

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL,
SOUTH ZONAL BENCH, CHENNAI
COURT HALL No. III**

EXCISE APPEAL No.41300 OF 2014

(Arising out of Order-in-Appeal No.CMB-CEX-000-APP-036-14 dated 25.03.2014 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals), 6/7, A.T.D. Street, Race Course Road, Coimbatore 641 018)

M/s.Sree Gokulam Food and Beverages Pvt. Ltd. ..Appellant

4/564, Madhuvarayapuram Village
Karunya Nagar Post, Sadivayal,
Coimbatore 641 114.

Versus

The Commissioner of GST & Central Excise, ...Respondent

Coimbatore GST Commissionerate
No.6/7, A.T.D. Street,
Race Course Road,
Coimbatore 641 018.

EXCISE APPEAL No.42196 OF 2014

(Arising out of Order-in-Appeal No.CMB-CEX-000-APP-036-14 dated 25.03.2014 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals), 6/7, A.T.D. Street, Race Course Road, Coimbatore 641 018)

Sri K. Sinosh, Executive Director

.....Appellant

M/s. Sree Gokulam Food & Beverages Pvt. Ltd.
No.Rajaveedhi, Choolaimedu,
Chennai 600 094

Versus

The Commissioner of GST & Central Excise, ...Respondent

Coimbatore GST Commissionerate
No.6/7, A.T.D. Street,
Race Course Road,
Coimbatore 641 018.

APPEARANCE :

Mr. P. Satheesan, Advocate
For the Appellant

Mr. N. Sathyanarayanan, Assistant Commissioner (A.R)
For the Respondent

CORAM :

HON'BLE Ms. SULEKHA BEEVI. C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 20.02.2024
DATE OF DECISION : 05.03.2024

FINAL ORDER Nos.40221-40222/2024**ORDER : [Per Ms. SULEKHA BEEVI. C.S]**

Brief facts of the case are that the appellants are engaged in the business of manufacture and sale of packaged drinking water under the brand name "Holy Aqua" falling under Chapter Heading 22019090 of Central Excise Tariff Act, 1985. Scrutiny of records of the appellant revealed that they were clearing Packaged Drinking Water from different units without taking Central Excise registration even after crossing the cumulative value of clearances of SSI exemption limit of Rs.150 lakhs of all the four units located at Konnakuzhy, Athur, and Thiruvallur and Sadivayil at Coimbatore,

without accounting the details of production and clearance in daily stock account, without issuing invoices and without payment of duty. Hence show cause notice dt. 28.12.2012 was issued for the period 2007-08 to 2010-11 proposing to demand Central Excise duty of Rs.4,48,070/- along with interest and for imposing penalties. After due process of law, the original authority confirmed the duty demand along with interest and imposed equal penalty under Section 11AC of the Central Excise Act, 1944. Separate penalty of Rs.1 lakh was imposed on the Executive Director of the company under Rule 26 of the Central Excise Rules, 2002. The proposal to impose penalty under Section 27 of Central Excise Rules, 2002 was dropped. Aggrieved by such order, the appellants filed appeals before the Commissioner (Appeals) who upheld the same. Hence these appeals.

2. The Learned Counsel Sri P. Satheesan appeared and argued for the appellant. It is submitted by the Id. Counsel that the duty demand has been arrived at by the department on the value assessed under Section 4A of Central Excise Act, 1944 by taking into account the M.R.P of the product and allowing abatement applicable as per Notification No.2/2006-CE (NT) dt. 1.3.2006 / 14/2008-CE (NT) dt. 1.3.2008 / 49/2008-CE (NT) dt. 24.12.2008. The appellant had consistently submitted that the above Notifications No.2/2006 or 14/2008 or 49/2008 are not applicable to the products manufactured by the appellant as the goods are not to be subject under M.R.P based assessment. The appellant was manufacturing only packaged drinking water which falls under CETH 22019090. The

MRP based assessment as per the above notifications is applicable only to mineral water and aerated water falling under Tariff Heading 22011010 or 22011020. Appellant does not manufacture mineral water. Further, as per Schedule II of Standards of Weights and Measures (Packaged Commodities) Rules, 1977 vide Sl.No.18A only mineral water and drinking water upto 5 litres capacity and also as per Legal Metrology (Packaged Commodity) Rules, 2011 vide SIno.17 only mineral water and drinking water upto 5 litres capacity are covered under the MRP based assessment.

