CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi.

Date of hearing/decision: 29.05.2017

Excise Appeal No. 57852 of 2013

(Arising out of order in appeal No. LTU/Appl/20/2013 dated 28.02.2013 passed by the Commissioner (Appeals) Central Excise & Service tax, New Delhi).

M/s Havells India Limited Appellant
Sh. J. P. Kaushik, Advocate for the appellant

Vs.

CCE & ST, New Delhi Respondent
Sh. H. C. Saini, AR for the Respondent

Coram:

Hon'ble Shri Anil Choudhary, Member (Judicial)
Hon'ble Mr. B. Ravichandran, Member (Technical)

Final Order No. 53604/2017

Per: **B. Ravichandran**:

The appellant is aggrieved by order dated 28.02.2013 of Commissioner (Appeals), Central Excise, New Delhi.

2. The appellants are engaged in the manufacture of MCCB, switches, fuses, relays etc. liable to Central Excise duty falling under various heading s of Chapter 85. The appellant's final products which are subjected to Central Excise duty, in term of value arrived at as per Section 4 as well as under Section 4A of the Central Excise Act, 1944. During the course of verification of records of the appellant in March, 2008, it was noticed by the Officers that in respect of a few invoices the appellant while clearing the goods, under CETH 8535, have not followed the MRP based assessment in terms of Section 4A of the Act. Thereafter, the appellant calculated differential duty on all such clearances

happened in the past and paid the short payment of Rs. 17,41,437/- alongwith interest of Rs. 4,55,320/-. The short payment relates to clearances made between 01.05.2003 to 31.03.2008. All the differential duty payments were made prior to 27.05.2008. Subsequently on 31.05.2008 a show cause notice was issued to the appellant to demand the said amount and to impose penalties on them. The case was adjudicated. The original authority vide his order dated 27.03.2009 confirmed the said differential duty alongwith interest and appropriated the duty already paid alonwith interest. He also imposed penalty equivalent to duty under Section 11AC of the Act. On appeal, the original order was upheld by the impugned order.

3. Ld. Counsel for the appellant submitted that the appellants were having large number of items, some of them are liable to duty under normal transaction value and some of them are liable to duty based on MRP, printed on the packages. They are following both the methods of assessment. However, in respect of a few products falling under CETH 8536 they failed to adopt MRP based value, by error. When the same was pointed out, they have taken immediate action to quantify differential duty in respect of such goods for the past five years and deposited the differential duty with applicable interest of delayed payment, without any demand. Based on the details provided by the appellant, after payment of differential duty, a show cause notice was issued to them.

4. Ld. Counsel submitted that they are not contesting the duty difference which they have paid with interest. They are only pleading that there is no intention for short payment of duty and as such it is a fit case for closure without proceedings. He also submitted that the appellant are an established

manufacturing unit with payment of more than Rs. 100 crores towards Central Excise duty. While accounting and clearing large number of products, this error in assessment in respect of a few items has repeatedly happened. The short levy has been duly discharged and ld. Counsel prayed for closure of the proceedings.

5. Ld. AR for the Revenue reiterated the finding of the lower authorities. He submitted that the error pleaded by the appellant cannot be accepted. Such short levy has been happening for quite some time and the proceedings for invoking Section 11AC of the Act by the lower authorities was correct.

6. We have heard both the sides and perused the appeal records. The case is not being contested on merit, regarding duty element. The applicability of provisions of Section 11A(2B) of the Act is the point of dispute. The said Section provides for closure of proceedings without issue of notice where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person, chargeable with the duty, may pay the amount of duty on the basis of his own ascertainment of such duty or on the basis of duty ascertained by a Central Excise Officer before service of notice on him. In the present case, the lower authorities held that in terms of Explanation 1 to Section 11A(2B) such closure is not possible if such short payment of duty is due to reason of fraud, collusion or any wilful mis-statement or intention to evade payment of duty. It is observed by the lower authorities the Central Excise duty nor paid for a longer time, will act as a bar for closure of case. It was also recorded that clerical mistake cannot happen for such a long time. We find that the lower authorities did not adduce/examine evidences for invoking

extended period of time for demand. The Explanation contains identical words applicable for such extended period demand.

7. As discussed above, the appellants have been clearing goods of both types – assessable under Section 4 as well under Section 4A. All the items are listed with the both values in the invoices. Admittedly, a few items which should have suffered duty under Section 4A have been cleared under transaction value. There is no evidence on record to sustain the allegation of wilful mis-statement, fraud or intention to evade payment of duty. Apparently, the longer period of short payment alone was considered as reason enough for non-closure of case under Section 11A(2B). This much has been recorded by the lower authorities also. We find the short payment spread over longer period by itself will not bar the closure of case, without show cause notice. Independently, the elements as mentioned in Explanation -1 are to be established for non-closure of cases under the said Section. Since such element are not established in the present case, we find the proceedings should not have been initiated against the appellant.

8. While upholding the payment of differential duty alongwith interest by the appellant, the penal proceedings against the appellant are found to be untenable. Accordingly, the penalty imposed on the appellant are set aside and the appeal is allowed to that extent.

(Dictated and pronounced in the open Court).

(Anil Choudhary)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

Pant