

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 21208 of 2016

(Arising out of Order-in-Appeal No. 425/2016 dated 08.06.2016
passed by the Commissioner of Customs (Appeals), Bengaluru.)

M/s. Hi-Tech Computers,

No.9, T.B.Road,
Deshpande Nagar,
Hubli – 580 038.

Appellant(s)

VERSUS

Commissioner of Customs,

C.R.Building,
P.B.No. 5400,
Queen's Road,
Bengaluru – 560 001.

Respondent(s)

With

Customs Appeal No. 20648 of 2018

(Arising out of Order-in-Appeal No. 76-77/2018 dated 07.02.2018
passed by the Commissioner of Customs (Appeals), Bangalore.)

M/s. Hi-Tech Computers,

#5 & 6, T.B. Road,
Deshpande Nagar,
Hubli – 580 029.

Appellant(s)

VERSUS

**Commissioner of Customs
(Appeals),**

BTMC Building,
Above BTMC Bus Stand,
Old Airport Road, Domlur,
Bangalore – 560 071.

Respondent(s)

AND

Customs Appeal No. 20649 of 2018

(Arising out of Order-in-Appeal No. 76-77/2018 dated 07.02.2018
passed by the Commissioner of Customs (Appeals), Bangalore.)

Mr. H. Kumar,

Managing Partner of

M/s. Hi-Tech Computers,

#5 & 6, T.B. Road,
Deshpande Nagar,
Hubli – 580 029.

Appellant(s)

VERSUS

**Commissioner of Customs
(Appeals),**

BMTC Building,
Above BMTC Bus Stand,
Old Airport Road, Domlur,
Bangalore – 560 071.

Respondent(s)

APPEARANCE:

Mr. V.M. Doiphode, Advocate, for the Appellant

Mr. K.A. Jathin, Deputy Commissioner (AR), for the Respondent

**CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS R BHAGYA DEVI, MEMBER
(TECHNICAL)**

Final Order No. 20729 - 20731 /2024

DATE OF HEARING: 29.04.2024

DATE OF DECISION: 29.04.2024

PER : DR. D.M. MISRA

These appeals are filed against respective Orders-in-Appeal passed by the Commissioner of Customs(Appeals), Bengaluru. Since the facts involved are common, these appeals are taken up together for hearing and disposal.

2. Briefly stated the facts of the case are that the appellants are importers of DVD players and Flip-down LCD monitors falling under Chapter Heading 8528, 8521 and 8519 of the Customs Tariff Act, 1975. They have filed Bill of Entry No.9311901 dated. 14.03.2013 (appeal No.C/20648/2018) for clearance of the said goods by declaring the Retail Sale Price (RSP) on the goods meant to be sold to Original Equipment Manufacturers(OEMs). They have addressed a letter to the Department saying that since the goods were to be sold directly to the manufacturers, no MRP based assessment is applicable; however on the insistence of the Department, they declared the MRP on the goods awaiting clearance from Customs. Later, it was found that the appellant had sold the goods at a higher price than the declared MRP.

Consequently, a show-cause notice was issued to them on 30.07.2015 proposing to recover the differential duty of Rs.42,04,845/- applying the MRP based assessment along with interest and proposal for penalty. The said show-cause notice was adjudicated and the differential duty was confirmed and penalty under Section 114A and penalty of Rs.40,00,000/- under Section 114AA was imposed on the appellant; penalty of Rs.4 lakhs under Section 112(a) and Rs.10,00,000/- under Section 114AA were imposed on Shri H. Kumar, Managing Partner. Similarly in appeal C/21208/2016, appellant filed Bill of Entry No.7499374 dated 25.11.2014 and 7755065 dated 19.12.2014 for import and clearance of DVD players falling under Customs Tariff Head 85219020 and Flip-down LCD monitor classifying under CTH 85285900 respectively. Alleging that the DVD players and LCD monitors are covered under Sl.No.91 and 97 of Notification No.49/2008-CE(NT) dt. 24.12.2008 as amended, the goods were required to be assessed under Section 4A of the Central Excise Act, 1944, applying the MRP based assessment, the goods were assessed and duty short-paid Rs.1,78,251/- was confirmed. Hence the present appeals.

3. At the outset, the learned advocate for the appellant has submitted that the appellants are importers of DVD players and Flip-down LCD monitors which were sold to Original Equipment Manufacturers (OEMs) of bus and coach segment viz. M/s. Volvo Buses India Pvt. Ltd.; M/s. Automobile Corporation of Goa Ltd.; M/s. Tata Marcolo Dharwad and M/s. Ashok Leyland. In a few stray cases, such goods are sold to dealers in retail on the instruction of OEMs. He has submitted that though the appellants had initially filed declarations in the respective Bills of Entry claiming that the imported goods would be for industrial use but on the insistence of the Departmental officers, they declared RSP, which they were not required to do in respect of sales to industrial consumers. The goods imported under Bill of Entry No.8138641 dated 05.10.2012 were sold directly to bus

manufacturers and not for retail sale; however, they filed MRP declaration to avoid delay in assessment. Similarly, in the case of Bill of Entry No.931190, the goods were directly sold to manufacturers and though MRP affixation is not necessary but on the insistence of the Customs, they have no option but to affix MRP on the imported goods. Similar imports were made during the period in question. Further he has submitted that in response to the show-cause notice issued on 30.07.2015 demanding differential duty of Rs.42,04,845/-, they have submitted that since the clearances were to industrial consumers, the assessment cannot be under MRP based assessment as their case falls under the exception clause of the Legal Metrology (Packaged Commodities) Rules, 2011. He has submitted that they have affixed RSP only after insistence of the officers which was not accepted by the learned Commissioner observing that it is an afterthought submission. He has submitted that the learned Commissioner erred in holding that sales are not for industrial consumers whereas the appellant has clearly stated they were liable to pay duty on RSP only in the case of minuscule sale made for replacement but that by itself cannot be make other bulk sales as a retail sales. He has submitted that the learned Commissioner(Appeals) has misinterpreted the provisions of Rule 2(bb) of the Legal Metrology (Packaged Commodities) Rules, 2011. Further, he has submitted that the issue is covered by the judgment of the Hon'ble High Court of Karnataka in the case of ***Ewac Alloys Ltd. Vs. UOI*** [2012(275) ELT 193 (Kar.)], which has been followed by the later in the case of ***CCE, Bangalore-III Vs. Lotus Power Gears Ltd.*** [2017(346) ELT 347 (Kar.)]. Also, they placed reliance on the judgment of this Tribunal in the case of ***Remi Sales and Engineering Ltd. Vs. CC, Mumbai*** [2019(365) ELT 142 (Tri. Mum.)] and ***Mahle Engine Components India Pvt. Ltd. Vs. CC, New Delhi*** [2020(374) ELT 425 (Tri. Del.)]. Further, he has submitted that in view of the amendment later brought to the provisions of Legal

Metrology (Packaged Commodities) Rules, 2011 in the year 2015 by way of insertion of Rule 2-A, explanation providing the definition of 'industrial consumers', the case is squarely covered and since the said rule is substituted, it has got retrospective application in view of the principles laid down by the Hon'ble Supreme Court in the case of **GOI Vs. Indian Tobacco Association** [2005(187) ELT 162 (SC)] and also the judgment of the Hon'ble Karnataka High Court in the case of **CCE&ST, Bangalore Vs. Fosroc Chemicals (India) P. Limited** [2015(318) ELT 240 (Kar.)].

4. Learned AR for the Revenue reiterated the findings of the learned Commissioner(Appeals).

5. Heard both sides and perused the records.

6. The short issue involved in the present appeals is whether the goods viz. DVD players and Flip-down LCD monitors falling under Chapter heading 8528, 8521 and 8519 imported by the appellant and majority of which cleared to industrial consumers be assessed to duty i.e. additional duty of customs (CVD) applying MRP based assessment under Rule 4A of the Central Excise Act, 1944.

7. Undisputed facts are that the said DVD players and flip-down LCD monitors falling under CTH 8528, 8521 and 8519 are notified vide Notification No.49/2008-CE(NT) dated 24.12.2008 liable to be assessed under Section 4A of Central Excise Act, 1944 on MRP based assessment. However, during the relevant period, it is also not in dispute that the appellant had cleared the goods to OEMs i.e. industrial consumers in bulk and only in stray cases, minuscule quantity was sold in retail to consumers at the direction of the OEMs. The Revenue has alleged that since the appellants are not manufacturers but traders, the imported DVD players and flip-down LCD monitors are liable to be assessed

under MRP based assessment, whereas the claim of the appellant is that since the goods are imported and cleared to industrial consumers i.e. OEMs in bulk, MRP based assessment is not applicable to them. We find that this issue has been addressed by this Tribunal in the case of **Starlite Components Ltd. Vs. CCE, Nashik** [2012(286) ELT 43 (Tri. Mum.)] on more or less similar facts. The assessee in that case imported Energy Efficient Lighting fixtures (portable lamps working on dry battery) Torch of various models. As the said goods were notified under the provisions of Legal Metrology (Packaged Commodities) Rules, 2011, the assessee was directed to declare the RSP on the imported goods and accordingly on the insistence of the Department; the RSP was declared ranging from Rs.66 to 170 per piece. On enquiry by the Department, it was found that the actual RSP on these products were Rs.135 to to Rs.375 per piece being sold by M/s. Bajaj Electrical Ltd. in the market. On investigation, it revealed that the assessee are importing these smart glow torches of different sizes from China in bulk and after importation, they unpack, print "Bajaj Logo" on the torches and insert and staple the card indicating details such as model, power supply, charging time etc. and affix the label indicating MRP and repack the torches as per the agreement with M/s. Bajaj Electrical Ltd. and these are sold later to the Bajaj Electrical Ltd. at RSP ranging from Rs.135 to Rs.375 per piece. In the said factual background, the Tribunal after analysing the provisions of Legal Metrology (Packaged Commodities) Rules, 2011 held as follows:-

