central Excise Tariff Act, 1985. This product is a specified product under the provisions of Section 4A and is included in the notification and accordingly the duty was being paid on the said Chocolate in terms of Section 4A based upon the \023retail sale price\024 after claiming the deductions on account of abatements. M/s.Nestle India entered into a contract with M/s.Pepsico India Holdings Ltd., where the agreed price of the KITKAT packet was Rs.4.80 and the chocolate so purchased at that price by M/s.Pepsico was meant for free supply of the same along with one bottle of Pepsi of 1.5 litres in pursuance of their Sales Promotion Scheme. The appellant cleared the disputed goods after payment of duty at Rs.4.80 per chocolate in terms of Section 4 of the Act after filing the due declaration on the premise that since the chocolates were being sold to M/s.Pepsico, this was not a \023retail sale\024 and on such chocolates supply there was no requirement to display the maximum retail price and as such the chocolates could not be covered under Section 4A and would eventually be assessable under Section 4 of the Act. However, the Department did not accept this and it issued a show cause notice dated 14.8.2001 raising a demand of Rs.48,95,370/- along with the proposal to impose penalty upon the appellant with interest. This proposal was contested by the assessee on the aforementioned plea that it was not required to print the MRP under the provisions of SWM Act and the Rules made thereunder. The Commissioner did not accept this and confirmed the demand. The appellant having failed in its appeal before the Tribunal has now approached this Court by way of this appeal.

21. The Tribunal came to the conclusion that the duty was rightly demanded in terms of Section 4A of the Act.

22. At the outset the learned counsel Shri Lakshmi Kumaranan accepted the position that when such chocolates are sold in the market, they would undoubtedly be required to print the MRP on each chocolate as the SWM (PC) Rules and more particular Rule 6(1)(f) would be applicable to them. Learned counsel, however, says that his contention is restricted only to the supply made by the assessee to Pepsico. He points out that the said chocolates were not being sold by the manufacturer in retail but were supplied to another company under a contract and the purchaser company was not to sell the said chocolates as the chocolates but to offer as a free gift along with its product, namely, a 1.5 litres bottle of Pepsi. Learned counsel also criticized the order of the Tribunal. Learned counsel also relied on the aforementioned Board Circular dated 28.2.2002.

23. The Tribunal formulated a question as to whether the package of KITKAT sold by the appellant to M/s.Pepsico India Holdings Ltd., under a contract of Rs.4.80 per KITKAT are required to be assessed at that price in terms of Section 4 of the Act or the assessable value of the same is required to be arrived at in terms of Section 4 A of the Act. The Tribunal while accepting the case of the Revenue simply went on to hold that once the goods are specified items under Section 4A(1) of the Act and are excisable goods, the chargeable duty would be required to be assessed on the MRP. The Tribunal also recorded that the only exception where a manufacturer can deviate from the general rule of printing MRP on the package would be Rule 34 of SWM (PC) Rules. It further held that the said Rule did not apply to the case of the assessee. The Tribunal also relied upon the first Explanation to Section 4A of the Act and came to the conclusion that even if a portion of goods is sold at a lower rate than the MRP affixed thereon, the assessable value in respect of such percentage of goods will not be lowered on that ground. The Tribunal also referred to the advertisements issued by Pepiso wherein it was displayed that KITKAT worth Rs.12 will be given free with one 1.5 litres bottle of Pepsi. The Tribunal also held that the circular dated 28.2.2002 did not apply to the case of the assessee. Holding thus, the Tribunal dismissed the appeal.

24. Shri Lakshmi Kumaran firstly pointed out that the KITKAT

chocolate sold to Pepsico was for free distribution along with 1.5 litre bottle of Pepsi and, therefore, there is no MRP affixed on the chocolate which accompanied the bottle. He further submits, relying on Section 2(v) of the SWM Act that there is no \023sale\024 of the chocolate to the consumers as it is offered free as a gift by Pepsi, which purchased the same from the assessee on contract basis.

