

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Excise Appeal No. 796 of 2012

(Arising out of Order-in-Original No. 93/BR-93/Th-1/2012 dated 28.02.2012 passed by the Commissioner of Central Excise, Thane-I)

Commissioner of Central Excise, Thane-I 4 th Floor, Navprabhat Chambers, Ranade Road, Dadar (W), Mumbai 400 028.	Appellant
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Vs.

M/s. Hindustan Coca Cola Beverages P Ltd Survey No.284-P, At & Post Kudus, Bhiwandi-Wada Road, Tal. Wada, Dist. Thane	Respondent
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Excise Appeal No. 823 of 2012

(Arising out of Order-in-Original No. 93/BR-93/Th-1/2012 dated 28.02.2012 passed by the Commissioner of Central Excise, Thane-I)

M/s. Hindustan Coca Cola Beverages P Ltd Survey No.284-P, At & Post Kudus, Bhiwandi-Wada Road, Tal. Wada, Dist. Thane	Appellant
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Vs.

Commissioner of Central Excise, Thane-I 4 th Floor, Navprabhat Chambers, Ranade Road, Dadar (W), Mumbai 400 028.	Respondent
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Appearance:

Shri J.H. Motwani, Advocate, for the Assessee
Shri Dharendra Kumar, Joint Commissioner, Authorised Representative
for the Revenue

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 21.11.2022
Date of Decision: 21.11.2022

FINAL ORDER NO. A/86221-86222/2022

PER: SANJIV SRIVASTAVA

Both the appeals, one filed by the revenue and other by the assessee (Appellant) are directed against order in original no 93/BR-93/Th-1/2012 dated 28.02.2012 of the Commissioner

Central Excise, Thane-I. By the impugned order, following has been held:

"ORDER

- I. I confirm the demand for Central Excise duty amounting to Rs.38,97,295/- (Rupees thirty eight lakh ninety seven thousand two hundred and ninety five only), (Basic duty Rs.37,83,780/-, Education Cess Rs.75,676/- and Secondary & Higher Education Cess Rs.37,835/-), relating to period March,2008 to May,2008, out of the total demand of Rs.2,29,37,692/-, and order it's recovery from M/s Hindustan Coca Cola Beverages Pvt. Limited, Wada under the provisions of Section 11A(1) of the Central Excise Act, 1944. I drop the remaining demand of Rs. 1, 90, 40,397/- pertaining to period prior to March, 08.*
- II. I impose a penalty of Rs.38,97,295/- (Rupees thirty eight lakhs ninety seven thousand two hundred and ninety five only) on them under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002 for contravention of provisions of the Central Excise Act, 1944 and Rules framed there under.*
- III. I also order for recovery of interest at appropriate rate on the and confirmed at I above from them under the provisions Section 11AB of the Central Excise Act, 1944.*
- IV. I order confiscation of the offending goods i.e. excisable goods cleared in RGB totally valued at Rs.17,95,63,821/- under Rule 25(1) of the Central Excise Rules, 2002 read with Section 4A(4) of the Central Excise Act, 1944 and since the goods are not available for confiscation, I impose a fine of Rs.3,60,00,000/- (Rupees three crores sixty lakhs) in lieu of confiscation on them under Section 34 of the Central Excise Act, 1944.*
- V. If M/s Hindustan Coca Cola Beverages Pvt. Limited, Wada pay the Central Excise duty as confirmed against sr. no. I above along with entire interest as ordered at Sr. no. III above, within 30 (thirty) days from the date of communication of this order, the amount of penalty liable to be paid by them shall be 25% (twenty five per cent) of the demand confirmed against sr. no.I above. The benefit*

of reduced penalty under first proviso to Section 11AC of the Central Excise Act, 1944 shall be available only if the amount of penalty so imposed is also paid within the period of 30(thirty) days from the date of communication of this order."

2.1 Appellant is engaged in manufacture of carbonated soft drinks (i.e. aerated water with brand names such as Coca-Cola, Sprite, Limca, Thums Up, Fanta, Kinley Soda and Maaza, fruit pulps based drinks) falling under Chapter 21 & 22 of the Central Excise Tariff Act, 1985. These goods are notified for valuation as per Section 4 A of the Central Excise Act, 1944.

2.2 During investigations of the assessee's records it was found that the Appellant is collecting an amount from their dealers and vendors under the head "Crate Rental" towards supply of plastic crates. They have entered into agreement with the dealers/vendors for supply of the crate and rent is charged for supply of such crates. Thus it was seen that such crates are as such cleared along with their final products i.e. aerated water without following proper Central Excise procedures.

2.3 After completion of investigation a Show Cause Notice dated 03.11.2011 was issued to the appellant asking them to show cause as to why-

- a) Central Excise duty amounting to Rs.2,29,37,692/- (Rupees Two crore twenty nine lakhs thirty seven thousand six hundred and ninety two only), (Basic duty Rs. 2,23,22,572/-, Education Cess Rs.4,46,451/- and Secondary & Higher Education Cess Rs. 1,68,669/-) should not be demanded and recovered from them under the provisions of proviso to Section 11A(1) of the Central Excise Act, 1944;*
- b) Penalty should not be imposed on them under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002 for contravention of provisions of the Central Excise Act, 1944 and rules framed there under;*
- c) Interest at appropriate rate should not be demanded and recovered from them on the Central Excise duty as*

mentioned at (a) above under the provisions Section 11AB of the Central Excise Act, 1944; and

- d) *the offending goods i.e. excisable goods cleared in RGB totally valued at Rs. 1,59,16,26,418/- should not be confiscated under Rule 25(1) of the Central Excise Rules, 2002 read with Section 4A(4) of the Central Excise Act, 1944 and since the goods are not available for confiscation, why fine in lieu of confiscation should not be imposed on them under Section 34 of the Central Excise Act, 1944.*

2.4 The show cause notice was adjudicated as per the impugned order referred in para 1 above. Both revenue and appellant have filed the appeals against the impugned order.

3.1 We have heard Shri J H Motwani, Advocate for the appellant and Shri Dhirendra Kumar, Joint Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits that issue involved in the matter has been settled by the tribunal in their own case as per the order reported at [2006 (190) ELT 718 (T-Del)] appeal filed by the revenue against the said order was earlier admitted by the Hon'ble Supreme Court as reported at [2008 (229) E.L.T. A96 (S.C.)] and subsequently dismissed as reported at [2016 (338) ELT A 232 (SC)]. This decision has been followed by the Kolkata bench in case Bharat Coca Cola Bottling North East (P) Ltd as reported at [2008 (227) ELT 402 (T-Kol)].