8. *As regards the appeal of the importer, the declaration of MRP for the purpose of levy of CVD is required only when there is a statutory requirement under the Legal Metrology (Packaged Commodities) Rules, 2011 to declare on the package thereof the retail sale price of such article. Only when the goods are intended for retail sale and are packed in retail packages, the provisions of Legal Metrology (Packaged Commodities) Rules, 2011 would apply. In the case under consideration, from the records of the case, it is absolutely clear that the appellants are*

*importing the impugned goods not for retail sale but for repacking, labelling and branding and selling the same in bulk to M/s. Bajaj Electricals Ltd. Therefore, they are not required to declare MRP in terms of Rule 3 of the said Legal Metrology (Packaged Commodities) Rules, 2011 as they are industrial consumers. This position has been further clarified by DGFT vide notification dated 22-1-2001 wherein it has been clearly stated that import of raw materials, components, bulk imports, etc. would invariably undergo further processing or removal before they are sold to consumer and in respect of these imports, the labelling requirements prescribed under Notification No. 44(RE-2000)97-2002 dated 24-11-2000 shall not apply. It is also not in dispute that the goods are specified in Third Schedule to the Central Excise Act, 1944 and the activities undertaken by the appellant importer amounts to "manufacture" under Section 2(f) of the said Act. In these circumstances, it is clear that the appellants were not required to discharge duty liability of additional Customs duty on the basis of MRP. Accordingly, we set aside the impugned order demanding the differential duty inasmuch as there was no requirement of declaring MRP. As a result, the confiscation of goods under Section 111(d) and (m) of the Customs Act, 1962 are also not justified. Consequently, the question of payment of redemption fine would not arise and also no penal consequence would follow under Section 112(a) *ibid*.*

8. Similar view was subsequently held in the case of Remi Sales & Engg. Ltd. , wherein the Tribunal has held as under:-

3. *We have perused the facts of the case and relevant proviso. The Appellant has challenged the assessment on the ground that the goods can be assessed on RSP only when they are specified in notification issued under Sections 4A(1); and (2) declaration of retail sale price on packages under the Standards of Weight & Measures Act, 1976 or under other law for the time being in force is mandatory which is only in case of retail sale. Considering the nature and use of goods it cannot be said that the same are intended for retail sale. Therefore the goods has to be assessed on transaction value. It was submitted by them, sale is made to institution i.e. hospitals, blood banks, Research institute, etc. are not covered under the definition of "Retail sale". We find that in terms of Rule 2A of the provisions of declaration of RSP is not applicable to the following types of goods :*

5.1 Rule 2A of the PC Rules, 1977 reads as follows :-

"2A. Applicability of the Chapter. - The provisions of this chapter shall not apply to,-

(a) packages of commodities containing quantity of more than 25 kg or 25 litre excluding cement and fertilizer sold in bags up to 50 kg; and

(b) packaged commodities meant for industrial consumers or institutional consumers.

Explanation :- For the purpose of this rule,-

(a) **Institutional consumer.** - Means those consumers who buy packaged commodities directly from the manufacturers/packers for service industry like transportation (including airways, railways), hotel or any other similar service industry.

(b) **Industrial consumer.** - Means those consumers who buy packaged commodities directly from the manufacturers/packers for using the product in their industry for production, etc. ”

From the above we find that the goods in question are sold by the Appellant to the hospital is sale to the institutional customer only. The Commissioner (Appeals) has held that an importer cannot be said to be manufacturer or packer of the goods and hence not eligible for exemption. We find that under the rules the importer is person responsible to comply with the Packaged Commodity Rules, 1977. Hence the importer has been treated at par with the manufacturer of goods. In such case for the purpose of levy of CVD the importer shall be responsible as manufacturer and eligible for exemption from complying with the provisions of RSP. We thus are of the view that the goods imported by the Appellant are liable for duty under Section 4 of CEA, 1944. We thus set aside the impugned order and allow the appeal with consequential reliefs.

9. Following the above judgment, we are of the view that the imported goods viz. DVD players and Flip-down LCD monitors which are cleared to OEMs i.e. industrial consumers in bulk are not liable to be assessed under MRP based assessment under Section 4A of the Central Excise Act, 1944; hence the differential duty on this count demanded from the appellant and confirmed in the impugned orders is not sustainable. However, the appellant had admitted that a minuscule quantity involving differential duty of Rs.1.00 lakh has been sold in retail to consumers at the direction of OEMs. The Department's

allegation is that the differential duty on sale directly to the consumers in retail is more than Rs.1.00 lakh. Therefore, only to ascertain the liability on account of retail sale to consumers, the matter is remanded to the adjudicating authority. However, considering the facts and circumstances of the case, we are of the view that penalty is not imposable on the appellants.

10. In the result, the impugned order is modified by setting aside the demand on clearances of goods to OEMs i.e. industrial consumers and confirming the demand with interest for clearances to retail consumers other than OEMs. Penalty is set aside. Consequently, the appeal No.C/20649/2018 is allowed and appeal No.C/21208/2016 and C/20648/2018 are allowed by way of remand to the extent mentioned as above.

(Operative part of this Order was pronounced in Open Court on conclusion of the hearing.)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R BHAGYA DEVI)
MEMBER (TECHNICAL)

Raja....