25. As against this the learned counsel Shri Subba Rao supported the order of the Tribunal and pointed out that this could be viewed as a \023retail sale\024. He adopted the reasoning given by the Tribunal on the definition of \023retail sale\024 holding that the transaction in the present case amounting to \023retail sale\024 since the chocolates were meant for distribution for consumption by \023an individual or group of individuals by retails sale\024 and therefore, covered in SWM (PC) Rules.

26. At the outset Shri Lakshmi Kumaran invited our attention to the notification dated 28.2.2002 bearing No.625/16/2002-CX. He pointed out that by that notification clarification was issued regarding various queries raised expressing the doubts about the assessability of the commodities under Section 4A or Section 4 of the Act. A reference is made to para 1, Entry 4 of which is as under:

\023Items supplied free with another consumer items as marketing strategy. Example, one Lux soap free with on box of surf.\024

Para 6 of the notification is as under:

\023It is, therefore, clarified that, in respect of all goods (whether notified u/s.4A or not) which are not statutorily required to print/declare the retail sale price on the packages under the provisions of the Standards of Weight & Measures Act, 1976, or the rules made thereunder or any other law for the time being in force, valuation will be done u/s 4 of the CE Act, 1944 (or under Section 3(2) of the Central Excise Act, 1944, if tariff values have been fixed for the commodity). Thus, there could be instances where the same notified commodity would be partly assessed on the basis of MRP u/s 4A and partly on the basis of normal price (prior to 1.7.2000) or transaction value (from 1.7.2000), u/s 4 of the CE Act, 1944.\024

Learned counsel very heavily relied on the last sentence of para 6 of the notification and pointed out that the KITKAT chocolate though a notified commodity, need not, in all cases be assessed under Section 4A. According to the learned counsel stated that this had a direct reference to Entry 4 in para 1 of the Circular which we have extracted above. Our attention was also invited to a ruling of the Tribunal reported in Commissioner of Central Excise Ludhiana vs. Pepsi Foods Ltd. [(2005) 186 ELT 603] wherein a view has been taken, relying on the aforementioned circular, that the packet of Lays (Potato Chips) which was to be supplied free along with Pepsi of 1.5 litre was bound to be assessed under Section 4 and not under Section 4A of the Act. Learned counsel points out that this judgment is not challenged by the Revenue and has become final. He further suggests that in keeping with the law laid down by this Court in CCE, Vadodara vs. Dhiren Chemical Industries [(2002) 139 ELT 3] the Department cannot now turn back and take a contrary stand. There is no doubt that the judgment of the Tribunal cited supra was attempted to be distinguished in the impugned judgment of the Tribunal on the ground that there appeared a price printed on labels affixed on Pepsi bottle and sold by M/s.Varun Beverages indicating that KITKAT worth Rs.12 is given free with the said Pepsi Bottle. In our view this printing of the price on the labels of Pepsi would be of no consequence for the simple reason that it is clearly meant for the advertisement of Pepsi and the MRP is not printed on the chocolate. It may be a move on the part of the Pepsi for advertising its product but that cannot be said to be binding vis-‘-vis Nestle. What is required is the requirement under the Rules of printing the price.

Therefore, the true test is not as to whether the price is printed on the labels of the accompanying product like Pepsi but whether there was a requirement under the SWM Act or the Rules made thereunder to print the MRP on the wrappers of KITKAT chocolates. The reason given by the Tribunal in para 10 for distinguishing the earlier judgment in Pepsi Food\022s case, therefore, has to be ignored as not relevant to the controversy. Once that position is clear, we are left with the notification alone and the aforementioned ruling in Pepsi\022s case. If the ruling has not been challenged by the Department, the same becomes binding as against the Department. Similar is the situation of the circular. The circular becomes binding as held in the case of Dhiren Chemical Industries (supra).