3. It is submitted by the counsel that "packaged drinking water" is not mentioned in column 3 of Notification No.2/2006-CE (NT) dt. 1.3.2006, 14/2008-CE (NT) dt. 1.3.2008 or Notification No.49/2008-CE (NT) dt. 24.12.2008, and hence the said finding of the original authority as well as the Commissioner (Appeals) is beyond the scope of these non-tariff notifications issued under Section 4A of the Central Excise Act, 1944. The notifications specify the description of goods given in Column (3) to be covered by Column (2) of the Tariff Heading. However, in column the description of goods is 'mineral water'. The finding of the adjudicating authority as well as the Commissioner (Appeals) that since the description of 'mineral water' remained unchanged in Notification Nos.2/2006, 14/2008 and 49/2008, "Packaged Drinking Water" would also be covered by the description of MRP is far-fetched and against the law of interpretation. The view taken by the department that the description of goods, namely, 'mineral water' contained in

notification is inclusive of "Packaged Drinking water" is erroneous interpretation of the scope of notification.

4. The intention of the Government is to charge Central Excise duty under Section 4A only for goods covered by description "mineral water" falling under Chapter 2201 or 2202 and not "packaged drinking water" falling under chapter 2201 9090. Mineral Water and Packaged Drinking Water are two different commodities known in the market and hence grouping of both these products together is bad in law.

5. The Ld. Counsel adverted to the Tariff Heading 2201 which is as under :

Tariff Item	Description of Goods	Unit	Rate of duty
(1)	(2)	(3)	(4)
2201	WATERS, INCLUDING NATURAL OR ARTIFICIAL MINERAL WATERS AND AERATED WATERS, NOT CONTAINING ADDED SUGAR OR OTHER SWEETENING MATTER NOR FLAVOURED; ICE AND SNOW		
2201 10	<i>-Mineral waters and aerated waters:</i>		
2201 10 10	--- Mineral waters	ℓ	12.5%
2201 10 20	---Aerated waters	ℓ	12.5%
2201 90	<i>- Others:</i>		
2201 90 10	--- Ice and snow	ℓ	Nil
2201 90 90	- Other	ℓ	12.5%

6. It is submitted that as per the Tariff Heading "Mineral Waters" fall under 22011010. The product of the appellant is 'Packaged Drinking Water'. The appellant does not add any minerals into it or

demineralize the water. The classification therefore falls under 22019090 only. It is submitted that the department has not disputed the classification adopted by the appellant but have stated that the product would fall under the category of Mineral Water and thus the above notifications would render the valuation to be made under Section 4A of the Central Excise Act, 1944.

7. The circular issued by the Ministry of Finance in F.No.9/1/94-CX-1 dt. 23.3.2016 was relied by the learned counsel to argue that the clarification issued by the circular would show that the water treated with bleaching powder so as to eliminate the injurious micro-organisms and thereafter purified by filtration without adding any minerals into it, cannot be called 'Mineral Water'. The process of adding minerals distinguishes the mineral water from purified potable drinking water. The Board's Circular No.239/73/96-CX. dt. 21.8.96 was adverted to by the learned counsel to argue that demineralization in the potable water may result in product such as artificial mineral water. From the above itself, it can be seen that department considers that potable purified water is different from that of mineral water. The conclusion therefore arrived at by the adjudicating authority that purified potable water would fall within 'mineral water' for the purpose of the notification is erroneous. It is submitted that unless the department proves that the appellant unit manufactures Mineral Water falling under CETH 22011010, there is no scope for valuation of packaged drinking water under Section 4A of Central Excise Act, 1944 in terms of the notifications. The notice

does not allege that the appellant manufacturers mineral water or artificial mineral water. The appellant has all the while pleaded and explained that they are engaged in manufacture of potable drinking water only.