3.3 Arguing for the revenue learned authorized representative re-iterates the findings recorded in the impugned order. He would rely upon the following decisions in the support of the case of revenue:

- Schneider Electrical India (P) Ltd. [2014 (311) E.L.T. 113 (Tri. – Mumbai)]
- Sushil Agarwal [2012 ((283) ELT 377 (T-Mum)]
- Planet Sports Pvt Ltd [2012 (283) ELT 377 (T-Mum)]
- Media Industries Ltd. [2006 (199) ELT 345 (T-Del)]

4.1 We have considered the impugned order along with the submissions made in the appeals and during the course of arguments.

4.2 For confirming the demand and dropping the part of demand made by show cause notice Commissioner has in the impugned order held as follows:

"18. I have carefully gone through the records of the case, written submission made by the noticee, oral submissions made by them during the hearing, and the relevant provisions of law on the subject matter. The issue involved in the case is mainly whether the amounts being collected by the assessee from their dealers and vendors under the head "Crate Rental" towards use/supply of plastic crates, is an additional consideration over and above the assessable value of their final products viz. aerated waters of different brand names, whether these amounts will attract Central Excise duty being part of the assessable value, and whether for this purpose the assessable value which is RSP/MRP based in terms of Section 4A of the Central Excise Act, 1944 needs to be, and can be re-determined. The crates in question are supplied by the assessee for proper storage of the glass bottles in which the aerated water is filled in, smooth transportation and safety the goods and to ensure that there is no breakage of the bottles during the transportation and after the bottles become empty, the same are again returned in the crates to the factory premises for the purpose of reuse/re-filling of the products. The assessee is showing separate amounts in their invoices due from his purchasers /Dealers /Vendors towards supply/use of the crates to them. Such amount recovered/due from their dealers/vendors is classified by them under the head "Crate Rentals". They have entered into an agreement with the dealers/ vendors for supply of the crate and rent is charged for supply of such crates. It is also observed that such crates are as such cleared along with their final products i.e aerated water without following proper Central Excise procedures. The assessee has not disputed the fact about supplying the bottles in crates, receiving back of the crate for reuse and receiving such amounts under the head crate rentals and in fact, this amount is shown on their invoices separately.

19. In the investigation of the case statements of Shri. Shinde, Manager, of the assessee have been recorded on 22.10.2009, 08.07.2011, 10.10.2011, 25.10.2011 and 01.11.2011 in which

successively the pattern of sale relating to the entire issue of crate rental has been brought out. As submitted in these statements by a responsible official of the assessee company, the evidence can be summarized-

i. The crate rentals were being collected by the assessee during the period from 2006 to May 2008 and was stopped since May 08 and they were paying VAT on it.

ii. Value of crate rentals was shown separately in their respective invoices.

iii. The crate in question are inputs and not capital goods as the same were essential for manufacture and sale of their finished goods i.e. carbonated drinks.

iv. The MRP of the products was not worked out by them by costing methods or principles but on the basis of the MRP of the identical products of their competitors.

v. Same MRP was being charged by them for their sale-transactions with their marketing company M/s Hindustan Coca Cola Marketing Company Limited and stock transfer for sale later on.

vi. No crate rentals charged in case of stock transfer and charged when sale through their marketing company.

*20. Subsequently, M/s. Hindustan Coca Cola Beverages Pvt. Ltd. the assessee were also requested vide letter dated 2.11.2011 to inform as to whether the crate rentals received by them, shown separately in their sales invoices formed part of the assessable value on which they pay duty. They replied vide letter dated 03.11.2011 that the crate rental charged are valued to the Central Excise duty under Section 4A *ibid*, and the amount charged by them from their customers was inclusive of crate rentals for the sale of finished goods and was taken into consideration while determining the MRP of such goods; and the crate rentals received separately in the invoice formed a part of assessable value. They also claimed that the price remained unchanged even after they discontinued the practice of charging crate rentals, after May 2008 which was an indication that the rentals were not over and above the assessable value as being held in the SCN.*

21. It is also revealed from the records that the assessee is clearing crates i.e. inputs along with their final products packed in returnable glass bottles (RGB) and the same are essential for the manufacture and sale of aerated water without which the goods cannot be manufactured and marketed being the durable and returnable packing material. They are taking CENVAT credit on the inputs (Crates) as packing material for their final products under the CENVAT Credit Rules, 2004. The assessee has also not disputed this fact.

22. Further, it is also clear that the assessee are considering the transaction of charging Crate Rentals as "Deemed Sale" as they are, paying Sales Tax/VAT on such transactions. The assessee has accepted this fact also and has given explanation for paying VAT on it. On the basis of these evidences it is alleged/proposed in the notice that the amount received by them from their customers as Crate Rentals is required to be considered as additional consideration received by them from their customers under the head 'Crate Rentals' and Central Excise duty be discharged accordingly, and thus they are under-declaring the MRP of the final product.

23. One of the other indicator brought out by the investigation is the fact that since the goods are cleared to both M/s. Hindustan Coca Cola Marketing Company Pvt. Ltd. and to M/s. Hindustan Coca Cola Beverages Pvt. Ltd. in crates at the same MRP and since crate rentals are charged only to clearances effected to M/s Hindustan Coca Cola Marketing Company Pvt. Ltd., crate rentals received is additional consideration which is not included in the declared RSP valuation of the product on which duty is paid. It is also brought out that the RSP is fixed on the basis of competitor's price without doing any costing of the ingredients which is not correct. It is thus brought out that M/s. Hindustan Coca Cola Beverages Pvt. Ltd. have not come out clearly to place the facts about the valuation, that the MRP values declared by them are not the correct MRP's as required to be declared and also that the declared MRP's are not the sole consideration for sale for the purpose of valuation under Section 4A of the CEA, 1944. In this background of the evidences, the assessable value

is proposed to be modified and duty recovered on the differential value.