27. The Tribunal in para 8 of its judgment has observed:

\023Once the goods are specified items under Section 4A(1) and are excisable goods chargeable duty (sic) with reference value, then such value shall be deemed to be the retail sale price declared on such goods, less amounts of abatements etc. As we have already observed that Weights & Measures Act requires chocolate manufactured by the appellant to be printed with MRP on the same, we are of the view that the duty of excise on such goods is required to be assessed in terms of the MRP. The only exception where a manufacturer can deviate from the general rule of printing of MRP on the package is Rule 34 of Standards of Weights & Measures (Packaged Commodity) Rules, 1977.\024

We are afraid the law is too broadly stated here. It may be that Chocolates manufactured by the appellant are required to bear the declaration of MRP but that cannot be true of all the chocolates. In this the Tribunal has ignored para 6 of the aforementioned circular dated 28.2.2002 wherein it is specifically provided that there would be instances where the same notified commodity would be partly assessed on the basis of MRP under Section 4A and partly on the basis of normal price prior to 1.7.2000 or transaction value from 1.7.2000. Again merely because the goods are specified items under Section 4A(1), that by itself will not be a be all and end all of the matter as before such goods are brought in the arena of Section 4A(1), there would have to be the satisfaction of a particular condition that the packages of such goods are \023required\024 under the SWM Act and the Rules made thereunder to declare the MRP. The Tribunal has even erred in holding that the circular dated 28.2.2002 is not applicable to the present case. A cursory glance at the circular would suggest that it is applicable to the present case where two commodities have been sold as a market strategy.

28. Shri Subba Rao also heavily relied on para 9 of the impugned judgment and further relied on the first Explanation of Section 4A and suggested that the \023retail sale Price\024 would be the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumers and includes all taxes, local or otherwise. The Tribunal has held, relying on the expression \023may be\024 in contra-distinction to the expression \023shall be\024 that even if a portion of the goods are sold at a lower rate than the MRP affixed therein, the assessable value in respect of such percentage of goods will not be lowered on the ground that they have actually been sold at a lower rate. In our opinion the thrust of the Explanation I is not as the Tribunal has shown but is more on as to what retail price should be. The explanation provides that the \023retail price\024, i.e., the maximum price would include all taxes, local or otherwise, freight, transport charges, commission payable to dealers and all charges towards advertisements, delivery, packing, forwarding and the like. The further thrust of the explanation is on the notion that the price is the sole consideration of such sale. The Tribunal has mixed up Explanation I with Explanation II which is not permissible. This was not a case under Section 4A, Explanation II (b) because we do not

find different sale prices declared on the different packages of the chocolates. The case of the assessee has been consistent from the beginning that these chocolates were sold to Pepsi under a contract for a particular value and the said chocolates were to be offered as a free gift to the one who purchased a particular bottle of Pepsi (1.5 litres). The Tribunal has further expressed that the argument that the bar of KITKAT was not to be sold by Pepsi in the retail market but was to be given as a free gift, would be of no consequence as even if the appellant itself intended to give the bar of KITKAT as a free gift to its customers along with other item, the appellant would not be in a position to claim that there is no assessable value of the goods and as such no duty of excise shall be charged on the same. The logic is clearly faulty. In the given circumstances, the appellant would undoubtedly be assessable to duty under Section 4 of the Act. It is not as if the appellant would be totally exempt from paying \023any\024 duty on such goods. It was rightly contended before the Tribunal that the thrust of Section 4A is on the packages and not on the commodity and it is only where the goods are sold in the packages that the section would be attracted. The submission was undoubtedly right. The Tribunal, while rejecting this submission, has clearly ignored the language of Section 4A(1) of the Act.

