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

APPEAL NOS: E/227 to 230/2011, E/378/2012, E/85733/2013

[Arising out of Orders-in-Appeal No: SB(217 to 220)Th-I/2010 dated 20th October 2010; YDB/261-262/Th-I/2011 dated 25th November 2011 and BR(281-282)/Th-I/2012 dated 19th November 2012 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone – I.]

For approval and signature:

Hon'ble Shri 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?	:	Yes
2.	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
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

Benison Footwear Pvt Ltd
Herald Lobo … ***Appellants***

versus

Commissioner of Central Excise
Thane – I ***…Respondent***

Appearance:

Shri SP Mathew, Advocate for appellant

Shri S Hasija, Superintendent (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Dr Suvendu Kumar Pati, Member (Judicial)

Date of hearing:	**21/01/2019**
Date of decision:	**20/03/2019**

ORDER NO: 85529-85534 / 2019

Per: C J Mathew

Three appeals of M/s Benison Footwear Pvt Ltd, and Shri Herald Lobo, arose from orders-in-appeal no. SB(217 to 220)Th-I/2010 dated 20th October 2010 of Commissioner of Central Excise (Appeals), Mumbai Zone – I pertaining to the period from 2003-04 to 2006-07 and for 2007-08 involving ₹ 4,83,295/- and ₹ 2,33,479/- as liability to duties of central excise. Two more appeals lie against order-in-appeal no. YDB/261-262/Th-I/2011 dated 25th November 2011 and BR(281-282)/Th-I/2012 dated 19th November 2012 for the period from 2008-09 and 2009-10 disputing recovery of ₹ 4,12,904/- and ₹ 4,75,042/-. In sum, four appeals of the appellant company and two appeals of the individual are taken up for disposal in this common order.

2. Learned Counsel for the appellant submits that, though only one of the impugned orders has invoked the extended period, imposition of penalty under section 11AC in all the orders has been

erroneously upheld by the first appellate authority. It is also his contention that the extended period, covering 2003-04 to 2006-07, could not have been invoked in a show cause notice dated 16th January 2009 as the appellant had disclosed all the invoices as early as in 2002.

3. Learned Authorised Representative counters this claim of bar of limitation on the ground that the submission of invoices itself does not stand in the way of invoking the extended period as the appellant had deliberately misled central excise authorities in the statutory returns.

4. Learned Counsel informs us that the entire case of Revenue rests on two pillars of which the first is the denial of the concessional rate of duty provided for in notification no. 5/2006-CE dated 1st March 2006 at serial no. 5 for non-compliance with condition no. 2 prescribing that

> ‘*this exemption shall apply only to such footwear on which the retail sale price is indelibly marked or embossed on the footwear itself.’*

for the clearance of

	‘Description of excisable goods	*Rate*
a)	*footwear of retail sale price not exceeding ₹250/- per pair*	*nil*
b)	*Footwear of Retail Sale Price exceeding ₹250/- and not exceeding ₹750/- per pair.’*	*8%*

in place of 16% prescribed in the tariff.

5. Learned Counsel also informs that the eligibility for this concession should not have been denied as the price was imprinted on the ‘footwear’ and ‘PVC shoe moulds’ manufactured by the appellant. He also pointed out that the demand for the period between 2010-11 and 2011-12 had been disputed before the Tribunal which, *vide* order no. A/226-227/14/EB dated 4th March 2014, had remanded the matter back to the original authority who dropped proceedings thereon.

6. Likewise, it is his submission that, in the other matter for 2011-12, the dropping of the demand at the first appellate stage had not been challenged by Revenue. Claiming that the settled position is that of eligibility for the concession on the ground that the markings were sufficient, he demanded that consistency of approach precluded Revenue from taking a contrary stand in the present appeals. In this context, he also draws our attention to the second pillar, *viz.*, valuation of the goods being outside the scope of coverage by section 4 of Central Excise Act, 1944, owing to the provisions of Standards of Weights and Measures (Packaged Commodities) Rules, 1977.

7. We have considered the rival submissions and perused the decision cited by both sides. The Hon’ble Supreme Court, in

Commissioner of Central Excise, Panchkula v. Liberty Shoes Ltd [2015 (326) ELT 422 (SC)], has held that

> *'12. Once we find that the footwear is an item which is specified under Section 4A, which is covered by Weights and Measures Act and Rules, and MRP was affixed on the products supplied, which were not exempted under Rule 34 of the Rules, the provision of Section 4A of the Act shall stand attracted.'*

and, thus, there is no alternative but to assess the goods in accordance with section 4A of Central Excise Act, 1944.

8. The contention of the Learned Authorised Representative that the facts of the case are entirely different inasmuch as that decision was handed down by following the decision of the Hon'ble Supreme Court in *Jayanti Food Processing (P) Ltd v. Commissioner of Central Excise, Rajasthan [2007 (8) SCC 34]* which related to retail packages contained within wholesale package that was supplied to the institutional buyers who, in turn, served them to customers. According to him, the present consignments had been cleared to industrial units for their own use and, as averred by the appellant-Director, in accordance with safety requirements. We fail to find any reason to concur with this proposition of Learned Authorised Representative as the decision of the Hon'ble Supreme Court in *re Liberty Shoes Ltd* is on scope of exclusion from the ambit of Standards of Weight and Measures (Packaged Commodities) Rules,