*24. Turning to the basic fact of the case, since the goods manufactured by the assessee, i.e. carbonated soft drinks (i.e. aerated water with brand names such as Coca-Cola, Sprite, Limca, Thums Up, Fanta, Kinley Soda and Maaza, fruit pulps based drinks) falling under Chapter 21 & 22 of the Central Excise Tariff Act, 1985 are notified for valuation under Section 4A of the Central Excise Act, 1944, the same are to be assessed to Central Excise duty on the basis of MRP of the product declared by the manufacturer, by arriving at the value on which duty is to be paid after deducting the abatement from such MRP as prescribed under relevant notification issued under the said section. The assessee is following this mode of valuation only, and so there is no dispute till this point. Nothing is placed on record, in the SCN nor proposed to change the classification of the products manufactured by the assessee, and consequently change the mode of valuation. What is proposed is that by collecting the afore-discussed rentals from the customers and by not paying duty thereon, the valuation adopted is wrong and the rentals need to be added to the value adopted by the assessee under Section 4A, *ibid*, and value be determined afresh adding the rentals and differential duty be recovered from them on this differential value. To examine this proposal first of all, it needs to be seen as to what are the exact provisions of said Section 4A of the Central Excise Act, 1944.*

25. The said Section 4A, introduced since 14.05.1997, reads as follows: -

Valuation of excisable goods with reference to retail sale price :-

(1) The Central Government may, by notification in the Official Gazette, specify any goods, in relation to which it is required, under the provisions of the Standards of Weights and Measures Act, 1976 (60 of 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 goods, to which the provisions of sub-section (2) shall apply.

(2) Where the goods specified under sub-section (1) are excisable goods and are charged to duty of excise with reference to , then, notwithstanding anything contained in section 4, such value shall be deemed to be the retail sale price declared on such goods less such amount of abatement, if any, from such retail sale price as Central Government may allow by notification in the Official Gazette.

(3) The Central Government may, for the purpose of allowing any abatement under sub section (2), take into account the amount of duty of excise, sales tax and other taxes, if any, payable on such goods.

(4) Where any goods specified under sub-section (1) are excisable goods and the manufacturer-

- (a) removes such goods from the place of manufacture, without declaring the retail sale price of such goods on the packages or declares a retail sale price which is not the retail sale price as required to be declared under the provisions of the Act, rules or other law as referred to in sub-section (1); or
- (b) tampers with, obliterates or alters the retail sale price declared on the package of such goods after their removal from the place of manufacture, then, such goods shall be liable to confiscation and the Central Government shall ascertain in the prescribed manner the retail sale price of such goods and the retail sale price so ascertained shall be deemed to be the retail sale price for the purposes of this section.

Explanation 1.- For the purposes of this section, "retail sale price" means the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes, local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement delivery, packing, forwarding and the like and the price is the sole consideration for such sale:

Provided that in case the provisions of the Act, rules or other law as referred to in subsection (1) require to declare on the

package, the retail sale price excluding any taxes, local or otherwise, the retail sale price shall be construed accordingly.

Explanation 2.- For the purposes of this section,-

- (a) where on the package of any excisable goods more than one retail sale price is declared, the maximum of such retail sale prices shall be deemed to be the retail sale price;*
- (b) where the retail sale price, declared on the package of any excisable goods at the time of its clearance from the place of manufacture, is altered to increase the retail sale price, such altered retail sale price shall be deemed to be the retail sale price;*

where different retail sale prices are declared on different packages for the sale of any excisable goods in packaged form in different areas, each such retail sale price shall be the retail sale price for the purposes of valuation of the excisable goods intended to be sold in the area to which the retail sale price relates.

26. On careful reading of the provisions it is clear that in terms of sub-section (1) of the said Section 4A, when the goods are notified by the Central Government, the provision as per sub-section (2) apply. As per said subsection (2), where ever as per sub-section (1), Section 4A is attracted, the provisions of Section 4 ibid are over-ride and the concepts of the Section 4 cannot be applied. In the present case, as discussed above, the goods are duly covered by Section 4A being notified thereunder; there is no dispute about it and so concept of "additional consideration", which is more relevant in terms of provisions of Section 4 and the Valuation Rules, 2000, applied for valuation seems unplaced. Because, once the RSP is declared by the assessee covered by this Section, the duty is to be discharged by him based on the RSP and any additional consideration has no place because, the concept of RSP pervades all the costs, considerations and charges leaving hardly any scope for additional recovery. However, since there is a possibility in the manufacturer not adhering to the RSP declared, sub-section (4) of the said section 4 lays down the mechanism for check on it. This has two situations discussed in sub-section (2) (a) and (b). Under, (a), if

the manufacturer removes the goods without declaring the RSP or declares a RSP which is not as per the provisions of Standards of Weights and Measures Act, 1976 (in short S.W.M. Act) or the Rules made thereunder or any other law, the goods are liable to confiscation and the Central Government is empowered to ascertain the RSP in prescribed manner which has to be taken as value under the Section. This provision and the sub-section 4A(4)(a) has been in effect since 14.05.2003. However, the mechanism for determining the RSP by the Central Government in cases covered by said sub-section, has been put in place w.e.f. 01.03.08 only, after introduction of C. Excise (Determination of RSP of Excisable Goods) Rules, 2008. Thus, even if recourse is to be taken for re-determining the RSP of the assessee it can be done only for the period after 01.03.2008 and not for the entire period of dispute, which is October 2006 to May 2008, after which the assessee have admittedly stopped collecting the said rental charges.

27. From the provisions of the said Section 4A, for qualification of the RSP declared by the assessee working under Section 4A ibid to re-ascertainment, it is to be proven that the declared RSP is not the RSP required to be declared under the SWM Act. On referring to the evidences on record it is indicated that the assessee is admittedly collecting crate rentals, only from their dealers and where there is sale through their marketing company, showing it separately in the invoices raised by them and they have not given costing break up of the MRP/RSP being charged by them and have on the contrary avoided giving it, persistently, claiming that the MRP/RSP is determined by them on the basis of the RSP charged for identical products by their competitors. If the assessee had submitted cost break up of their MRP and showed that one of the constituents of the MRP is crate rentals also then that would be sufficiently conclusive that the charges are not over the MRP. The claim that the charges were shown separate to meet the provisions of Sales Tax Act, is lame since, nothing is placed on record to prove the treatment given by them after May 08, when they stopped showing it separately in their invoices giving reason of "administrative difficulties". Thus, there is sufficient evidence on record to hold that the RSP

declared by the assessee is not as per the provisions of the SWM Act and so the same falls in the ambit of the sub-section (4) of the Section 4A ibid.