29. It was then suggested that the free gift by Pepsi to its customers would amount to distribution and would, therefore, be amounting to \023retail sale\024 and the package of KITKAT would be \023retail package\024. However, what is material is the definition of \023retail sale price\024. The requirement of Rule 6(1)(f) is specific. It requires the retail sale price of the package be printed or displayed on the package. If there is no sale involved of the package, there would be no question of Rule 6(1)(f) being attracted. There is a clear indication in the definition of \023retail sale price\024 as provided in Rule 2(r) which clearly explains that the MRP means the maximum price at which the commodity in packaged form \023may be sold\024 to the ultimate consumer. Thus, the definition of \023sale\024 in Section 2(v) of the SWM Act becomes relevant. Therefore, unless there is an element of sale, as contemplated in Section 2(v), Rule 6(1)(f) will not be attracted and thus such package would not be governed under the provisions of SWM (PC) Rules which would clearly take such package out of the restricted arena of Section 4A(1) of the Act and would put it in the broader arena of Section 4 of the Act.

30. Shri Lakshmi Kumaran lastly relied on Rule 34 (a) of the SWM (PC) Rules and pointed out that the case was completely covered under that Rule since firstly the package in this case specifically declared that \023it was specially packed for Pepsi\024. The thrust of the argument was that there appears such declaration on the package of KITKAT and secondly it was for the purpose of servicing Pepsi thereby satisfying both the conditions for applicability of Rule 34(a). The Tribunal has rejected this argument in a very casual manner by observing:

\023Admittedly, the situation in the present case is not covered by any of the conditions noticed in the said Rule 34.\024

Learned counsel Shri Laxmi Kumaran pointed out that there was no question of the application of SWM (PC) Rules apart from any other reasons, because of the applicability of Rule 34. We accept the argument. After-all if the contract of the chocolates was for the purpose of advertising of a particular product of the particular industry, it would be covered within the expression \023servicing any industry\024. We have already dilated upon the expression \023servicing any industry\024 in the earlier part of our judgment. Those observations would similarly apply to the present appeal also. With the result this appeal has to be allowed by setting aside the order of the Tribunal. We accordingly allow this appeal without any order as to costs.

CIVIL APPEAL NOS.2150-2151 OF 2004

CIVIL APPEAL NO.1144 OF 2004

CIVIL APPEAL NO.1385 OF 2005
CIVIL APPEAL NO.3847 OF 2005
CIVIL APPEAL NO.6425 OF 2005

31. The next group of appeals that we take into consideration is in relation to the sale of telephones by the companies like ITEL, BPL Telecom, Himachal Exicom and Uniword Telecom. In all the cases the Tribunal has found in favour of the assesses holding on the facts that the assessment should be under Section 4A and not under Section 4. The Revenue pleaded that the assessment should be under Section 4 of the Act (perhaps for attracting more revenue). In arriving at this conclusion, the Tribunal took note of the factual situation that all the telephone instruments were specified goods under Section 4A of the Act and that all the telephone instruments were packed and every package declared the MRP thereupon.

32. It is an admitted case that all these telephone manufacturing companies sold the instruments (Push Button Telephones) to Department of Telecommunications (hereinafter referred to as the \023DoT\024), Mahanagar Telephone Nigam Limited (hereinafter referred to as the \023MTNL\024) and Bharat Sanchar Nigam Limited (hereinafter referred to as the \023BSNL\024). The purchaser did not sell these instruments to the general public but instead provided the instruments on rental basis or otherwise to their customers, meaning thereby that there was no further sale of these instruments. The product falls under sub-heading 8517 and is covered under Notification No.9/2000-CE (NT) dated 1.3.2000 and subsequently by Notification No.5/2001 dated 1.3.2001. It was, therefore, an admitted position that from 1.3.2000 Electronic Push Button Telephones manufactured by the assesses were specified goods and were bound to be valued for assessment with reference to the retail price under Section 4A of the Act. It is also an admitted position that on all the telephone pieces sold to DoT, MTNL and BSNL, as the case may be, the assesses had declared the MRP. The assesses got the advantage of the abatement and because of that they were required to pay lesser duty under Section 4A as compared to the duty chargeable under Section 4 of the Act on the basis of contract price. The abatement was 40% on the retail price. It was undoubtedly true that bulk supply was made by the telephone manufacturing assesses to DoT, MTNL and BSNL and perhaps because of that the Department averred that since this was a wholesale transaction, the duty was assessable on the contract price and not on the MRP. Before the Tribunal Revenue relied upon various provisions and more particularly on Rules 2(q), 2(x), 3, 6(1)(f), etc., of the SWM (PC) Rules. A reference was made to the Board Circular dated 28.2.2002 also. There was a difference of opinion amongst the two Members of the Tribunal in Appeal No.E/701/2002 & E/962 of 2002 (Civil Appeal No.2150-51 of 2004 before this Court) as to the applicability of Section 4A vis-'-vis Section 4A of the Act to the transactions. The matter, therefore, was considered by the third Member who came to the conclusion that the only applicable provision would be Section 4A. The Third Member found that the goods were cleared with the MRP having been declared on the package. The third Member of the Tribunal further observed that unless the packages themselves were exempt under the SWM (PC) Rules, the assessment would have to be under Section 4A and that the goods were sold in bulk under contract cannot be the criteria.

