IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066
Principal Bench, New Delhi
COURT NO. 1

Date of Hearing: 5.11.12
Date of Decision: 29.11.12

Excise Appeal No. E/1277 & 2489/2011

M/s. Hero Motorcorp Ltd. — Appellants

Vs.

CCE, Delhi-III — Respondent

(Arising out of the Order in Original No.8/SSS/CCE/2011 & No. 13/CE/PKJ/CCE/ADJ/2011,Dtd.12.07.2011passed by the Commissioner of Central Excise Delhi-III)

Hon'ble Shri Justice Ajit Bharihoke, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rule, 1982? :
2. Whether it would be released under Rule 27 of the CESTAT (procedure) Rule, 1982 for publication in any authoritative report or not? :
3. Whether their Lordships wish to see the fair Copy of the order? :
4. Whether order is to be circulated to the Department Authorities? :

Appearance
Sh. P.K.Ram, Advocate - for the Appellant
Sh.Davinder Singh,A.R (Jt.CDR) for the Respondent

Final ORDER No A/1348-1349/2012-Ex(BR)

Per Rakesh Kumar

The fact leading to this appeal are, in brief, as under:-

1.1 The appellant having their factory at Daruhera, Disttt. Riwari (Haryana), are engaged in the manufacture of Motorcycle and the parts thereof chargeable to Central Excise Duty. They have spare parts division at Gurgaon, where they received the Motorcycle parts in bulk from Daruhera Unit. The parts are cleared by Daruhera Unit to

SPD, Gurgaon on payment of duty on the Value Determined under Rule-9 read with Rule-8 of the Central Excise Valuation Rules 2000 i.e. on 110% on the cost of production. The SPD after packaging parts for retail sale, clears the same on payment of duty on the Value Determined u/s 4A, as packing or re-packing of Motor Vehicle Parts for retail sale amounts to manufacturer under the Provision of Section 2 (f) (iii) of the Central Excise Act,1944 and automobile parts are notified under section 4A. The Department was of the view that Daruhera Unit should have paid duty on clearances the spare parts to SPD Gurgaon on the Value Determined u/s 4A i.e. on MRP minus abatement. On this basis the Department has alleged that the Appellant have short paid the duty. Accordingly the Show Cause Notice dtd. 17.7.2009 was issued for demanding duty amounting to Rs.2,59,72,130/- along with interest in respect of clearances of Motorcycle parts to SPD, Gurgaon during period from 1.06.06. to 31.07.08. This show cause notice issued by invoking Proviso to Section 11A(I). Subsequently, another show cause notice dtd. 28.07.10 was issued to the appellant for demand of allegedly short paid duty amounting to Rs. 1,18,50,423/- along with interest, in respect of clearances to SPD, Gurgaon during period from Aug.'09 to March 2010 and also for imposition for penalty on the appellant under Rule 25 of the Central Excise Rules 2011.

1.2 The show cause notice dtd. 17.07.09 was adjudicated by the Commissioner vide order in original dtd. 23.08.11 by which the Commissioner holding that in respect of clearances of the Motorcycle parts by the appellant to SPD, Gurgaon for being sold as spare parts, the Provisions of Section 4A are applicable, and hence the duty was required to be paid on MRP minus abatement. The Commissioner accordingly confirmed the duty demand of Rs.2,59,72,130/- along with interest and imposed penalty of equal amount by the appellant u/s 11AC of the Central Excise Act. The Second show cause notice dtd. 28.07.10 was adjudicated by the Commissioner vide order in original dtd. 15.07.11 by which he confirmed the duty demand of Rs. 1,18,50,423/- along with interest and besides this imposed penalty of Rs.30 lakhs on the Appellant under Rule 25 of the Central Excise Rule 2011.

1.3 Against the above orders of the Commissioner of these two appeals have been filed.

2. Heard both the sides.

3. Sh.S.Ganesh, Senior Advocate, along with Sh.P.K.Ram Advocate, appearing on behalf of the appellant, pleaded that the Motorcycle parts are cleared by Daruhera Unit to their Gurgaon unit in bulk, that at that stage, the same have not been packed for retail sale, that the packing for retail sale is done at the spare parts division at Gurgaon when the MRP is affixed on packages, that the SPD, Gurgaon is registered as a manufacturer as the packing of Motor Vehicle parts for retail sale amounts to manufacture u/s 2 (f)(iii) and the SPD, Gurgaon pays duty on the clearances of Motorcycle parts packed for retail sale on the Value Determine u/s 4A, that the Provision of Standards of Weights and Measures Act,1976 (SWM Act) and the Standards of Weight and Measures Rules 1977 (SWM Rules) are not applicable to the spare parts cleared in bulk in loose condition, that the Provision of SWM Rules become applicable only when a Commodity has been packed for

