IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH – COURT NO. 1

Excise Appeal No. 456 of 2011

(Arising out of Order-in-Appeal No. 22/Kol-I/2011 dated 21.03.2011 passed by the Commissioner of Central Excise (Appeal-I), Kolkata, 169, A.J.C. Bose Road, Bamboo Villa, 4th Floor, Kolkata – 700 014)

M/s. Albert David Limited **: Appellant**
5/11, D. Gupta Lane,
Kolkata – 700 050

VERSUS

Commissioner of Central Excise **: Respondent**
Kolkata-I Commissionerate
Kendriya Utpad Shulk Bhawan,
180, Shantipally, Rajdanga Main Road, Kolkata – 700 107

APPEARANCE:

None for the Appellant

Shri S.S. Chattopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 76251 / 2024

DATE OF HEARING: 27.06.2024

DATE OF DECISION: 09.07.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

The present appeal has been filed by M/s. Albert David Limited, 5/11, D. Gupta Lane, Kolkata – 700 050 against the Order-in-Appeal No. 22/Kol-I/2011 dated 21.03.2011 passed by the Commissioner of Central Excise (Appeal-I), Kolkata, 169, A.J.C. Bose Road, Bamboo Villa, 4th Floor, Kolkata – 700 014.

2. The facts of the case are that the appellant is engaged in the manufacture of medicaments falling under Chapter Headings 3003 and 3004 of the Central Excise Tariff Act, 1985. During the period from

January 2005 to June 2008, the appellant had removed from their factory packaged medicines covered by the Standards of Weights and Measures Act [hereinafter referred to as the 'SWM Act'] on stock transfer basis to their Patna depot, on payment of duty by adopting MRP based valuation under Section 4A of the Central Excise Act, 1944. Subsequently, on getting orders from Nepal buyers, such medicines were sold to them for export from their Patna depot at wholesale prices. With normal trade discounts, these wholesale prices were often higher than the MRP based value, depending on the market condition.

3. The Department was of the view that for the purpose of payment of duty, MRP based valuation of the goods, under Section 4A covered under the SWM Act, is applicable only when the goods are removed from the factory for domestic sale and valuation under Section 4A is not applicable when goods are sold outside the country, such as Nepal. Accordingly, the Department determined the duty as per the transaction value, as provided under Section 4 of the Central Excise Act, 1944 for the goods sold to the Nepal buyers.

4. On this ground, a Show Cause Notice was issued and after due process, the ld. adjudicating authority passed the Order-in-Original dated 23.10.2009 confirming the demand of duty of Rs.1,42,187/- along with interest and imposed equal amount of duty as penalty. On appeal, the Ld. Commissioner (Appeals) upheld the demands confirmed in the adjudication order vide the impugned order dated 21.03.2011. Aggrieved against the said order, the appellant has filed the present appeal.

5. None appeared for the appellant. However, vide letter dated 19.06.2024, the appellant has requested to decide the issue on the basis of the submissions made by them vide their letter dated 27.02.2017. In their written submission dated 27.02.2017, the appellant has submitted that they are not seriously contesting the Department's finding regarding determination of assessable value of the goods in question under Section 4 of the Central Excise Act. Accordingly, they submitted that they have already deposited the duty confirmed along with interest before filing this appeal. The appellant mainly contests the imposition of penalty under Section 11AC of the Central Excise Act,1944.

6. The appellant submits that they do not receive or solicit any orders from Nepal buyers at their factory; at the time of clearance of the goods from their depot, they were not aware that the said goods would be cleared from their depot later to the buyers located in Nepal; accordingly, they have cleared the goods on payment of duty to their depot by adopting the MRP as provided under Section 4A of the Central Excise Act. Thus, they submit that they had no intention to evade payment of duty by avoiding payment of duty as per the transaction value as provided under Section 4 of the Central Excise Act. It is contended by the appellant that the Department has not brought in any evidence to show that they had *mala fide* intention in clearing the goods at MRP in respect of the Nepal buyers.

6.1. Therefore, the appellant prayed for setting aside the penalty imposed on them.

7. The Ld. Authorized Representative appearing for the Revenue reiterated the findings in the impugned order.

8. We have perused the appeal documents.

9. We observe that the appellant normally cleared their goods to their depot at Patna by adopting MRP based valuation as provided under Section 4A of the Act. At the time of clearance of the goods to their depot, the appellant was not aware that some part of the goods would be sold to buyers in Nepal from their Patna depot. Accordingly, they adopted the MRP based valuation for all the goods cleared from their factory to the depot. When they got the orders for Nepal buyers, they cleared the goods from their depot by adopting wholesale prices. In some cases, the wholesale prices adopted by the appellant were more than the MRP based value. Accordingly, the Department has demanded differential duty on the basis of transaction value in terms of Section 4 of the Central Excise Act from the appellant.

9.1. We observe that MRP based valuation is applicable only for goods cleared for domestic sales, where the SWM Act is applicable. When goods are sold outside the country, such as Nepal, MRP based valuation is not applicable and the value to be adopted is the transaction value as provided under Section 4 of the Act. This view has been expressed by the Tribunal, New Delhi in the case of *Gillette India Ltd. v. Commissioner of Central Excise, Jaipur [2006 (193) E.L.T. 331 (Tri. – Del.)]* wherein it was observed that export consignments to Nepal were required to be valued in terms of their transaction value under Section 4 and not in terms of Section 4A, even if the goods under export were specified under Section 4A(1) of the Act.

9.2. We observe that the appellant has fairly accepted the valuation in terms of Section 4 of the Act for the goods cleared to Nepal from their depot at Patna and paid the differential duty before filing this appeal. Therefore, by relying on the decision of the Tribunal in the case of *Gillette India Ltd. v. Commissioner of Central Excise, Jaipur [2006 (193) E.L.T. 331 (Tri. – Del.)],* we uphold the demand of differential duty confirmed in the impugned order along with interest.

10. The appellant has mainly contested the penalty imposed on them under Section 11AC of the Central Excise Act, 1944. In this regard, they have submitted that at the time of clearance of the goods from their factory to the depot, they were not aware that some part of the goods would be cleared to Nepal buyers later. Accordingly, the goods were cleared to their depot by adopting MRP based valuation as provided under Section 4A of the Act. Later, the said goods were cleared to Nepal buyers as per MRP value as provided under Section 4A of the Act. Thus, they submit that they had no intention to evade payment of duty and hence no penalty is imposable on them under Section 11AC of the Central Excise Act, 1944.

10.1. We find merit in the submission of the appellant that they had no intention to evade payment of duty while adopting the MRP based value for the purpose of clearance of the goods to their Patna depot, part of which were cleared to Nepal buyers later. At the time of clearance of the goods to their depot, the appellant did not have the orders from the Nepal buyers. Subsequently, when they got the orders from the

Nepal buyers, they have cleared the goods from their depot by adopting the MRP based valuation. When the Department contended that MRP based valuation is not applicable for the goods cleared to Nepal, the appellant accepted their liability and paid the differential amount of duty. Even though it was paid after issuance of the adjudication order, we observe that in this case, there is no *mens rea* or intention to evade payment of duty existing on the part of the appellant. As suppression of facts with intent to evade payment of duty is not established in this case, we hold that the penalty imposed under Section 11AC of the Central Excise Act, 1944 is not sustainable and accordingly, we set aside the same.

11. In view of the above, we pass the following order: -

(1) We uphold the demand of duty along with interest confirmed in the impugned order.

(2) We set aside the penalty imposed on the appellant under Section 11AC of the Act.

12. The appeal is disposed of on the above terms.

(Order pronounced in the open court on **09.07.2024**)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd