CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Date of hearing: 18.08. 2017
Date of decision: 22.09.2017

Excise Appeal No. 50452 of 2014
(Arising out of order-in-appeal No. LTU/Appl/45/2013 dated 18.11.2013 passed by the Commissioner (Appeals) Central Excise & Service Tax, New Delhi).

M/s HPL electric & Power Limited Appellant

Vs.

CCE, New Delhi Respondent

Appearance:

Sh. Amit Jain, Advocate for the appellant
Sh. M. R. Sharma, AR for the respondent

Coram:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Final Order No. 56690/ 2017

Per: **V. Padmanabhan**:

The appellants manufacture switchgear falling under chapter heading 85.36 which is notified under Section 4A of the Central Excise Act, 1944 for the purpose of assessment on the basis of MRP read with Notification No. 14/2008-CE (NT) dated 01.03.2008. The appellants had been clearing switch gear to industrial consumers directly on assessment under Section 4 of the Central Excise Act, 1944, and they had also been clearing switch gears of less than 25 kg. each to their dealers and assessing them in terms of MRP under Section 4A of the Central Excise Act, 1944. These two types of clearances are not the subject matter of dispute in the present case. The dispute in the present case is in relation to the switch gears weighing more than 25 kg. each and cleared to their dealers. These switch gears have been assessed by the appellants under Section 4 ibid while the adjudicating authority held that these are liable to be assessed under Section 4A ibid as they were not directly sold to the industrial consumers. Having so held, the adjudicating authority went ahead to determine the MRP (as no MRP was printed on such switch gears) and arrived at the MRP by adopting their list prices and adding sales tax and octroi etc. thereto.

2. By finalising the assessment under Section 4A in respect of switch gear sold to industrial consumers through dealers, the adjudicating authority confirmed duty demand amounting to Rs. 45,37,620/- for the period January to July, 2008 alongwith interest and penalty. The same was upheld in the first appeal. Aggrieved by the impugned order, the present appeal has been filed.

3. With the above background, we heard Sh. Amit Jain, ld. Advocate for the appellant and Sh. M. R. Sharma, ld. AR for the respondent.

4. The appellants have contended that they had no intention to evade duty and as a matter of fact had been paying duty under Section 4A where ever they considered it to be payable thereunder. In respect of packages of switch gears weighing more than 25 kg. no MRP was required to be printed, in their opinion, in view of Rule 2A(a) of Standards of Weights and Measures (packaged Commodity) Rules, 1977 in terms of which packages of commodities containing quantity of more than 25 kg. were covered under Chapter –II of the said Rules. The adjudicating authority did not find this argument tenable and held that this rule is applicable to those commodities which are sold by weight. The appellants' contention that these switch gears weighing more than 25 kg. each were eventually used by industrial consumers was also found to be

untenable for the purpose of treating them to have been cleared for industrial consumers because as per Rule 2A(b) such consumers have to purchase goods directly from manufacturers.

5. Ld. Advocate for the appellant relied on the following case laws:

i) Havells Electronics Pvt. Ltd. & Ors. vs. CCE, Rajasthan
2007 (3) TMI 1452-CESTAT, Allahabad

ii) Controls & Switchgears Contractors Ltd. vs. CCE, Noida
2005 (183) ELT 95 (Tri. Delhi) affirmed by Supreme Court
2011 (274) A109 (SC)

iii) Ewac Ceramics vs. CCE, Rajkot
2014 (304) ELT 542 (Tri. Ahmd.)

6. Ld. AR for the Revenue justified the impugned order. He submitted that the goods manufactured by the appellant are specified for assessment under Notification No. 14/2008-CE (NT) dated 01.03.2008, issued under Section 4A. The goods manufactured by the appellant are not items which are sold by weight and hence are required to be assessed under Section 4A and not under Section 4. Accordingly, he prayed that the impugned order may be upheld.

7. We have considered the rival submissions and perused the record. The dispute pertains to whether the switch gear manufactured by the appellant and weighing more than 25 kg. each and sold through dealers are required to be assessed under Section 4A on MRP basis. In terms of provision of Section 4A, only those commodities are required to be assessed under the Section, which are required to be affixed with MRP as per the provisions of Standards of Weights and Measures (Packaged Commodity) Rules, 1977 such required is not there in respect of certain categories of packaged goods. In this regard Rule 2A ibid reads as follows:

> "*Rule 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.*
>
> (c) ***Industrial Consumer****.- Means those consumers who buy packaged commodities directly from the manufacturers/ packers for using the product in their industry for production, etc*.]"

8. The above rules specifies those commodities for which the MRP need not be affixed on the commodities. Consequently, such commodities are not covered under Section 4A. The main contention of the appellant is that packages of switchgear weighing individually more than 25 kg. are exempt from affixing MRP. But switch gear manufactured by the appellant are evidently not being sold by weight or by measure but are sold in terms of numbers. Hence such goods even if weighing over 25 kg. each, which are duly packaged and sold to the dealers by the appellants, cannot be said to be covered under the exemption under Rule 2A(a) of the above rules. From the pattern of sale adopted by the appellant it is also evident that the goods are sold through dealers and not directly sold to industrial or institutional customers in bulk. We also note that the commodities manufactured by the appellant are not covered by the exemption contained in Rule 34 of the P.C. Rules, 1977.

9. The investigation undertaken by the department has established that the appellants were selling all their switch gear product in packaged condition after

repacking and labelling in their factory, after curing the same from their own other unit. The activity of packing/ repacking, labelling etc. on the impugned goods in their factory amounts to manufacture and in the present case are liable to duty in terms of Section 4A.

10. We have also considered the case laws relied upon by the appellant. In the case of ***Havells Electronics Pvt. Ltd. & Ors***. (supra), we note that the Tribunal has remanded the matter for denovo adjudication and hence cannot be considered as a precedent. In the case of ***Controls & Switchgears Contractors Ltd.*** (supra), the facts of the case are different. In that case, the goods were specially packed for exclusive use of industries as raw material and not for retail sale. Hence, the assessments were to be made under Section 4 and the above decision is not applicable to the facts of the present case. In the case of ***Ewac Ceramics*** (supra) the issue before the Hon'ble Karnataka High Court as regarding the vires of Rule 2A and 2(p) of the relevant Rules. Consequently, we are of the view that the observations of the Hon'ble High Court has been made in a different context.

11. In view of the above discussions, we find no reason to interfere with the impugned order which is upheld alongwith the reasons mentioned therein. In the result, appeal is rejected.

(Pronounced on 22.09.2017).

(Justice (Dr.) Satish Chandra) President	(V. Padmanabhan) Member (Technical)

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