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

**WEST ZONAL BENCH**

**CUSTOMS APPEAL NO: 242 OF 2009**

[Arising out of Order-in-Appeal No: 336/2008/MCH/J.C./VII(D)/2008 dated 26th December 2008 passed by the Commissioner of Customs (Appeals),Mumbai – I.]

D S Chandok & Sons
307 V P Road, Mumbai 400004 … ***Appellant***

*versus*

Commissioner of Customs (Export Promotion)
2nd Floor, New Custom House, Ballard Estate
Mumbai - 400001 ***…Respondent***

*APPEARANCE:*

Shri G B Yadav, Advocate for the appellant

Ms Trupti Chavan, Assistant Commissioner (AR) for the respondent

**CORAM:**

**HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)**
**HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)**

**FINAL ORDER NO: A / 86735 /2021**

DATE OF HEARING: 19/07/2021
DATE OF DECISION: 07/09/2021

*PER: C J MATHEW*

This dispute arises from the peculiarity in levy of 'additional duties of customs' on the impugned goods under the *proviso* to section 3(2) of Customs Tariff Act, 1975. Additional duties of customs is imposed on all imported goods to accord a level playing field to like goods – whether indigenously manufactured or sourced from abroad – by subjecting them to impost at par with duties of central excise. The default for assessment is the application of rate of duty in the Schedule to Central Excise Tariff Act, 1985 for like articles produced or manufactured in India to a value that is the sum of basic customs duty as assessed under section 12 of Customs Act, 1962 and the value within the meaning of section 14 of Customs Act, 1962 adopted for such assessment.

2. With the transition to assessment of specified goods on marked 'retail selling price' by incorporating section 4A in Central Excise Act, 1944, corresponding incorporation of

> *'Provided that in case of an article imported into India,—*
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> *(a) in relation to which it is required, under the provisions of the Standards of Weights and Measures Act, 1976 or the rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such article; and*
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> *(b) where the like article produced or manufactured in India, or in case where such like article is not so produced or manufactured, then, the class or description of articles to which the imported article belongs, is the goods specified by notification in the Official Gazette under subsection (1) of section 4A of the Central Excise Act, 1944 (1 of 1944),*

> *the value of the imported article shall be deemed to be the retail sale price declared on the imported article less such amount of abatement, if any, from such retail sale price as the Central Government may, by notification in the Official Gazette, allow in respect of such like article under sub-section (2) of section 4A o Central Excise Act, 1944.*
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> *Explanation. — Where on any imported article more than one retail sale price is declared, the maximum of such retail sale price shall be deemed to be the retail sale price for the purposes of this section.'*

in section 3(2) of Customs Tariff Act, 1975 made way for separate and distinct assessment of 'additional duties of customs' on such goods. Consequently, the value of the imported article shall, for assessment of additional duties of customs, be deemed to be 'retail sale price' declared on the imported article abated to such extent as is permissible by relevant notification.

3. It is on the weave of this canvas that Learned Counsel outlines the challenge of M/s DS Chandok & Sons to order-in-appeal no. 336/2008/MCH/J.C./VII(D)/2008 dated 26th December 2008 of Commissioner of Customs (Appeals), Mumbai – I which upheld the decision of the original authority to demand differential duty of ₹1,08,725/- by revising the value of 'electronic goods' imported against bill of entry no.777536/03.07.2007, declaring 'retail sale price' of ₹5,47,378/-, to ₹ 14,70,900/- for assessing 'additional duty of customs' besides ordering confiscation of goods under section 111(m)

of Customs Act, 1962 with option to redeem on payment of fine of ₹2,00,000/- while imposing penalty of ₹ 30,000/- under section 112 of Customs Act, 1962. It is contended by Learned Counsel that the first appellate authority had failed to appreciate their submission that the assessing authority was not vested with the power to re-determine the declared price and that, even under Central Excise Act, 1944, the empowerment to revise such declared value was conferred only from 1st March 2008. He cites the decision of the Tribunal in *Acme Ceramics v. Commissioner of Central Excise, Rajkot [2014 (304) ELT 542 (Tri.-Ahmed.)]* which 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. The relevant paragraphs from the said judgment are reproduced herein below.*

> *12. …………………*
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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) ELT 713 (Tri. - Bang.)], this Bench on this point has held as under :-*

