IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

Appeal No. E/2137/2010

(Arising out Order-in-Appeal No. SB(102) 102/MV/2010 dated 21.09.2010 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone I)

For approval and signature:
Hon'ble Mr C J Mathew, Member (Technical)
Hon'ble Dr. Suvendu Kumar Pati, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
3.	Whether Their Lordships wish to see the fair copy of the Order?	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	Yes

M/s. Multiplex Electronics — Appellant

Vs.

Commissioner of Central Excise, Mumbai Zone I — Respondent

Appearance:

Shri Mayur Shroff, Advocate for the appellant
Shri Anil Choudhary, AC (AR) for the respondent

CORAM:
Hon'ble Mr C J Mathew, Member (Technical)
Hon'ble Dr. Suvendu Kumar Pati, Member (Judicial)

Date of hearing : 31-01-2019
Date of decision : 31-01-2019

O R D E R No: **A/85257 / 2019**

Per: C J Mathew

This appeal lies against order-in-appeal no. SB(102) 102/MV/2010 dated 21st September 2010 of Commissioner of Central Excise (Appeals), Mumbai Zone I which has upheld the order of the original authority confirming demand of ₹16,36,968/- under section 11A of Central Excise Act, 1944, along with interest thereon under section 11AB of Central Excise Act, 1944, while imposing penalty of like amount under section 11AC of Central Excise Act,1944.

2. We have heard Learned Counsel for the appellant and Learned Authorised Representative at length. Though a number of submissions were made on the liability to discharge duty under section 4A of Central Excise Act, 1944 as well as the non-applicability of the provisions of Standard of Weights & Measures (Packaged Commodities) Rules, 1977 on supplies to institutional buyers and the bar of limitation of time, we find that the matter can be disposed off within the narrow compass of the scope for enhancing assessable value of the said goods under section 4A of Central Excise Act, 1944 during the relevant period.

3. It has been brought to our notice that the goods were being manufactured by M/s Multiplex Electronics for M/s Multivision Electronics Pvt Ltd who had supplied the components and that duty

liability had been discharged on the invoice price. The demand pertains to clearances effected between November 2003 and March 2004 and again from November 2004 to March 2005 on goods that, in the impugned order, are referred to as 'coin box telephones' installed in 'public call offices.'

4. In identical circumstances, the Tribunal, in *Acme Ceramics v. Commissioner of Central Excise, Rajkot [2014 (304) ELT 542 (Tri-Ahmd],* had held that

> *'12. For the period prior to 1-3-2008, we have to record that the provisions of sub-section (4) of Section 4A were enacted in the statute which is reproduced hereinabove, if read, would indicate that if the manufacturer declares retail price which is not the correct retail price as required to be declared under the provisions of the Act, then the ascertainment of such retail sale price will be done in a prescribed manner. We fine that though the provisions of sub-section (4) of Section 4A was brought into statute from 14-5-2003, how to redetermine the RSP in the case of misdeclared RSP was not "prescribed" by the Central Government till the issuance of Notification No. 13/2008-C.E. (N.T.), dated 1-3-2008. This would effectively mean that the Legislature in its wisdom has considered a situation wherein the RSP which is declared could be wrong RSP, thought of remedying the situation by inserting the provision of sub-section (4) in Section 4A, but had not prescribed the rules how the redetermination has to be done till 1-3-2008. It can be seen from the definition of the word "prescribed" as enshrined in Section 2(g) of the Act (as reproduced hereinabove) that it is very clearly stated that it can be done only by the rules made under this Act. Closer perusal of Notification No. 13/2008-C.E. (N.T.),*

dated 1-3-2008 indicated that the said notification was issued in exercise of powers conferred by Section 37 read with sub-section (4) of Section 4A of the Central Excise Act, 1944 (1 of 1944), the Central Government hereby makes the following rules. It can be seen from the above preamble to the Notification No. 13/2008-C.E. (N.T.), Central Government made the rules as applicable for sub-section (4) of Section 4A w.e.f. 1-3-2008. In the cases in hand, for the period prior to 1-3-2008, the entire exercise of the Revenue in redetermining the RSP, even if RSP is not in accordance with the law, is faulty and not in accordance with the law, as prescribed manner of redetermination of RSP was brought into statute only from 1-3-2008. We find that once the Central Government has not framed the rules for redetermining the RSP in a case where the RSP declared on the package was sought to be rejected, though being empowered, authorities had no power to redetermine the RSP in any manner; more so in a manner adopted in these appeals. It is also provided in the statute, that as per sub-section (4) of Section 4A of the Act, the manner has to be prescribed only by the Central Government by rules, which came into force only from 1-3-2008, which would also indicate that the provisions of Section 4A(4) could not have been operationalised, till the manner for ascertaining the RSP was prescribed by framing the rules. In the absence of any rules for redetermination of RSP, the contentions of ld. Special Counsel for the Revenue that the Revenue can adopt best judgment method for ascertaining the said RSP, is against the provisions of the law and cannot held as correct, as the provisions of Section 4A of the Act do not indicate any other manner for ascertainment of the RSP based upon the best judgment method prior to 1-3-2008. The law on this is settled by the decision of Apex Court in the case of Gulam Mohammad & Anr v. State of Bombay & Others - AIR 1962 SC 97. We also find that if the Legislature prescribes that if the thing is to be done in a particular manner, then the same has to be done in the stated manner only, is the law which is settled by the Apex

