**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI**

**WEST ZONAL BENCH**

**Customs Appeal No: 548 of 2011**

[Arising out of Order-in-Appeal No: 150(GR.VB)/2011(JNCH)/IMP-112 dated 31st March 2011 passed by the Commissioner of Customs (Appeals), Nhava Sheva, Mumbai – II.]

Harvinder Singh … ***Appellant***
J-11/56 Rajouri Garden, New Delhi – 110 027

*versus*

Commissioner of Customs (Import) …***Respondent***
Mumbai – II, JNCH, Nhava Sheva, Taluka Uran, Dist: Raigad – 400 707

*APPEARANCE:*

Ms Lakshmi Menon, Advocate for the appellant

Shri C Singh, Assistant Commissioner (AR) for the respondent

**CORAM:**

**HON'BLE MR ANIL CHOUDHARY, MEMBER (JUDICIAL)**
**HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)**

**FINAL ORDER NO: A/88470/2018**

DATE OF HEARING: 16/07/2018
DATE OF DECISION: 16/07/2018

*PER: C J MATHEW*

This appeal lies against Order-in-Appeal No: 150(GR.VB)/ 2011(JNCH)/IMP-112 dated 31st March 2011 of Commissioner of Customs (Appeals), Nhava Sheva, Mumbai – II in which duty liability of ₹ 32,06,176/- has been ordered to be recovered on two consignments of ‘button cells’ of Hong Kong origin and imported against bills of entry no. 947688/12.10.2007 and 957025/18.10.2007. The goods, which were to be levied to additional duty of customs on the ‘retail selling price’ as mandated in *proviso* to section 3(5) of the Customs Tariff Act, 1975, were issued with ‘out of charge’ endorsement but were detained and subsequently seized on the basis of enquiry eliciting that the ‘retail selling price’ of the impugned goods had been undervalued. The goods were released provisionally and the adjudication order confirming demand of duty, with various other attendant detriments, was appealed against before the first appellate authority who confirmed the order of the original authority in entirety.

2. The appellant herein was imposed with penalty of ₹2,00,000/- under section 112(a) of the Customs Act, 1962 in his capacity as power of attorney-holder of M/s Archana Traders whose proprietor had steadfastly refused to appear before the investigating authority and also before the adjudicating authority.

3. It is the contention of the Learned Counsel that there was no scope for determination of undervaluation on the basis of a market enquiry, and, therefore, the appellant could not be charged with any activity that rendered the goods liable for confiscation under section 111 of Customs Act, 1962.

4. Learned Authorised Representative reiterated the findings of the lower authorities. It is seen that the issue herein pertains to the legality of revision of the value declared for the purpose of assessment of additional duties of customs while the goods were yet under control of customs and it is seen that the Tribunal has, in *ABB Ltd v. Commissioner of Customs, Bangalore [2011 (272) ELT 706 (Tri-Bang.)]* and *Suzuki Ceramics v. Commissioner of Central Excise & Service Tax, Rajkot [2016 (334) ELT 169 (Tri.-Ahmd.)]*, clearly held that the statute was wanting in machinery provisions for re-determination of retail selling price. From

> '*15. As far as the CVD under Section 3 of the Customs Tariff Act is concerned, the Government is yet to similarly prescribe the manner to ascertain the RSP when the importer does not declare the RSP on the packages imported. The assessee had relied on the judgment of Hon'ble High Court of Madras in Eternit Everest Ltd. v. Union of India [1997 (89) ELT. 28] wherein their lordships had quashed the demand notices issued under 11D of the Act proposing to recover amounts collected as excise duty in excess of what was due and paid to the exchequer on the ground that there was no machinery provision in the statute to recover the same. We find that the situation obtaining in the case on hand is similar to the situation covered by the above judgment. The Section 11D of the Act had provided that "every person who has collected any amount from the buyer of any goods in any manner as representing duty of excise shall forthwith pay the amount as collected to the credit of the Central Government".*

*15.1 On a reading of the above provision, there is no ambiguity as regards the legislative intention. However, the Hon'ble High Court found a conspicuous omission in Section 11D of the Act any provision to initiate any proceedings and adjudicate upon any dispute with reference to the liability envisaged under sub-section (1) of Section 11D. While holding Section 11D to be a valid piece of legislation their Lordships of the Hon'ble High Court allowed the writ petitions and quashed the demand-cum-show cause notices. In the light of this judgment we find that the argument of the revenue that the impugned demand had to be sustained considering the legislative intention and accordingly construing the provisions of CTA does not appeal to us as the correct course we should follow. In the absence of a machinery to determine the relevant RSP, no demand of differential CVD could have been validly raised. We find that the impugned demand of differential duty is therefore, not sustainable. As the demand of duty is not sustainable, the demand of interest as well as imposition of equal penalty also does not survive.*

*15.2 It was argued for ABB that if it was guilty of not declaring MRP on packages, the competent authority could penalise it. State Metrology Dept. had initially seized a consignment of such goods and issued Show Cause Notice. After ABB replied, no further action was taken. It meant that ABB had not violated the provisions of SW&M Act and PC Rules while engaging in the impugned transactions according to the authority competent to implement those provisions. We find merit in this submission of ABB. However, this claim was not raised before the lower authority and the facts have not been verified.'*

in the former, this is evident.

5. Furthermore, it is seen that 'market value' was ascertained while the goods were yet in custody before clearance while revision of the declared 'retail selling price' may well have occurred between clearance and sale in market, that eventuality cannot be concurred while the goods were pending for assessment. Even so, the role of the appellant in any part of the transaction, except in the matter of representing himself as power of attorney, has not been ascertained. The said 'power of attorney' is dated 1st December 2007 whereas the goods had been imported in October 2007. It is, therefore, not discernible as to the specific activity of the appellant that contributed to the goods having been rendered liable to confiscation. Accordingly, we find that the impugned order has erred in invoking the provisions of section 112 of the Customs Act, 1962 against the appellant.

6. The appeal is, therefore, allowed and the impugned order is set aside.

*(Pronounced in open court)*

**(C J Mathew)**
***Member (Technical)***

**(Anil Choudhary)**
***Member (Judicial)***

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