28. On applying the said sub-section (4) of Section 4A, the valuation has to go as per the provisions of RSP Determination Rules, 2008 which lays down as follows :-

Rule 4 - "Where a manufacturer removes the excisable goods specified under sub-section (1) of section 4A of the Act-

- (a) without declaring the retail sale price on the packages of such goods; or*
- (b) by declaring the retail sale price, which is not the retail sale price as required to be declared under the provisions of the Standards of Weights and Measures Act, 1976 (60 of 1976) or rules made thereunder or any other law for the time being in force; or*
- (c) by declaring the retail sale price but obliterated the same after their removal from the place of manufacture, then, the retail sale price of such goods shall be ascertained in the following manner, namely:-*
 - (i) if the manufacturer has manufactured and removed identical goods, within a period of one month, before or after removal of such goods, by declaring the retail sale price, then, the said declared retail sale price shall be taken as the retail sale price of such goods:*
 - (ii) if the retail sale price cannot be ascertained in terms of clause (i), the retail sale price of such goods shall be ascertained by conducting the enquiries in the retail market where such goods have normally been sold at or about the same time of the removal of such goods from the place of manufacture:*

Provided that if more than one retail sale price is ascertained under clause (i) or clause (ii), then, the highest of the retail sale price, so ascertained, shall be taken as the retail sale price of all such goods.

Explanation.- For the purposes of this rule, when retail sale price is required to be ascertained based on market inquiries, the said inquiries shall be carried out on sample basis."

Rule 5:- "Where a manufacturer alters or tampers the retail sale price declared on the package of goods after their removal from the place of manufacture, resulting into increase in the retail sale price, then such increased retail sale price shall be taken as the retail sale price of all goods removed during a period of one month before and after the date of removal of such goods:

Provided that where the manufacturer alters or tampers the declared retail sale price resulting into more than one retail sale price available on such goods, then, the highest of such retail sale price shall be taken as the retail sale price of all such goods."

Rule 6 - "If the retail sale price of any excisable goods cannot be ascertained under these rules, the retail sale price shall be ascertained in accordance with the principles and the provisions of section 4A of the Act and the rules aforesaid."

29. In re-determining the value RSP of the assessee's products in question, since only available head of receipt that has not been added is the crate rentals, the proposed value is the RSP adopted by the assessee plus the said crate rentals, which is consistent with the principles and provisions of Section 4 A of the Act and the aforesaid Rules, and so falls in the ambit of Rule 6 given above and so the same is correct. However, once again the whole exercise can be limited only to the period after 01.03.08 when this mechanism is prescribed under the law and till May, 08 when the assessee have stopped such car rentals and so the demand is also for the period upto then only. This is also one of the major counter arguments made by the assessee in their defense and in the light of the position as discussed above has to be upheld. Once this effect is given the demand for the period after 01.03.08 comes down to Rs.38,97,295/- of duty, for value of clearance during the same period of Rs. 17,95,63,321, excluding the value of exempted fruit- pulp based products wrongly included in the annexure of the SCN.

30. Now turning to the arguments put forth by the assessee through their written and oral submissions on merits, it is seen that the principle argument against the demand made by the assessee is the limitation in terms of Section 11A under which the demand is raised claiming that the same is time barred and the extended period under the said Section can not be invoked. In this regard the principle objection given by them is that the Department was always aware about their collection of rental charges and that as way back as in 2002 enquiries were made into their so called rentals and so the clause of suppression of facts, or mis- statement can not be applied. To substantiate their this argument they have submitted in detail the enquiries made by the Department from time to time and their submissions in respect of each such enquiry. It is seen that at least on four occasions the details of the car rentals were called for by the Department. The assessee is hammering on these enquiries. However, on referring to the replies given or submissions made by them in response to these enquiries, it can be seen that at no point of time the assessee has submitted to the Department the correct picture about the said crate rentals and till the present SCN, they have not been able to place on record the fact regarding the costing of their products, explicit account to show that the rents are included in their RSP and that, hence, their valuation is correct and resultantly, no rules are contravened. This shows that all along facts about the rents have been attempted to be suppressed, many facts have been mis-stated and there is intention to evade payment of duty. Some of the replies given, statements made by their various officials in response to the enquiry of the Department at different times are evident of the evasive reply of assessee.

- a. In the letter dated 11.11.02, HCCBPL, have stated that MRP is not fixed on cost plus basis but on market factors, but it covers all the costs upto consumer. Details of overhead product-wise is not maintained. The lease agreement between the assessee and HCCM for lease of fixed assets of distribution has no relevance for the proceedings.

- b. Letter dated 27.02.02 from AD cost clearly mentions that break up of MRP is not given and retention charges of crates and bottles is not reconciled with RT12 returns.*
- c. In the letter dated 14.05.02 they have still not given any reconciliation but have misled the enquiry by using a lot of accounting jargons.*
- d. On the letter dated 02.04.04, a clear mention is made that the requisite information of fixing the MRP, break up of MRP etc. has not been supplied.*
- e. In the letter dated 15.04.04, claiming reiteration they state that fixing of MRP is based on company's perception of the market.. Marketing company has no instruction written policy. Break up of MRP is not available.*
- f. In the letter dated 07.06.2004, they succinctly and glibly describe car rentals and MRP and say that after all deductions what is left is cost of manufacturer. And depending on statutory requirement and accounting practice, rentals are shown separately but not collected twice.*
- g. In letter dated 09.01.09 they explain why Service Tax is not payable on crate rentals but do not furnish any details.*
- h. In the letter dated 08.10.09, they submit that the crate rentals was charged for loss to company's assets arising out of breakages of neck of bottles, which is a total turn around to earlier stand that it was for use of crates.*
- i. In the letter in response to enquiry in 2011 again they have repeated the already given information have not submitted the requisite details.*

31. A combined and close reading of all the above correspondences will indicate that all along the assessee has been making descriptive submissions without actually submitting any statistical data that has been called for time and again other than what is given in their returns and misleading the Department to believe that the crate

*rentals, which they show separately in the invoice are not collected over and above the RSP, propriety to show it separately if it is already included in the RSP, and changing stand on the issue. The case laws submitted by them in support of their contention, such as of M/s Chemiphar Drugs and Liniments {1989(40)ELT 276 (SC)} and M/s Tamilnadu Housing Board { 1994(74)ELT 9 (SC)} on the contrary support the Department's case that when a essential and vital information about collection of rentals has been withheld by the assessee in spite of a continuous requests by the Department and illogical and misleading claims that costing of the products by a company of the level of theirs is not done at all, or though shown separately the rentals are part of MRP, without giving supporting break up or complete turnaround that rentals are towards breakages of assets (and not for use of rentals, have been mis-declaration and made, the case falls in the ambit of mis-statement suppression of facts and even contravention of Rules with intent to evade duty. Merely knowledge of the Department about existence of some collection by the assessee is not sufficient for examination of valuation or for that matter any aspect. In a company of the scale of theirs, with complex accounting procedures, the Department can not be expected to work out the details of the actual collection, from the limited and un-statistical, and descriptive information without supporting documents, and come up with a demand without substance. The merits of their submissions and explanations now given by them will be examined in the ensuing part. But, by continuously avoiding giving the details of the rentals and MRP, by giving glib description of the market and competition and accounting procedure, they have made themselves liable to application of the proviso to Section 11A(1) *ibid*, especially after considering the case laws cited by them which only indicate cases where all the facts were known to the Department, and not the present case where even now the assessee has not come out with facts and figures of crate rentals. Hence the*

extended period invoked in the notice is correct and the demand is not time barred.