8. The Ld. Counsel submitted that potable drinking water is different from mineral water. The price of mineral water is higher than that of potable drinking water. So also, the BIS specification numbers are different. BIS certification is mandatory for packaged drinking water and also mineral water. These specifications are mentioned on the bottles. The BIS code of packaged drinking water is **IS 14543**. The BIS specification of Mineral Water is **IS 13428**. The appellant has been issued BIS certification for *Packaged drinking water (other than packaged natural mineral water)* and the certificate is produced along with appeal. The BIS noted in this certificate is *IS 14543*. It is submitted by the learned counsel that the department has wrongly held that the goods are assessable under Section 4A of Central Excise Act, 1944.

9. The amended Notification No.3/2015-CE (NT) dt. 01.03.2015 was adverted to by the learned counsel. At Sl.No.25A of the said notification, the tariff item shown is 2202. The description of goods given is "*all goods except mineral waters and aerated waters*". This would clearly show that the earlier notifications (2/2006, 14/2008 and 49/2008) covered only mineral water and aerated water falling under chapter heading 2202. The same logic would apply to the items falling under 2201 also and only mineral water and aerated

water falling under 2201 are to be included in the MRP assessment in all the above notifications.

10. The Chennai unit of the appellant was issued a show cause notice dt. 8.1.2013 demanding duty of Rs.21,78,888/-. The demand in the said case was confirmed by OIO No.3/2016 dt. 29.01.2016. On appeal, the Commissioner (Appeals), Chennai set aside the demand of duty. In the said order, it was observed by the Commissioner (Appeals) that Notification No.49/2008 is applicable only to mineral waters and the water manufactured by the appellant is packaged drinking water. Further, SCN on the very same allegation was issued to M/s.Nest Foods and Beverages Corporation, Aluva, Kerala demanding duty on packaged drinking water covering the period from October 2009 to September 2014. The original authority held that the proposal in the SCN demanding duty under Section 4A on packaged drinking water cannot be sustained. The demand was set aside. It was held that since the process amounts to 'manufacture' the goods are subject to duty of excise at tariff rate as per the transaction value under Section 4 of Central Excise Act 1944. The department cannot take a contrary view for the earlier period involved in the appellant's Coimbatore unit, which is the subject matter of this appeal.

11. Without prejudice to the above contentions, it is submitted that 20 litres bottles of packaged drinking water cleared by the appellant would not come under M.R.P assessment as only bottles upto 5 litres are covered under the Second Schedule to the Legal Metrology (Packaged Commodities) Rules, 2011 which require affixation of M.R.P. Ld. Counsel submitted that the duty confirmed as per Section 4A of the Act cannot sustain and if at all the assessment has to be made under Section 4 of the Act *ibid*.

12. It is submitted that the demand is barred by limitation. The present SCN is third one issued to the appellant on the very same issue and same set of facts. The department had knowledge of these facts and cannot allege any suppression of facts on the part of appellant. In the case of *Nizam Sugar Factory Vs CCE - 2008 (9) STR 314 (SC)* it was held that when the second notice is issued on the very same set of facts and issue, the department cannot invoke the extended period. The issue is interpretational in nature as it involves the question whether the assessment has to be made under Section 4 or Section 4A of the Central Excise Act, 1944. It also involves interpretation of notifications. There was no intention on the part of appellant to evade payment of duty. The department has gathered information with regard to the clearances made by appellant for quantification of duty on the basis of the accounts maintained by the appellant. Therefore, there is no suppression with intent to evade payment of duty and the extended period cannot be

invoked. Penalty imposed on the appellant as well as the Executive Director cannot sustain. There is no evidence that the Executive Director had involved directly in the clearance of the goods. It is prayed that the appeals may be allowed.

13. Ld. A.R Shri N. Sathyanarayanan appeared and argued for the Department. It is submitted by Ld. A.R that appellant has contested the determination of value under Section 4A claiming that only Mineral Water and Aerated Water are covered under Sl.No. 24 & 25 of the notification. On examination of Notification No.49/2008-CE (NT) dt. 24.12.2008, it can be seen that the description of goods shown against Sl.No.24 & 25 are "Mineral Waters" and "Aerated Waters". It is pertinent to note that instead of giving specified sub heading of Mineral Waters which are 22011010 / 22011020, Chapter heading "2201 or 2202" is shown in Col. 2 of the notification as detailed below :