33. Learned counsel Shri Subba Rao, however, reiterated his argument that since the goods were sold in bulk the valuation should be under Section 4 of the Act. We have already explained earlier the scope of Section 4A suggesting that the Section would apply to the package if it is required under SWM Act and the Rules made thereunder to declare the MRP thereon. We are not in a position to accept the arguments of learned counsel that merely because there is a bulk sale to DoT, MTNL and BSNL, the assessment should be

under Section 4 of the Act. We again mention it at the cost of repetition that the nature of sale is not important, what is important is the requirement of printing the MRP on the packages. It was not and indeed cannot be disputed that these telephones are also sold in the retail market in the same form and the same package and that there is a requirement of printing the MRP on each package of the Push Button Telephone. Learned counsel Shri Subba Rao also did not dispute before us the necessity of printing the MRP on the package of each telephone which is sold in the market. If that is so, the package would be covered under the relevant SWM (PC) Rules. We do not find anything in the SWM (PC) Rules that where a customer purchase a large number of packages, such bulk purchase itself rules out the applicability of the SWM (PC) Rules. Under Rule 2A, as it then stood, it was provided that Chapter II apply to all pre-packaged commodities. Rule 3 thereof provided that the provisions of Chapter apply to the packages intended for \023retail sale\024 which would mean that the sale would be for consumption by an individual or group of individual or any other consumer. There can be no doubt that the telephone instruments were to be used by the consumers. Therefore, the telephones were sold to these three instrumentalities, there is no escape from the fact that these telephones were meant to be ultimately used by the consumers and it is only with that object that the said telephones were purchased by the three instrumentalities from its manufacturers. Therefore, the sale of the telephone instruments would be covered in the term \023retail sale\024. Rule 6 is thereafter very clear which requires every package to make certain declarations including the declaration of the \023retail sale price\024 on the package. There is also no dispute that the said declaration was indeed made on the package of each piece of telephone. If this be so, then it is obvious that Rule 6 could apply and there will be a requirement under the Rules as provided in Section 4A(1) of the Act for printing the MRP on the package. Shri Subba Rao argued that the transaction between the assessee companies and DoT, MTNL & BSNL did not satisfy the requirement of definition of \023retail sale\024 as there was no retail sale agency or other instrumentalities involved in the said transaction. We are afraid the specific language of \023retail sale\024 is not being perceived properly. The \023retail sale\024 does not have to be only through the \023retail sale agencies\024 or other \023instrumentalities\024. One look at the definition of \023retail sale\024, as provided in Rule 2(q) is sufficient to justify this inference. The argument is, therefore, rejected. According to Shri Subba Rao further the package would not be a \023retail package\024 as contemplated in Rule 2(p) as the DoT, MTNL & BSNL cannot be viewed as an individual or group of individuals. We are afraid again the unamended definition of Rule 2(p) is not read properly. When a \023retail package\024 containing any commodity is produced, distributed, displayed, delivered or stored for sale for consumption by an individual or group of individuals, it would be a \023retail package\024. In this case, admittedly, DoT, MTNL & BSNL provided these instruments, after they have purchased the instruments , to the individual customers, though not by way of a \023sale\024 but for their use. The \023package\024, therefore, undoubtedly be a \023retail package\024. It was further suggested, relying on the definition of \023retail sale price\024 in Rule 2(r) that DoT, MTNL & BSNL are not the \023ultimate consumers\024 as contemplated in the definition. We are afraid even there the definition is not being read properly as it cannot be said that DoT, MTNL & BSNL are not the \023ultimate consumer\024. The purchasers, in this case, undoubtedly, used the telephone instruments for supply to their customers on rental basis or on some other basis. It cannot be, therefore, said that they would be excluded from the term \023ultimate consumer\024. It was thereafter contended that the MRP was not printed whereas it is asserted on behalf of the learned counsel for the assessees that each package was carrying the MRP and duty was paid with reference to the MRP and this is how the goods were cleared. We are not prepared to accept a bald statement made before us that the