32. Now turning to the arguments taken by the assessee on merits against the allegation of which are discussed below :-

- a. It is first of all argued that SCN wrongly alleges that HCCBPL has under- declared retail sale price (MRP) as required to be declared as per the Standards of Weight and Measures Act, 1976 and hence, contravened the provisions of Section 4A ibid read with Rule 4 of the RSP Determination Rules. It is also argued that they have not recovered any Crate Rentals from the end consumers who pay MRP while buying the goods and have recovered crate rentals from its distributor and the aggregate sale price of the goods, including the crate rentals is much lower than the MRP declared on the goods. They have further stated that the Department assumed that crate rentals have been recovered from the end consumers over and above the MRP declared on the bottles, on merely an assumption, and could not bring any material on record to justify their allegation of additional consideration over and above MRP. However, in turn the assessee also has not been able to place on record any concrete evidence to substantiate their claims other than mere assertions, and have also not been able to explain why the rentals are then shown separate in the invoices and why the same are charged selectively.*
- b. The other argument taken by them is that SCN has not properly appreciated the relevant statutory provisions of Standards of Weights and Measures Act, 1976 and Rules made thereunder, and also the provisions of Section 4A of the Central Excise Act and the Rules made thereunder. They have also discussed the relevant provisions of both the legislations. However they have misinterpreted the provisions of Standards of Weights and Measures Act, 1976 by which there is a mandatory*

requirement of making declaration of certain specified parameters/particulars on every package, interalia the "retail sale price" of the package. However this RSP has to be a correct one and merely mentioning some RSP which is not a true RSP and excludes certain constituents is not a compliance with the requirements. Thus even if the assessee has duly complied with aforesaid provisions of the SMWA and SWMPC Rules and declared Retail Sale Price/Maximum Retail Price on all SKUs of aerated water manufactured by it, the same is not a correct one as made out. Thus, it is a case that the MRP declared on the packages during the relevant period is incorrect and allegation are not presumptuous. Therefore, the allegation that the act of recovering additional consideration has resulted in short payment/non-payment of duty to Rs.2,29,37,692/- which is recoverable along with interest from CCBPL is correct as they have not duly complied with the provisions of SWMA and Rules made thereunder by not correctly declaring the Retail Sale Price on aerated water bottle. The crate rentals even if claimed to have not been recovered from the end-consumers; nothing is placed to prove that the same is not recovered from the end consumers by them or their distributors, marketing company. On the contrary, the Excise cum Tax Invoice of the noticee, issued in the name of Distributors shows that crate rental have been charged separately and the price of liquid beverage have been charged separately from the Distributor. Also contrary to their claim the invoices do not show that the total of price charged for liquid beverage and crate rentals collectively is lower than the MRP, when the rentals are shown separately and propriety of showing it separate is not explained. Therefore, the recourse to sub-section (4) of Section 4A ibid for correct determination of RSP is in order.

- c. *The assessee has also argued that sub-section (4) of Section 4A of the Central Excise Act, has laid down for prescribing mechanism to determine correct RSP but the same has been notified only under Notification No. 13/2008 C.E.(NT), dated 1-03.2008, i.e. w.e.f. 01.03.08 and so taking recourse to this mechanism for the period prior to it is beyond the provisions. This has already been already discussed at length above and conceded in favour of the assessee's case.*
- d. *The evidence to support the allegation of incorrect RSP is available in the form of all the tax invoices raised by the assessee wherein while the rentals are charged separately on one hand, on the other the assessee's continuous inability to give either break up of their MRP or to place on record the mechanism of deciding the RSP, its constituents, bring out clearly that one such constituent is rentals.*
- e. *The assessee has also argued that the basis adopted for making allegations has not considered the definition of 'Retail Sale Price' as per SWMPC Rules and Explanation I to the Section 4A and if both are read together, it can be seen that 'Retail Sale Price' is the 'maximum price' at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes, local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement delivery, packing, for loading and the like and the price is the sole consideration for such sale. However, in view of these definitions the 'maximum price' at which goods in 'packaged form' may be sold to the ultimate customer, is conditional subject to condition that there is no additional consideration for such sale. However, as is seen from the tax invoices itself, there has been charge of rentals shown separately in it which the assessee is unable to explain in its break up indicating to non- inclusion thereof in the RSP and so the re-determination for*

correct RSP is in consonance with the provisions. The position also does not alter even if HCCBPL sell finished goods to its customers (usually distributors), who in turn sell the same to retailers and further, retailers in turn sell it to the ultimate customer at RSP. SCN has nowhere presumed that HCCBPL directly sells their finished goods to the end consumers at the declared MRP. Further, once a particular constituent is charged separately in the invoices, it is indicated that the price charged from the ultimate consumer in the market can not be at the MRP declared on packages. The manner and methods of charging sale price of a retail package by its manufacturer to the Distributor and by the Distributor to the retailer may not have bearing on the MRP already declared on such retail package, as long as the manufacturer does not charge anything over and above the MRP. In fact, it is for this portion of the price above the cost or value for duty that law has made provision of abatement therefrom. Thus, the provisions of SWMA Act and the SWMPC Rules and the provisions of Section 4A of the Excise Act deal with the MRP declared on the retail package which is the price meant for the end consumer, but the same needs to be correct MRP, and collection by the manufacturer from their dealers should be either independent of such price; necessarily below it and inclusive of all constituents or when once the price itself is charged, no other constituent should be charged again.