Sl.No.	Chapter, heading or sub-heading or Tariff item	Description of good	Abatement as a percentage of retail sale price
(1)	(2)	(3)	(4)
24	2201 or 2202	Mineral waters	45

14. From the above, it can be seen that the description 'Mineral water' is used in the above notification in a general sense and not specifically to mean only '*mineral water specified under sub heading 22011010*'. Otherwise, the specific sub-heading of mineral waters would have been mentioned in the said notification. This is more

evident on examination of relevant entry in the notification No.2/2006 which provides the abatement for goods under M.R.P based valuation under Section 4A of Central Excise Act, 1944 prior to 1.3.2008. for the period 2007-08. Therefore, the said notification No.2/2006 would be applicable. The relevant entry of notification No.2/2006 reads as under :

Sl.No.	Chapter, heading sub-heading or Tariff item	Description of goods	Abatement as a percentage of retail sale price
(1)	(2)	(3)	(4)
25	2201 10 10, 2201 90 90, 2202 10 90, 2202 90 90	Mineral waters	50%

15. Though the sub heading 2201 90 90 refers to "Others" in the Central Excise Tariff Act, 1985, in the above notification, the description mentioned is merely "Mineral Waters". It has to be noted that it includes goods falling under sub heading 22019090 also. The said notification was replaced by Notification 14/2008 which was again replaced by notification 49/2008. In the notifications 14/2008 and 49/2008 though the description "Mineral Waters" remains unchanged, "the specific headings 2201 10 10 and 2201 90 90 were replaced by Chapter heading "2201" which is general in nature.

16. On a combined reading of all the three notifications and the corresponding description under 2201, it is clear that the description intended is "Mineral Waters". The said description therefore includes sub-heading 22019090. The Packaged Drinking Water manufactured

by the appellant is classifiable under 22019090. The said product would thus be covered under Mineral Water. The valuation is therefore to be done under Section 4A of the Central Excise Act, 1944. The appellant was clearing the goods without payment of duty even though the value of clearances when computed under Section 4A exceeded the SSI limit.

17. As per Notification 8/2003-CE (NT) dt. 1.3.2003 (which provides for SSI exemption) the manufacturer is eligible for exemption from payment of Central Excise duty if the aggregate value of all the clearances of specified goods from one or more factories does not exceed Rs.150 lakhs during a financial year and the aggregate value of all clearances of all excisable goods for home consumption by the manufacturer from one or more factories or from a factory by one or more manufacturers does not exceed Rs.400 lakhs in the preceding financial year. In the present case, the aggregate value of clearances from all the four units has exceeded the exemption limit of Rs.150 lakhs. When the value is assessed under Section 4A of the Act, after granting abatement (as per the above notifications 2/2006, 14/2008 & 49/2008), the appellant is liable to pay duty of Rs.4,48,070/- during the period from December 2007 to September 2010.

18. The appellant has manufactured and cleared Packaged Drinking Water with brand name "Holy Aqua" without taking Central Excise registration and even though crossed the value of Rs.150 lakhs, the appellant has not paid central excise duty. Thus,

the appellant has suppressed facts of production and clearance of goods with intent to evade payment of duty. The show cause notice invoking the extended period is therefore legal and proper. Ld. A.R. prayed that the appeals ay be dismissed.

19. Heard both sides.

20. The issue to be decided is (i) whether the Packaged Drinking Water is to be assessed under Section 4A of the Central Excise Act, 1944 or under Section 4 on the basis of transaction value (ii) whether the demand of duty, interest thereon and penalties are sustainable and (iii) whether the show cause notice issued invoking the extended period is legal and proper.

21. The appellant has classified the goods (Packaged Drinking Water) under CETH 22019090. The tariff heading has already been noticed in para 5 above. The department does not dispute the classification adopted by the appellant. However, they contend that the said goods would fall under 'Mineral Water' so as to come within the purview of abatement Notification No.2/2006, 14/2008 and 49/2008. The whole confusion has arisen for the reason that the Notification No.2/2006-CE (NT) [noticed in para 14 above] has mentioned the chapter heading in Col. 2 as CETH 22019090 as well as 22011010. As per the Tariff Act, Heading 22011010 applies to 'Mineral Waters' and Heading 22019090 applies to 'Packaged Drinking Water'. However, the description in column (3) of the

notification is given as "Mineral Waters". The department has therefore held that the 'Packaged Drinking Water' would fall within the category of 'Mineral Water'.