packages did not have the MRP on them as from the orders of the Tribunal we do not find such factual position emerging. That was the most relevant factor and we are sure that the Tribunal could not have missed it. Again we do not find that such a factual position was canvassed before the Tribunal. We, therefore, reject this contention and accept the assertion on the part of the counsel for the assessees that the MRP was displayed on each package. However, we leave it open to the Department to check this factual position again and the Department would be free to proceed if the MRP is not printed on the part of any particular assessee. It was also asserted by Shri Subba Rao further that some of the assessees had not paid the duty on the MRP but on the contract price. There is no reference of this assertion even before the Tribunal. Instead we have the affidavits before us that in each case the duty has been assessed not on the contract price but on the MRP. We do not wish to go into that question now at this juncture but we only clarify that if that is so, then the Department would be free to take action against the concerned assessees. All the learned counsel for the assesses accepted that if at all they have made the payment of the duty not on the MRP but on the contract price, they would be liable to be proceeded against by the Department in accordance with law. We leave the question on the basis of this assertion. However, we must reiterate that we do not find any such reiteration in the order of the Tribunal. We, therefore, leave it to the Revenue Department to ascertain this position and to proceed against the erring assessees, if any.

34. Lastly Shri Subba Rao, by way of almost a desperate argument tried to rely on Rule 34 of the SWM (PC) Rules suggesting therein that the Rules did not apply as the transactions in the sets of telephone instruments was covered under Rule 34 of the SWM (PC) Rules. We do not accept the argument for the simple reason that there does not appear any factual assertion on the part of the Department that the packages contained a declaration that they were specially packed for a particular industry for servicing the same. In the absence of this factual background the applicability of Rule 34 is completely ruled out. We, therefore, dismiss all the appeals of the Department subject to the observations which we have made as regarding the printing of MRP and also as regards the payment of duty on the basis of contract price and not on MRP in the earlier part. In the facts and circumstances of the case, there will be no order as to costs.

Civil Appeal No.2877/2005
Civil Appeal No.6168/2005
Civil Appeal No.5840/2006

35. These appeals filed by the Revenue Department are against the Electrolux Kelvinator Ltd., and Electrolux India Ltd.,. These cases pertain to the valuation of the Refrigerators manufactured by the assesses. It is a common plea that after the manufacture of these Refrigerators, they are sold to the Bottling Companies like Pepsi, Coca Cola and other soft drink manufacturers under the contract. It is further admitted position that all the Refrigerators which are sold are packed in a package declaring the MRP on them. The MRP and the contract price are different. It was the claim of the assesses that they have paid the duty under Section 4A(1) of the Act on the MRP. The goods are specified goods under Section 4A(1) of the Act. However, because of the abatements they have to bear lesser duty which abatements are not available to the contract price. Therefore, if the duty is assessed on the basis of the contract price under Section 4 of the Act, the duty would be more than the duty paid under Section 4A(1) of the Act. The Tribunal, in all the three cases, has held in favour of the assesses holding that these cases would be governed by the decision of the Tribunal in ITEL Industries Pvt. Ltd. vs. CCE reported in [2004 (169) ELT 219] in which case the sale of telephones by the telephone manufacturing companies to DoT, MTNL & BSNL was considered and it was held that the duty will be under