- f. It is claimed in their argument that the amount charged by HCCBPL from its distributors inclusive of crate rental for sale of the finished goods was considered while determining the MRP of such goods and the price at which the goods were sold by HCCBPL was much less than the MRP of such goods and the crate rental so received, shown separately in the invoice formed a part of the assessable value on which duty has been paid However in spite of*

repeated enquiry they have not been able to prove this from their accounts or accounting procedure. The argument that the price charged by HCCBPL from the distributor remained unchanged even after they discontinued the practice of charging crate rental separately from them on the sale of the finished goods, is in fact an indicator to the basic theory in the demand. If the collection of rentals was stopped, the MRP would have changed if the rentals was part of it. Further the administrative difficulty given as a reason to stop it without much explanation is also an indicator that it certainly had to do something with the RSP. In any case it was incumbent on them to show how the said rentals were already included in the price charged to their distributors by showing break up of the price; one such constituent being rentals.

- g. The other argument that crate rentals so charged during the relevant period were subject to Value Added Tax which was duly discharged and price for 'Liquid' and 'Crate Rentals' taken together and charged from customers (distributors) was always below the MRP declared on the bottles, no price over and above the MRP was ever charged is a again a hollow claim. To substantiate this they have given a few statements containing break-up of the price charged in few sample excise-cum tax invoices, along with the relevant Excise cum Tax invoices and ten sample Excise cum Tax Invoices. However, based on this the contention made that the difference between the MRP and the aggregate of basic price and crate rental charged by HCCBPL comprises of distributor's margin, retailer's margin and applicable taxes paid by the distributor/ retailer, is without basic explanation as to why the rentals are charged separately in the invoice when the 'price' is supposed to comprise of entire charges from the customer. The case law cited in this regard is addressing the issue of recourse to valuation Rules of Section 4 for*

goods assessed under Section 4A ibid, which is not a proposal in the present case.

- h. They have also submitted that the Stock Transfer transaction are misunderstood and equated with 'sale transaction', that the receiving sister units of HCCBPL sold goods to distributors with a separate charge of Crate Rentals. They have stated that the SCN has erred in correct appreciation of distribution model adopted by HCCBL during the relevant period and erroneously alleged that in case of the clearances of final products to HCCMPL, HCCBPL is charging crate rentals, but not when clearances are made to their own unit and also, in both the cases, the MRP of the similar products remain same. For the stock transfer transaction they have explained that the receiving unit of HCCBPL when later sold such goods to their customers would have charged an agreed price signifying sale and transfer of ownership and sister units would have also in turn charged Crate Rental in tax invoice while selling to distributors. In view of this, it is contended that the allegation that the amount charged under the head crate rentals is the additional consideration is incorrect. However even after leaving aside these stock transfer transactions, which are taken as only an indicator to the additional consideration, when they themselves are committing that later their sister unit would collect the charges which is equal to collection by the assessee, the indicator to additional consideration is substantiated.*
- i. The argument that they have units at 22 manufacturing plants and none of it has ever received any SCN or demand for contravention of SWMA or SWMPC Rules or Section 4A of the Excise Act has no relevance to the present case.*
- j. They have also submitted that as 2 part of annual exercise, HCCBPL/sister-units have furnished complete price-break up of MRP to assist CBEC in determination of appropriate abatement rates, with a*

sample copy of the submissions enclosed. However, this again is not any breakup of MRP but merely MRP that would be tentatively kept by them in coming year.

- k. They have also contended that under the sales tax /value added tax laws, the tax rate applicable on sale of products such as aerated beverages or juice based drinks are different from 'deemed sale' transactions such as crate rentals and so, in order to avail the differential rates ordained by the VAT laws, crate rentals were shown separately. However this again is an evidence indicator that there was a separate transaction and separate charge for rentals and if the value was included in the MRP and the price charged to their distributors, they in fact would have argued so with S.T. Department and not paid even differential rate as there was not even separate deemed sale of crates. Similarly, their claim that Crate Rentals were never shown as 'Exempted Sale' in Excise cum tax invoice: - as per the policy of ST, only the liquid beverages and not the deemed sale transaction such as crate rentals were exempt, is also contradictory as in fact when there was no sale of crates at all and only rent for use or breakages thereof by customers, they should have argued such transaction with ST. The allegation in the SCN that crate rentals have been shown as exempted sale in invoice for the excise is based on sale from excise point of view and not what they projected to ST.*
- l. The argument that in SCN, an allegation is made that MRP is fixed merely on the basis of the competitor's price without doing any costing, is based on the evidence submitted by their own official in his statements and their persistent stand to this effect. Contrary to their claim that they had in 2002 submitted costing details is also incorrect and so called costing methodology given by then is also a mere descriptive write up without any specifics. It is*

known that mandatory cost records as prescribed under Section 209(1)(d) of the Companies Act, 1956 have not been mandated for them and hence, there was no statutory record available under the Companies Act, 1956 which could be produced during the course of investigation. What was expected that their internal costing data only to evidence that crate rentals are part of their cost be produced. It is beyond imagination that a company of their level of turnover in a very competitive field would not do the costing and decide their MRP on the basis of competitors MRP as per their own claim.

- m. The different stands taken by the Department on the issue of Crate Rentals at different commission rates, stated by the assessee is beyond the scope of decision on the present SCN and also can not affect the present decision.*
- n. They have also argued that the SCN has erroneously alleged that HCCBPL has cleared excisable goods packed in RGB totally valued at Rs. 1,59,16,26,418/- which are liable for confiscation under Rule 25(1) of the Central Excise Rules read with Section 4A (4) of the Central Excise Act, as they appear to have been cleared without paying appropriate Central Excise Duty due to mis- declaration i.e. lower declaration of MRP and since the offending goods are not available for confiscation, fine in lieu of confiscation is liable to be imposed on them under Section 34 of the Central Excise Act and once it is established by HCCBPL that provisions of Section 4A (4) of the Central Excise Act cannot be invoked to the facts of the present case, there can be no question of invocation of provisions of Rule 25(1) of the Central Excise Rules, as alleged in the captioned SCN. In this regard from the findings it can be seen that by misdeclaring the MRP on their goods their case is covered by the provisions of sub-section (4) of the Section 4A ibid read with Rule 25 (1) ibid and so proposal for confiscation of all the goods with mis-*

declaration of MRP resulting into short payment of duty is correct. It is also established that HCCBPL has removed excisable goods manufactured by it in contravention of the provisions of Section 4A of the Act and rules or notification issued thereunder by paying short duty in effect and so the provisions of Rule 25(1) of the Excise Rules are correctly invoked for confiscation of goods and imposition of penalty. Moreover, whenever confiscation is adjudged under this Act or the Rules made thereunder, the option to pay fine in lieu of confiscation can be given only if goods are available by way of seizure or detention. In the present case, though the goods are not available, when once the same are liable to confiscation under Section 4A(4)ibid read with Rule 25(1) of the Excise Rules, confiscation under Section 34 has to be upheld. However, as argued by the assessee their value of clearance for the relevant period also included clearances of fruit-pulp based products which were exempted. These items being beyond the purview of Section 4A being exempt, the same or their value cannot be considered while considering confiscation.