22. A product has to be classified on the basis of Tariff Act and not on the basis of the notifications. The present notifications are Central Excise Notifications giving the details of abatement in regard to valuation of goods under Section 4A. Merely because the chapter heading, sub heading has been mentioned in Col. 2, the goods cannot be said to be assessed under Section 4A unless the goods also fall under the description given in Col.3. At the cost of repetition, in Column 3 of Notification No.2/2006, 14/2008 and 49/2008, the description of goods is given as 'Mineral Water' only. The process of manufacturing Mineral Water and Packaged Drinking Water is different. From the Circulars issued by the Board, it can be seen that when no minerals are added to the water, it cannot be classified as mineral water. So also, it is clarified by the Board that when the water is demineralized by reduction of minerals the same would form 'artificial mineral water'. The circulars are noticed as below :

F.No. 9/1/94-CX-1
 Government of India
 Ministry of Finance
 (Department of Revenue), New Delhi

Subject: Classification of Aqua Mineral Treated Water under Central Excise Tariff-Regarding.

Please refer to Board's circular No. 9/87-CE (F.No. 9/1/87-CX 1) dated 28.7.87 on the subject noted above clarifying that Aqua Mineral Bisleri treated water is non-excisable. The process of manufacture of the product has been explained in Para 2 of this circular and is reproduced below"-

"Water is treated with bleaching powder to eliminate injurious micro-organisms. Thereafter, it is purified by filtration. Subsequently it is softened. Finally, it is sterilised to keep such drinking water free from bacteria and to avoid contamination during treatment."

2. It has been brought to the notice of the Board that in addition to processes given above, some manufacturers are also de-mineralising the treated water and are adding minerals in it. The Chief Chemist has earlier advised that the process that distinguishes artificial mineral water from purified potable water, is whether mineral salt have been added or not. In case, there is addition of mineral salt, the product will have to be treated as mineral water and will be liable to duty accordingly.

3. It is, therefore, clarified that in case in addition to processes mentioned above, if mineral salt(s) are also added in the treated water, the resultant product will be mineral water and will be excisable and liable to duty under sub-heading 2201.90.

4. The word "Bisleri" wherever it occurs in circular No. 9/87 stands deleted.

Sd/-
 (S.C. Bhatia)

Circular No. 239/73/96-CX
 dated 21/8/96

F.No. 9/1/94-CX.1
 Government of India
 Ministry of Finance
 Department of Revenue
 Central Board of Excise and Customs, New Delhi

Subject: Classification of Aqua Mineral Treated Water under Central Excise Tariff- Regarding.
 In continuation of Board's Circular No. 84/84/94-CX (F.No. 9/1/94-CX.1) dated 20.12.94 on the subject noted above, it is hereby further clarified that demineralisation or reduction of certain non-essential minerals in the treated potable water may from an artificial mineral water and it will amount to manufacture in view of Chapter Noted 2 of Chapter 22 of Central Excise Tariff.

Sd/-
 (S.C. Bhatia)
 Under Secretary to the Govt. of India

23. The Packaged Drinking Water is entirely different product falling under separate chapter sub-heading. Further, the price of Packaged Drinking Water is less than the price applicable to Mineral Water. Again, BIS specification for Mineral Waters is different from that of Packaged Drinking Water. The appellant has been issued BIS

certification for packaged drinking water as IS 14543. The certificate is noticed as below :



भारतीय मानक ब्यूरो
BUREAU OF INDIAN STANDARDS

Coimbatore Branch Office

Address : 5th Floor, Kovai Towers,
44 Dr Balasundaram Road
Coimbatore
641018
Phones : 0422-2245984,2240141,
Fax : 0422-2246705
E-mail : cbto@bis.org.in
Web : http://www.bis.org.in


ATTACHMENT TO LICENCE NO. CM/L- 6512259

<u>CML NO</u>	<u>NAME OF THE LICENSEE WITH ADDRESS</u>	<u>PRODUCT</u>	<u>IS NO</u>
6512259	M/s. SREE GOKULAM FOOD & BEVERAGES PVT. LTD. D.NO.4/564, MATHUVARAYAPURAM, KARUNYA POST, SADIVAYIL, COIMBATORE - 641 114	Packaged drinking water (other than packaged natural mineral water)	IS 14543: 2004

ENDORSEMENT NO. 14 Dated **1 JUL 2014**

Renewed for a further period of one year from First July Two Thousand and Fourteen to Thirtieth June Two Thousand and Fifteen.

Other terms and conditions of Licence remain the same.


(M. SADASIVAM)
SCIENTIST-F & HEAD

24. All these would go to show that both are different products. The valuation of the product has to be based upon the classification of the product. When the classification unambiguously falls under 22019090 the valuation has to be on transaction value as per Section 4 of Central Excise Act, 1944. Merely because the abatement notification mentioned heading 22019090 in column (2) it cannot

be said that the Packaged Drinking Water is included in the Mineral Waters. Interestingly, the department does not dispute the classification adopted by appellant for 'packaged drinking water'. However, department construes that packaged drinking water is mineral water as per notifications 2/2006, 14/2008 and 49/2008. These notifications are issued under subsection (1) and (2) of Section 4A. As per subsection (1) of Section 4A, the Central Government may, by notification in the official Gazette, specify any goods in relation to which SWM (P&C) Rules, 1977 apply so as to declare the RSP on such goods, to which the provisions of subsection (2) shall apply. As per subsection (2) the value of such goods shall be deemed to be the RSP declared on such goods less the abatement. Thus, Section 4A provides for valuation in case of goods on which RSP / MRP has to be declared as per SWM (P&C) Rules, 1977 or Legal Metrology Act, 2011. Thus for section 4A to apply the goods are to be specified by notification. Notifications 2/2006, 14/2008 and 49/2008 do not mention 'packaged drinking water'; instead mentions 'mineral water'. These notifications give the rate of abatement available to goods which are to be assessed under Section 4A of the Act *ibid*. Indeed, there is confusion in the notification as it mentions the sub-heading 22019090 which applies to drinking water. Section 4A is the provision for payment of duty on goods cleared on MRP basis. In order to assess the value of goods under Section 4A, the abatement granted in these notifications also have to be considered. The department is of the view that sub-

heading 22019090 applicable to packaged drinking water when mentioned in column (2) of the notification, it is implied that packaged drinking water is to be included in the category of mineral water. We are not able to endorse this view. Taxation statutes cannot be interpreted on any presumptions or assumptions. In other words, there is no implied power of taxation. It has often been held by courts that subject goods is not to be taxed, unless the words of the statute unambiguously impose a tax. An ambiguity in a taxation provision is to be interpreted in favour of assessee. [*Commissioner of Customs (Import), Mumbai Vs Dilip Kumar & Company - 2018 (361) ELT 577 (SC)*]. Our view is further fortified by the fact that in subject notification No.3/2015-CE (NT) dt. 1.3.2015, in column No. (2) the tariff heading is mentioned as 2202 and description of the goods is given as "all goods except mineral waters and aerated waters". In Notification 49/2008, the Sl.No.24 referred to 'Mineral Water' and Sl.No.25 to 'Aerated Water'. As per amendment brought forth in Notification 49/2008 w.e.f. 1.3.2015, a new Sl.No.25A was added which referred to '*all goods except mineral water and aerated water*'. This makes it clear, that 'drinking water' was never intended to be specified as goods to which Section 4A would apply. We therefore find that the duty demand cannot sustain.

25. The Ld. Counsel has argued on limitation. The issue is purely interpretational in nature. Further, there were earlier notices issued to the appellant on the very similar set of facts. In other similar matters, the department has set aside demand and taken the view

that Packaged Drinking Water cannot be assessed under Section 4A of the Act *ibid*. For these reasons, we hold that the invocation of extended period cannot sustain. For the same reasons, the penalty imposed on the Executive Director of appellant-company is not warranted and requires to be set aside, which we hereby do.

26. In the result, the impugned order is set aside. Appeals are allowed with consequential reliefs, if any.

(Pronounced in court on 05.03.2024)

sd/-

(VASA SESHAGIRI RAO)
Member (Technical)

sd/-

(SULEKHA BEEVI.C.S)
Member (Judicial)

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