1977. Though rule 34 of the said Rules exclude certain specified categories from the prescription of incorporating maximum retail sale price, Learned Authorised Representative was unable to explain the applicability of this provision. In our opinion, the reference to 'industry', prior to 1st January 2007, in rule 34 is limited to such goods as are found to have specific use in specific industries and is not a reference to any manufacturing establishments or orders by such manufacturing establishments. Furthermore, we find that this exclusion has since been transposed to chapter 2 of the said Rules which, consequently, ceases to enable application of the provisions of that chapter to clearances effected to institutional buyers and industrial consumers. Institutional buyer, by definition, is a provider of service and any goods required for the provision of such service has deliberately been kept out of the purview of the prescriptions mandated in chapter 2 of the said Rules. The attempt of Revenue to bring the customers of the appellant company within the meaning of 'industrial consumers' would also fail as these are restricted to raw materials that are deployed as inputs and the impugned goods are not relevant for any manufacturing activity. It is quite clear that the assessees are likely to take recourse to the scheme of assessment that promotes their interest. At the same time, it appears that Revenue is motivated by maximizing its tax collection and prompting recourse to the scheme that promotes such. In these circumstances, we can only posit that the privilege of claiming the coverage under one of the two alternative assessment system vests on the assessee and, to the extent that such claim cannot be denied, must be accepted. In the present instance, the claim is made on behalf of Revenue by recourse to the decision of the Tribunal in *Commissioner of Central Excise, Tiruchirappalli v. Nova Paints [2017 (358) ELT 711 (Tri.Chennai)]*, in *Charms Cosmetics Pvt Ltd v. Commissioner of Central Excise, Pune – I [2017 (352) ELT 197 (Tri.-Mumbai)]* and in *Grasim Industries Ltd (Unit-I) v. Commissioner of Central Excise, Trichy [2009 (238) ELT 655 (Tri.Chennai)]*. The decision in *re Grasim Industries Ltd* may not offer Revenue much support as that was handed down in the context of a clarification given by the Legal Metrology Department and the dispute thereon pertained to the reliance that could be placed on it. In *re Nova Paints*, the matter in dispute was the specialized packaging provided to the goods attended with the claim that the goods were not for general use. In *re Charms Cosmetics Pvt Ltd*, it was held that supply of goods to Canteen Stores Department was the point of evaluation of applicability and not the status of downstream purchases. All these are specific to facts of specific situations that would not apply to the issue in the present dispute.

9. The question that arises for determination is whether it is mandated that the goods be marked with the price. On a perusal of

the provisions of the Rules, we find that footwear is covered within the ambit of the Rules and, in such circumstances, the contention that these are not required to be so marked or are exempt, is not relevant. Therefore, following the decision of the Hon'ble Supreme Court in *re Liberty Shoes Ltd,* we hold that the assessment should be under section 4A of Central Excise Act, 1944.

10. Turning to the issue of applicability of the notification, we find that the decision of the first appellate authority that has been relied upon by Learned Counsel does not appear to be correct. The notification itself is not restricted to the two categories enumerated *supra* but also a third category, *viz.*, that of goods that are marked with a retail price of over ₹750/- per unit. The manner in which the entitlement to the exemption, or concession is to be extended is prescribed in the notification itself, *i.e.* by embossing or marking with indelible ink. It is not the case of the Learned Counsel for appellant that the goods were marked. On the contrary, it is clear that the goods were affixed with sticker. According to Learned Authorised Representative, the Tribunal in *Amit India Foot Art Pvt Ltd v. Commissioner of Customs Excise, Delhi I [2017-TIOL-3336-CESTAT-DEL]*, in a similar dispute, has held that the lack of embossing with indelible mark is violative of the notification itself. Learned Authorised Representative also informs us that the remand order of the Tribunal, referred to by the Learned Counsel for appellant,

in *Benison Footwear Pvt Ltd v. Commissioner of Central Excise, Thane – I [2014 (307) ELT 606 (Tri.-Mumbai)],* was specific to the context of a finding that the marking did exist on the footwear and that the lower authorities were merely required to follow the test results obtained from the Indian Institute of Packaging and National Test House made on those consignments. On the other hand, we find nothing on record in the present instance that the goods now impugned were marked or subject to testing. In the absence of such evidence, and in view of the admitted fact that stickers were the only means of indicating the retail sale price, we find no reason to hold that the condition of the notification has been complied with.

11. The reliance placed by the Learned Counsel for appellants on the decision in *Rupani Shoes & Footwear Products [2007 (210) ELT 309 (Commr.Appli)]* suffers from a similar frailty. In view of the third category of clearances being liable to the additional rate and in view of the above, we find that the appellant-company is not entitled to the benefit of notification.

12. Mere existence of the invoices submitted in routine will not suffice for restricting the demand to the normal period. It is on record that the appellant-company had filed returns but without indicating that the goods were not marked but affixed with stickers. The provisions of the notification are also crystal clear and it was

incumbent upon the appellants to comply with the conditions therein. Imposition of penalty under section 11AC would not, therefore, suffer from illegality. We, therefore hold that the duty liability would be restricted to the tariff rate of 16% on the goods cleared without embossing or marking the 'maximum retail sale price' of indelible ink subject to appropriate abatement.

13. The appeals are allowed partially to the extent indicated above.

(Pronounced in Court on 20/03/2019)

(Dr Suvendu Kumar Pati)	**(C J Mathew)**
Member (Judicial)	***Member (Technical)***

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