33. However, as discussed at length in the para 26 above, as for the period prior to March 08 out of the total period of demand, since there was no recourse mechanism available to revise or reconsider the RSP declared by the assessee if the same was found not as per the provisions of Section 4A of the Central Excise Act, 1944, the proposal to revise the same for the period prior to March 08 can not be upheld under the provisions of law. On giving effect to the demand accordingly, the same for the period from 01.03.2008 to May 08 comes to Rs.38,97,295/-, which is the total of the differential duty computed in Column no.22 of Annexure A to the SCN dated 03.11.2011, for the period 01.03.08 to May 08 and the value of the dutiable goods cleared by them during the period, leaving out the goods which were exempt during the relevant period, and so are beyond the purview of the present demand, comes to Rs. 17,95,63,821/-,

which is the total of the Column No.11 of the Annexure A to the SCN, titled " modified assessable value inclusive of crate rentals after abatement" for the period from 01.03.08 to May 08. In the light of the discussions in detail made earlier, the assessee have contravened the provisions of Section 4A of the Central Excise Act, 1944, and in respect of the goods cleared by them during the period from March 08 to May 08, and they have short paid duty of - 1997 Rd SC 698 dated 02.09.97, issue of same rentals realized above the invoice price has been discussed at length and reference is made to a order of honb'le CEGAT, who in the light of judgment in the case of M/s Indian Oxygen Limited {reported at 1988(4) SCC139} held that the crate rentals were includible in the assessable value. Although this order pertains to the period when the goods in question were under assessment as per Section 4A (and not Section 4A, introduced later), it is seen that the view to include this charge in the value can be applied even in present valuation and leaves no scope to show its charge separate in the invoices without substantiation."

4.3 We find the issue has been considered by the impugned order without appreciating the concept of MRP/ RSP based valuation introduced by the Section 4A of the Central Excise Act, 1944. Admittedly and undisputedly impugned goods in the present case are the ones which have been notified for assessment as per Section 4A. As per the provisions of the Section 4A, the assessable value is RSP as reduced by the abatement notified. The Section 4A (4) is applicable only in the case where the RSP is not declared, misdeclared or obliterated. To determine whether the RSP is not declared or misdeclared or obliterated then that has to be established by way of the enquiries made in the retail market. Hon'ble Supreme Court has in case of ITC [2004 (171) ELT 433 (SC)] has held as follows:

"49.*The object with which the levy was shifted from the assessable value to the printed MRP was stated by the Finance Minister in his budget speech while introducing the new system :*

"The revenue realization had been affected inter alia on account of disputes over the method of arriving at the assessable value. With a view for (sic) ending the room in uncertainty once for all, I propose to fix specific rates of duty in respect of cigarettes.

These rates of duty would be linked to their retail sale price printed on the cigarette packs”.

50.*It appears that this is how the Central Board of Central Excise also (understood the scheme. The 34th Report of the Public Accounts Committee (1985-86) records the evidence of the Chairman, Central Board of Excise and Customs. He said :*

“In this case in 1982 and 1983 we opted for the ‘specific rate of duty’. For the purpose of calculation since the printing of the price is a legislative requirement, we will go by that and have ‘specific duty’. Another system is ad valorem which has created enormous problems..... What we are interested is to collect a certain amount of duty from a particular industry. The rate of duty is accordingly fixed. Ad valorem duty is based on the value of the goods. ‘Specific rate’ is directly related to the product. So, it was decided that we could adopt a formula linked to ‘printed retail price’ for classification of the goods for deciding the amount of duty that this particular commodity should bear Even at that time we were conscious of the fact that there could be an overcharging of the prices by the retailer. But according to Packaged Commodities Rules the retailers were bound to sell the goods at that particular price, and if the prices were more there was a legal provision for taking action against the retailers”.

51.*The attempt was clearly to do away with the disputes, litigation and consequent delay involved in determination of the assessable value of the whole sale price of cigarettes. As far as the appellant is concerned, between 1973 to 1981, several proceedings were pending relating to various aspects of the determination of the assessable value in respect of the cigarettes manufactured in its five factories including disputes relating to the permissible deductions on account of post manufacturing expenses.*

52.*The Tribunal itself noted that the intention underlying the Notification was to get over “hassles arising on the question of determination of assessable value under Section 4(1)(a) of the Act and the admissible deductions”. But then it held that the switch over was made from “assessable value to ‘quasi-specific duty’. Duty is either specific or not. Since it is not specific*

according to the Tribunal, it would be open to the Department to go behind the printed prices and find out the "effective prices" at which the retailers may sell the packages to consumers and treat such prices as the printed prices for the purpose of determining the rate of duty applicable. The consequences of this interpretation by the Tribunal would be startling. There is no dispute that the Notification envisages a single retail price in respect of certain brands of cigarettes. It is this single retail price which has to be printed on the package. If one were to accept the High Court's prima facie view, the printed MRP should reflect the actual price at which the particular kind of cigarette is sold throughout the country. The patent impossibility of this was acknowledged by the Tribunal which held that the actual price at which the cigarettes were sold could not "lawfully or logically" be the printed MRP because "the manufacturer has limited or little control over the actions of the retailers" who are, in the case of the appellant, "about a million in number" ; that the appellant could not be held responsible for "the tendency of the retailers to charge higher than the printed price so as to secure larger margin" and that different prices may be actually charged for the same brand all over the country. Therefore, the Tribunal held that the printed MRP should have been the "reasonable price" at which the cigarettes could be sold. This led the Tribunal and the adjudicating authority to go into an elaborate exercise to determine what should be that single reasonable price for the entire country which should have been declared and printed by the appellant on the packages.