Court. We find that our this view is fortified by the decision of the Co-ordinate Bench of the Tribunal in the case of M/s. Ravi Foods Pvt. Ltd., wherein similar issue came before the Bench. In the case of M/s. Ravi Foods Pvt. Ltd., the Revenue sought to redetermine the RSP of the goods which were covered under the provisions of Section 4A of the Act, by adding the value/amount received not accounted for by the appellant therein.

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> *It can be seen from the above reproduced Section 4A of the Central Excise Act, 1944, that the said section provides for determination of duty payable on excisable goods on the basis of RSP as per the provisions of Standards of Weights and Measures Act, 1976 and Rules made thereunder. It is undisputed that in the month of December, 2001 and January, 2002, the appellants filed monthly returns indicating the assessable value after availing the abatement in accordance to the notification issued under the said section i.e. 65% of the MRP. There is also no dispute that the MRP which was declared on the goods cleared during the relevant period was either obliterated or scored out. It can be seen from the above reproduced Section 4A that sub-section (4) was introduced by the Legislature w.e.f. 1-3-2008. It is also to be noted that the recalculation or re-quantification of an amount received in excess of the MRP declared and collected from the customers has to be done in a prescribed manner. The provisions of MRP Valuation Rules under sub-section (4) of Section 4A was introduced w.e.f. 1-3-2008 wherein the Central Government prescribed a procedure to be followed for re-determination of RSP and MRP in case where assessee has collected an amount in excess of the RSP/MRP declared. This re-determination has to be done, failing which the RSP/MRP cannot be revised by the authorities. We find that the C.B.E. & C. vide Circular No. 334/1/2008-TRU, dated 29-2-2008 made it clear that the MRP Valuation Rules are effective from 1-3-2008. This would indicate that prior to 1-3-2008, there was no procedure to revise the MRP and demand the duty even though there being a provision under sub-section (4) of Section 4A of the Central Excise Act, 1944. In the absence of any legal machinery during the relevant period, re-determination of RSP/MRP by the Department is without any authority of law. We find that in the case of Millennium Appliances India Ltd. v. CCE, Hyderabad [2009 (248) E.L.T.*

713 (Tri. - Bang.)], this Bench on this point has held as under :-

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It can be noted that these rules came into force with effect from 1-3-2008. We are of the considered opinion that if these rules came to be effective on 1-3-2008, the ascertaining of value of similar goods has to be done so, with effect from 1-3-2008 and cannot be used to determine the value for the clearances made prior to 1-3-2008. We find strong force in the contention raised by the learned Counsel that the decision of the Tribunal in the case of Aditya Cement (supra) would squarely cover the issue in favour of the appellants. The relevant ratio in Para 9 of the said decision is reproduced :-

> *"9. It can be seen from the above reproduced rule that it was in context of the definition of "person liable for paying the Service Tax". This provision in itself may not suffice revenue to direct the appellant to discharge the service tax liability as service receiver, on the face of the fact that notification under Section 68(2) of the Finance Act, 1994, was issued by the Central Government only on 31-12-2004. If the contention of the learned SDR is to be accepted, then there was no necessity for the Government to issue Notification No. 36/2004-S.T. notifying the service receiver from non-resident having no office, to pay Service tax, as receiver. By issuing the said Notification, Central Government intended to tax the service receiver from non-resident, with effect from 1-1-2005, which, in corollary would be that no service tax is payable by this category prior to 1-1-2005. If that by so, then the amount paid by the appellant is not a tax, which the revenue cannot kept with it."*

and in consequence of the absence of machinery provision during the period of dispute the assessable value for the purpose of computation of duty, even though not found to be affixed on the product, would have to be accepted as the 'retail selling price.'

5. Respectfully following the decision *supra*, we set aside the demand and allow the appeal.

(Operative part pronounced in Court)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(C J Mathew)
Member (Technical)

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