Section 4A of the Act and not under Section 4. Relying on that decision, the Tribunal in Civil Appeal No.2877/2005 has held in favour of the assessees. It is also held by the Tribunal that Rule 34(a) of SWM (PC) Rules would not be attracted in these cases. In short the Tribunal has held that these cases are identical with the cases involving the sale of telephone. We have already approved the judgment of the Tribunal pertaining to the sale of telephones in the earlier part of this judgment. We do not see any reason to take a different view in case of the Refrigerators. It was feebly stated by Shri Subba Rao that the assesses have paid the duty based on contract price and not on the MRP. We do not think so as there is material placed before us by the learned counsel appearing for the assesses that the duty has been paid not on the contract price but on the MRP. However, we leave it open to the Department to take an action in accordance with law if it is found that the duty is paid on the contract price and not on MRP. Needless to mention that reasonable opportunity would be given to the assessees to put their say in case the Department decides to proceed against the assesses on this ground. However, the appeals filed by the Revenue would have to be dismissed and are accordingly dismissed. In the facts and circumstances of the case there will be no order as to costs.

Civil Appeal No.498/2006

36. This appeal relates to the manufacture and sale of Electric Filament Lamps. The Tribunal has allowed the claim of the assessee relying on the decision in ITEL Industries Pvt. Ltd. vs. CCE reported in [2004 (169) ELT 219]. A perusal of the order of the authorities below suggest that this case is identical with the case involving the manufacture and sale of telephones by ITEL. It is admitted position that the goods here were sold with the MRP declared on the packages as per the SWM (PC) Rules. We see no reason to take any different view. Nothing was stated before us by Shri Subba Rao as to why we should take any different view in this matter. In that view we would chose to dismiss the appeal filed by the Department but without any order as to costs.

Civil Appeal Nos.6559-60/2005

37. These appeals are in respect of Mineral Water bottles. The manufacturer used to pack 12 200ml. bottles in a single package and used to mention the MRP on the said package. The assessee was paying the duty under Section 4A(1) of the Act. The Tribunal, relying on the judgment in Jayanti Food Processing Pvt. Ltd. vs. CCE, Jaipur [2002 (141) ELT 162] held that the assessment was bound to be under Section 4A(1) and not under Section 4 of the Act as the package amounted to a \023retail package\024 in view of the provisions of Rule 2(p) of the SWM (PC) Rules. On that basis the Tribunal came to the conclusion that the valuation was bound to be under Section 4A(1) and not under Section 4 of the Act. Aggrieved by that, the Department has come up before us in the present appeals. Shri Subba Rao, learned counsel appearing on behalf of the appellant Revenue drew a parallel with Jayanti Food\022s case and urged that the valuation is bound to be under Section 4 of the Act as the Tribunal had incorrectly held that the \023package\024 would be a \023retail package\024. Learned counsel relied on the definition of \023wholesale package\024 under Rule 2(x) of the SWM (PC) Rules and pointed out that the \023package\024 in question came within the definition of \023wholesale package\024 as there are a number of retail packages in the form of Mineral Water Bottles in that one package and further the said package is not intended for sale directly to a single consumer. These bottles which were of 200 ml. capacity were not meant for sale directly to a single consumer. He, therefore, urges that this matter was identical with Jayanti Foods\022 case and, therefore, we should take a view that the valuation should be on the basis of Section 4 and not under Section 4A of the Act as has been done by the Tribunal. Though the Tribunal has relied on the judgment passed by it in the case of Jayanti Foods, we find that there is no parallel in between Jayanti Foods and the present case.

