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LEGAL METROLOGY LAW IN INDIA: MYSTIFYING ASPECTS

LEXport managing partner Srinivas Kotni and associate Shikha Bhardwaj offer an overview of India's current metrology laws and suggest a more balanced approach to the system in the lastest installment of our 40 under 45 article series.

"We often miss opportunity because it's dressed in overalls and looks like work"

— Thomas A. Edison

AV Dicey, the great promoter of "Rule of Law" in the 19th Century emphasised that every citizen should be governed by law. Taking this principle further, political theorist Joseph Raz stressed the need for clear, stable and fair laws and procedures. From here let's begin our discussion on the Legal Metrology (Packaged Commodity) Rules, 2011 (**Packaged Commodity Rules**) and the laws and procedures stated therein in contrast with other packaging, labelling, import and tax laws that have a bearing on packaged commodities meant for retail customers in India.

These Packaged Commodity Rules are driven by a simple logic, ie, the protection of a customer's interests by making the originator (be it the manufacturer, packer or importer) of goods accountable for such products, which are meant for consumption by the general public. However, the Packaged Commodity Rules, combined with various other statutory regulations dealing with packaging and labelling, import and taxation in India, are a clear case of an opportunity missed (by the legislature). The numerous and complex compliance requirements for different types of products and vendors, a lack of practical procedures for revision of the maximum retail price (MRP) and the treatment of imported goods on a par with the domestically manufactured goods (even at the port of import) render these Packaged Commodity Rules highly impractical, ambiguous and prone to litigation. Moreover, the departmental officer's and/or inspector's apathy towards the trade and industry (manufacturers, importers, packers) adds insult to injury.

Complexity and Multiplicity of Compliances

Rule 6 of the Packaged Commodity Rules alone has more than 30 mandatory compliance requirements for retailers, apart from various other compliances in the subsequent rules. Furthermore, there are many product specific legislations which have their own set of labelling requirements such as the Drugs and Cosmetics Act 1940, the Seeds Act 1966, the Food Safety and Standards Act 2006, the Foreign Trade Policy 2009-2014, Cigarettes and Other Tobacco Products (Packaging and Labelling) Rules, etc. One such lesser-known compliance requirement is provided in a Notification from as long ago as 1965, issued under the erstwhile Trade and Merchandise Marks Act 1958, obligating the specified importers of certain commodities to indicate the origin of the goods on their packaging . Further, in case of commodities given free of cost, it is

not clear or not the net content should be declared, as per the Packaged Commodity Rules. Therefore there are labelling compliance requirements that flow from multiple legislations, which makes their implementation a challenge. There has been no attempt to consolidate the requirements into a single legislation to make it simpler to follow. In our experience, the list of compliance requirements involved for labelling sometimes run up to 60– 65 items, which have their source from multiple Acts and Regulations. The cause for concern is the stringent penal consequences. Though first offences are compoundable, subsequent offences can lead to criminal prosecution of the officers in default of the company. In view of this stringency, even a very technical instance of non-compliance having no consumer impact whatsoever – for example, making labels in a size marginally smaller than the legal requirement, using non-contrasting colours, smudging the ink (even in a one-off retail pack), failing to mention the net content in the metric system, missing the manufacturing licence number, missing the pin code in the manufacturer's address, etc – usually leads to the legal metrology officers putting the concerned entity in a precarious situation.

Yet another challenge is explaining to officers when the goods are meant for wholesale, industrial or institutional consumption. Many labelling requirements do not apply if the packaged item is not meant for retail sale. However, when a legal metrology inspector/officer strolls into the warehouse where these packages are kept, it is always hard to persuade them that the goods are meant for wholesale, industrial or institutional consumption, as the case may be. More often than not, the industry is forced to approach the courts to give relief from the ambiguity and inflexibility of the legal metrology and labelling law regime in the country.

Prejudicially biased against the importers

The Foreign Trade Policy of India in its General Notes regarding Import Policy (in the ITC (HS) Classification for Imports), vide clause 5, provides that all packaged products which are subject to Packaged Commodities Rules, when produced/packed/sold in the domestic market in India, and when imported into India, shall be compliant with all the provisions of the above Packaged Commodity Rules. It is clearly provided that the compliance of these Packaged Commodity Rules shall be ensured even before the import consignments of such products are cleared for home consumption in India. It further goes on to regulate that such pre-packed commodities imported into India shall carry the specified declarations (specified in the import policy) on their labels.