*"9. Another issue involved in this case is regarding the situation that arises where there are no clear cut statutory provisions to arrive at the value. We find that strong force in the contentions raised by the appellants on the provisions of Section 4A of the Central Excise Act (as is reproduced in Para 8 hereinabove). We find that the Department did not issue any guidelines or rules for determination of value as provided under sub-section (4) of Section 4A of the Central Excise Act……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."*

*xxxxx*

*14. We find that the above said findings recorded by the adjudicating authority are directly in conflict of the law which has been settled by the higher judicial fora as regards the confirmation of demand of the duty on an*

> *assessee on the ground of undervaluation in respect of goods covered under Section 4A of Central Excise Act, 1944.*
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> *15. In the case before us, the question of undervaluation would not arise, and assuming even if it arises, during the relevant period (in this case prior to 1-3-2008) there was no procedure under Section 4A of the Central Excise Act to demand the duty, as the said procedure came into statute from 1-3-2008 only…..'*

4. Relying on the decision of the Hon'ble Supreme Court in *RIB Tapes (India) Pvt Ltd & Another v. Union of India and Others [1986 (26) ELT 193 (SC)],* he contended that section 111(m) of Customs Act, 1962 had been invoked without proper authority. He placed reliance on the decision of the Tribunal in *Ajay Industrial Corporation v. Commissioner of Customs (Export Promotion), Mumbai [2006 (201) ELT 410 (Tri.-Mumbai)]* on the scope for invoking of section 111 of Customs Act, 1962.

5. Narrating the background to the revision undertaken by the original authority, Learned Authorised Representative pointed out that, based on suspicion of the declared 'retail selling price' not being comparable with prevailing market prices, enquiry was made at three different 'points of sale' and the average thereof had been adopted as the basis of assessment.

6. The assessment of duties of central excise on the basis of 'retail selling price' was intended to dovetail enforcement of the levy with the statutory oversight contemplated by the Standards of Weights and Measures Act, 1976 and Standards of Weights and Measures

(Packaged Commodities) Rules, 1977 (and the substituting Legal Metrology Act, 2009 and Legal Metrology (Packaged Commodities) Rules, 2011) and its adoption, for parity, in assessment of 'additional duties of customs' was ineluctable. The declaration of value on the packaging was considered to be sacrosanct enough for the two purposes at the initial stage. Though Central Excise Act, 1944 did empower re-valuation with effect from 1st March 2008 in the specifically enumerated circumstances, there has been no corresponding empowerment under either Customs Act, 1962 or Customs Tariff Act, 1975. The exercise of such power in the proceedings leading to the impugned order is, thus, without authority of law.

7. Furthermore, the mandate by which an assessing authority was enabled, under Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, to revisit the value declared in the entry under section 46 of Customs Act, 1962 is limited to assessment of 'basic customs duty' under section 12 of Customs Act, 1962. Any revision in the assessable value for determination of 'basic customs duty' would correspondingly impact 'additional duties of customs' too. That inheres in the legislative intent couched in section 3(2) of Customs Tariff Act, 1975. However, while inserting the *proviso* to section 3(2) of Customs Tariff Act, 1975, carving out an exception to the general scheme for valuation where rates of 'additional duty of

customs' are *ad valorem*, that reference to value under Customs Act, 1962 had, necessarily, to be dispensed with for parity with domestic manufacture as stipulated in section 3(1) of Customs Tariff Act, 1975. Recourse to rules of valuation framed under the authority of section 14 of Customs Act, 1962 was, thus, precluded and the sanctity of 'declared' 'retail selling price' protected from being re-determined.

8. As re-labelling of the specified goods would amount to manufacture after import, it is not that recourse was unavailable to remedy any breach of parity. The adoption of 'retail selling price' of other re-sellers and, that too, while the impugned goods were yet to be cleared for home consumption on the presumption that the importer intended to enhance the 'retail selling price' at the point of sale appears to be a mis-direction on the part of the original authority and the confirmation thereof, by the first appellate authority, bears the same taint as to warrant the setting aside of the impugned order.

9. Accordingly, the appeal is allowed with the demand for differential duty liability, confiscation and penalty set aside.

*(Order pronounced in the open court on 07/09/2021)*

**(Ajay Sharma)**
***Member (Judicial)***

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

**/as*