In a way there is a conflict in these two cases in the sense that while Jayanti Foods would want its valuation under Section 4, the present assessee would want it under Section 4A of the Act.

38. The factual scenario is that though the MRP was declared on the package of 12 bottles, the bottles did not have any MRP instead it was written: (a) not for re-sale; (b) specially packed for Jet Airways. No retail price was written on 200 ml. Bottle. There is further no dispute that the assessee had entered into a contract with Jet Airways dated 13.2.2002 and the contracted price of sale for the goods was Rs.2.61. It was the condition in the contract that each bottle to be supplied shall have a printed label \023specially packed for Jet Airways\024. On the basis of these facts Shri Subba Rao urged that this case, if it was identical with Jayanti Foods case, then it was bound to be held that the MRP based assumption could not be the correct assessment and it should be under Section 4 of the Act. The contention is incorrect and as in fact the \023package\024 cannot be viewed as a \023wholesale package\024. It does not come within the definition of Rule 2(x)(i) as the \023package\024 was not intended for sale, distribution or delivery to an intermediary. On the other hand it is sold directly to Jet Airway and the Jet Airways supplied the said bottles to their passengers and thus there is no further sale by the Jet Airways of these bottles. Therefore, it is obvious that after the first sale bottles go directly to the \023ultimate consumers\024. There would be, therefore, no question of application of Rule 2(x)(i). Rule 2(x)(ii) will also not apply as this does not amount to a commodity sole to an intermediary in bulk so as to enable such intermediary to sell, distribute or deliver, the said commodity to the consumer in smaller quantities. The concerned period regarding which the show cause notice was given is April, 2002 to September, 2002. Therefore, Rule 2(x)(iii) which came by way of an amendment into 2000 would also have to be considered. However, even that clause is not applicable as the said \023package\024 though contains more than 10 bottles, those bottles cannot be viewed as the \023retail package\024 nor is there any rule requiring labeling the said \023retail package\024 and declaring the price thereof. In fact there is no price involved as it is specifically written on the package \023not meant for sale\024. It is, therefore, obvious that the \023package\024 containing 12 bottles cannot, therefore, be viewed as a \023wholesale package\024. Once that position is clear, there is no question of the applicability of Section 4 of the Act as the \023package\024 as it is a retail sale of the package to the Jet Airways which supplies the same to the passengers on demand. Therefore, the contention of Shri Subba Rao has to be rejected that we should draw a parallel in this case with the appeal of Jayanti Foods and hold that Section 4 is applicable to the transactions. Once that position is clear, the \023package\024 will be covered under Section 6 requiring the declaration of \023retail sale price\024 which appears on the package. In this behalf we must take into consideration the definition of \023commodity in packaged form\024 as provided in Section 2(b) of the SWM Act. The definition is as under:

\0232(b) \023commodity in packaged form\024 means commodity packaged, whether in any bottle, tin, wrapper or otherwise, in units suitable for sale, whether wholesale or retail.\024

Twelve bottles were packed in a wrapper and the wrapper contained the MRP price though the bottles themselves did not have the price. Therefore, we accept the view taken by the Commissioner (Appeals) and the Tribunal that the MRP was correctly mentioned and as such the assessment should have been under Section 4A of the Act and not for the reasons given by the Tribunal that we uphold the ultimate verdict of the Tribunal that the valuation should be under Section 4A of the Act. We accordingly dismiss the appeals filed by the Department but without any order as to costs.

39. In the result Civil Appeal Nos.2819/2002 and Civil Appeal No.1738/2004 are allowed and Civil Appeal Nos.2050-51/2004,

1144/2004, 4754/2004, 1385/2005, 3847/2005, 6425/2005, 2877/2005, 6168/2005, 5840/2006, 498/2006 and 6559-60/2005 are dismissed. In the facts and circumstances of the case, there will be no order as to costs.