Thus it is clear that as per the Foreign Trade Policy all imported packaged products should carry the specified declarations at the time of their import into India. In this connection it is relevant to note that Rule 33 of the Packaged Commodities Rules 1977, which dealt with the labelling of imported goods, was done away with – vide notification dated 17 July 2006 and made effective from 30 January 2007. The logic seems to be not to put the importers in difficulty, as the labelling requirements can very well be satisfied even after importation of the goods into India.

Unfortunately, the Foreign Trade Policy (Specifically Import Policy) has not been amended in line with the amendments made to the Packaged Commodities Rules, and even after the introduction of the new Legal Metrology Law.

Thus, it is mandatory for the importer to comply with all the necessary declaratory compliances before selling, distributing, delivering, displaying or storing the imported goods. However, given that the exporters located in a foreign territory are unaware of the Indian labelling laws, such goods are always prone to inadvertent non-compliance. This is compounded by the indirect taxation laws (central excise and customs), which in respect of certain commodities, such as footwear, aerated drinks, cosmetics, drugs, software etc, mandate declaration of the MRP to the customs authorities, in respect of goods on which declaration of the MRP is mandated as per Packaged Commodities Rules, since the import duties (more particularly the Countervailing Duty) are to be determined on the basis of such MRP. Also of relevance is the fact that for some products, the central excise law deems labelling a manufacturing activity, thus bringing it under the central excise regulatory net, such importers who just affix labels on the imported pre-packed commodities leading to such additional compliances and also attracting tax liability just because labeling is being done on an already manufactured and pre-packed commodity. Moreover, where the transactions are not linear – ie, where the goods are passed on to many buyers through high sea sale agreements – there is very little scope for complying with the labelling laws on board the vessel. Further, if such goods are imported as they are, then the importer runs the risk of involuntary non-compliance. Even in cases where the importer can afford the bonded warehouses for affixing the required labels, the cost implications make such imported product more expensive for the customer. Furthermore, to be compliant with the import and legal metrology laws, even if the importer opts to go for labelling in the customs-bonded warehouse, then the escalated cost shall naturally spread to the end consumer and be indirectly prejudicial to their interest. Therefore, the efforts of the legislature to protect the interests of the consumers inadvertently end up doing just the opposite. Hence it is apparently clear that not much thought has been put into the practical difficulties faced by the importers while formulating the laws, and this has kept them on a par with other domestic entities. There is is no compatibility between the labelling regulations in the legal metrology and other laws, and the deeming fiction (of labelling being a manufacturing activity) under the Central Excise Law. For instance, affixing labels with various statutorily provided declarations and the MRP is a mandatory requirement to be followed in respect of pre-packed commodities meant for retail trade; thus, any person who intends to trade in such items has to comply with the law. While complying with one law, however, he or she inadvertently falls within the central excise net in view of the deeming fiction. Therefore, it is anybody's guess as to what these different laws do to the consumer interest in general.

Regulatory bottlenecks and lack of explicit authorising body

The legal metrology officers are trained to mechanically assess the declaratory compliances of the manufacturer, importer and packer, performed in the interest of the end consumers. Due to a stringent and complex compliance regime under the Legal Metrology Act, and other legislations referred above, the departmental officers/inspectors show little sympathy towards the practical difficulties faced by the industry, which very often results in unnecessary harassment.

Under the current tax laws, at least in respect of companies having non-resident interest, the concept of advance ruling has been provided. This assists those being assessed in removing the ambiguities related to such matters and obtaining an advance ruling to help structure their business practices. Since the Packaged Commodities Rules present so many complex practical difficulties before the importers, manufacturers or packers, incorporating specific provisions for a dedicated advance ruling body would have been a panacea of many evils which afflict the system today. However, no such validation procedure has been provided in the existing legal framework and the industry has to suffer the ever-glaring possibility of criminal prosecution for even minor instances of labelling non-compliance. For instance, the Packaged Commodities Rules prescribe that either manufacturing, import or packing dates can be mentioned on the label. Therefore, one view can be that any of the dates will meet the compliance requirement; a more conservative view, however, is to print all the dates, which may make the consumer more weary and frustrated.

Conclusion

HLA Hart, in his book *The Concept of Law*, wrote that obedience by the populace of a rule is called efficacy, and no law can be said to be efficacious unless it is followed by the majority of the populace. Therefore, if the law is so complex so as to constantly run the risk of non-obedience then it is not a good law and therefore liable to be changed. Therefore, though we are not averse to protection of consumer rights by way of enforcing the Packaged Commodities Rules, we nonetheless believe that the current state of the law does not address the situation in a balanced manner. It is only looking at one side of the argument – and so trade and industry is left to grapple with their own practical difficulties, with little aid from the legislature and regulatory authorities.