retail sale, that the spare parts cleared in bulk by the appellant unit at Daruhera are not the commodity in packaged form and hence the Provisions of SWM Rules are not applicable and there is no requirement to declare the MRP and for this reason the Provision of Section 4A would not be applicable, that in this regard he relies upon the tribunal's judgement in the case of **Malhotra Shaving Products (p) Ltd. Vs. CCE, reported in 2010 (250) E.L.T. 118,** that the same view have taken by the tribunal in the case of **M/s. Sterling Tools Limited. Vs. CCE Delhi-iv (Stay Order No.677-678/2012-Ex(BR) dtd. 20.04.12**, that even if the department's view is accepted and duty is held as payable by the appellant's unit at Daruhera on the value determine u/s 4A, this duty would be available as cenvat credit to the spare parts devision at Gurgaon, whose operation of re-packing for retail sale amounts to manufacture and duty payment by the Gurgaon unit would become nil, and that thus, this is a Revenue neutral situation. He also pleaded that in respect of Show Cause Notice dtd. 17.07.09, there was no justification for invoking extended period as there was no suppression of any fact or intention to evade the payment of duty on the part of the appellant and for the same reason there is no justification of imposition of penalty on the appellant u/s 11AC of the Central Excise Act or Rule 25 of the Central Excise Rules, 2002. He, therefore, pleaded that the impugned orders are not sustainable.

4. Sh. Davinder Singh, the learned joint CDR, defending the impugned order by reiterating the findings of the Commissioner, pleaded that the provisions of SWM Rules are applicable to the Motorcycle parts cleared by the appellant unit at Daruhera to their SPD

at Gurgaon, and therefore the duty in respect of the goods cleared should have been paid on the value determined u/s 4A.

5. We have considered the submissions from both the sides and peruse the records. Undisputed facts are that the goods, in question, in respect which the duty has been demanded have been cleared by the appellant unit at Daruhera in bulk and in loose condition to their spare parts division at Gurgaon and re-packing of the goods for retail sale is done in Gurgaon unit. There is no dispute about the fact that the Gurgaon unit (SPD) is registered as a manufacturer and is paying duty on the spare parts cleared in packaged condition for retail sale on the value determined u/s 4A. The point of the dispute is as to whether in respect of the goods cleared by Daruhera unit to SPD, Gurgaon, which are in loose condition, the duty is required to be paid on the value determined u/s 4A. While the appellant have paid the duty on these goods on 110% of the cost of production in terms of the provisions of Rule-9 read with Rule-8 of the Central Excise Valuation Rule 2000, the department seeks to recover duty on the value determined provision of Section 4A i.e. on MRP minus abatement.

6. In terms of the Apex Court's judgment in the case of the **Jayanti Food Processing (p) Ltd., Vs. CCE, Rajasthan, reported in 2007(215) E.L.T. 327(S.C.)** for application of the provision of section 4A in respect of the any goods, there must be a requirement under SWM Act or the Rules made there under to declare the MRP of the goods on their packages. In terms of the provisions of SWM Rules, the requirement to declare the MRP on the packages is only in respect of commodities packaged for retail sale. The goods cleared in loose condition cleared to spare parts division for being packed for retail sale

are not the packaged commodity and hence there would be no requirement to declare MRP and the provision of Section 4A would not have applicable. We find that the tribunal in the case of **Malhotra Shaving Products (p) Ltd. Vs. CCE, Hyderabad, reported in 2010 ((250) E.L.T. 118,** where the facts and the issue involved are, similar has, relying upon the Apex Court's judgment in the case of the **Jayanti Food Processing (p) Ltd.(Supra),** held that safety razor blades and razors cleared in bulk to another unit for being re-packing for retail sale would be liable to duty on value determined under section 4 not on value determined under section 4A. The judgment of the Tribunal in the case of **M/s. Sterling Tools Limited. Vs. CCE Delhi-iv,** reported in 2012 (281) E.L.T-573 (Tri.Del.) (Para-9), is not applicable to the facts of this case as in that case some of the parts were being cleared in packed condition for retail sale while this is not so in this case. We, therefore, hold that the provisions of Section 4A are not attracted to goods cleared by their Daruhera Unit to their spare parts devision, Gurgaon and hence the orders confirming the duty demands against the appellant on this basis and imposing penalty are not sustainable. The impugned orders are, therefore, are set aside. The appeals are allowed.

(Order pronounced in the open court on 29.11.12)

(Justice Ajit Bharihoke)
(President)

(Rakesh Kumar)
Member (Technical)

S.Kaur