53.*In our opinion the outcome of this would be equally illogical. It envisages an excise officer in one part of the country determining what would be the reasonable market price throughout the country for that particular brand, an exercise which the Tribunal itself concedes would require the examination of the cost data and market considerations and would be a "very complicated and time consuming impractical exercise which was rightly not provided for". And yet according to the Tribunal's and the Revenue's interpretation of the notification, the Excise Officer would have had to do just that. Apart from the patent impracticability of the matter, the question whether the price so*

fixed by the Excise authority is 'reasonable' or not would itself be justifiable with the consequent blockage of revenue in the quagmire of litigation. That is precisely what the Notification had sought to avoid."

4.4 The entire enquiry/ investigations made in the present case go contrary to the observations made by the Hon'ble Apex Court. Following the above judgement tribunal has in the case of Appellant observed as follows:

"2. *The appellant M/s. Hindustan Coca-Cola Beverages Pvt. Ltd. is a bottler of well-known soft drinks (Coca Cola, Limca etc.) at Varanasi. Excise duty demand under the impugned order is for the period June 1999 to May 2000. During this period, the soft drinks in question were required to be valued for the purpose of assessing them to excise duty in terms of Section 4A of the Central Excise Act. The provision of that Section is that assessable value shall be the retail sale price declared of such goods less such amount of abatement, if any, from such retail price as the Central Government may allow by notification in the Official Gazette". At the time of clearance of the goods covered in the present proceeding the appellant had valued the soft drinks based on declared prices and discharged duty. For example, the retail price declared on the coca-cola bottle was Rs. 9/- and duty liability was discharged by adopting this declared price less abatement notified by the Government.*

3. *Subsequently, show cause notices were issued alleging that "actual" retail sale price was Rs. 10/-, against Rs. 9/- declared on the bottle. It was therefore, proposed that Rs. 10/- shall be taken as the retail price and after allowing abatement, the goods re-assessed to duty and short-levy recovered. In adjudication as well as in the first appeal before the Commissioner (Appeals), demands made in the show cause notices remain confirmed.*

4. *The evidence relied upon in the adjudication are two fold - (i) investigation has shown that some Dhaba and hotels were actually selling the soft drinks at Rs. 10/-, there was display board at dhabas showing the sale price at Rs. 10/- and it was the evidence of the dhaba owners that, such boards were maintained by Hindustan Coca-Cola Beverages Pvt. Ltd. themselves, (ii) in addition to the price for soft drinks recovered*

under the invoices, the manufacturer was also collecting Rs. 15/- per crate of bottle as rental charges for the bottles. The authorities have treated that these realizations are flow-back of price of soft drinks. Duty demand is thus, based on evidence of sale at a higher price as well as flow-back of additional price to the manufacturer.

5. *The appellant's stand all though has been the same. Firstly, it is contended that the measure fixed under Section 4A is that retail sale price declared on such goods less such amount of abatement shall be the value. It is the appellant's submission that payment of duty, in all circumstances, has to be in terms of this measure and that the actual sale price was wholly irrelevant to the assessment. Thus, it is being contended that the revenue authorities were legally in error in assuming that 'actual' sale price could be substituted for the declared price. The second contention is that it is a gross error, and contrary to the judicially recognized practice in the soft drink industries, to treat rental charges of crates and bottles as a flow-back.*

6. *In addition to the above main pillars of defence, the appellant has also sought to show that the evidence about the higher actual sale price and appellant's involvement with it is too scanty and unreliable. The explanation for such a higher sale price has also been attempted as the result of dhabas charging higher price for cooling and serving beverages.*

7. *During the hearing of the case, learned counsel for the appellant has submitted that the effect of adopting declared retail price for the Central Excise assessment now remains settled by the judgment of the Hon'ble Supreme Court in the case of ITC Ltd. v. C.C.E., New Delhi - 2004 (17) E.L.T. 433 (S.C.). It is being pointed out that the Hon'ble Supreme Court has held that the declared MRP is not subject to any enquiry and that the consumer can insist on the retailer to abide by printed price and retailers violating the declaration can be punished under the provisions of Standards of Weights and Measures Act, 1976. The Hon'ble Supreme Court has concluded that no differential duty can be demanded from a manufacturer on the basis that "actual" retail price was higher than the "declared"*

retail price and for that reason, assessable value should be "actual" retail price.

8. Learned counsel has also referred to the decision of this Tribunal in the case of *Herbertsons Limited v. C.C.E., Bombay - 1997 (89) E.L.T. 553* in support of the contention that it is well settled that hire charges of bottles and crate are not to form part of the assessable value of beverages since hiring out of these items is a ancillary and allied activity, separate from the manufacture and sale of soft drinks.

9. Learned counsel has further submitted that the finding on flow-back is entirely erroneous and contrary to evidence inasmuch as, firstly rental charges of bottle are entirely for different consideration than sale of beverages and secondly, as explained through the costing data to the lower authorities, the retail price declared by the appellant-manufacturer took in all costs and profits including that of the retailer and there was sufficient margin within the declared MRP to provide for all costs and legitimate profits of every link in the distribution chain.

10. As regards the evidence about the higher price and the appellant's involvement with the same, the explanation is that it is common that sellers charge higher price in hotels and restaurants for beverages than the printed price and that the appellant is not involved in the administering of such prices. It is also being pointed out that the position observed at a particular time in three or four dhabas or hotels cannot be made the basis for concluding that Rs. 10/- was the actual retail price for the beverage, since the appellant's beverages were sold from about 2500 outlet and the price position in those outlets has not been considered.

11. Learned SDR would emphasis that according to law "ultimate consumer price" is to be the basis for assessment and since the appellant had only put up board showing higher price, the assessment order at the higher price is to be upheld.

12. The findings in the impugned order are not sustainable for the reasons mentioned hereunder. Section 4A provides for assessment on a fixed and invariable basis. That basis is to treat retail sale price declared on the goods less such amount of

abatement as allowed by the Government as the value of the goods. "Actual" retail sale price has no place in such a scheme because actual prices are bound to be different from the prices since declared price is a maximum price and many sales may be below that price. The legal consequences that follow sales at a price higher than the declared price remains settled by the judgment of the Apex Court in the case of ITC Ltd. (supra). The view taken by the lower authorities that actual sale price can substitute for declared price for the purpose of valuation of excisable goods is clearly contrary to the rule laid down in that judgment. The factual finding about flow-back through rent for bottle is also contrary to the judicially recognized factual position. It is common practice in regard to sale of liquid and gases in durable containers that rental charges are collected for the containers separately and such rental charges do not form part of the value of the goods sold in them. This position remains recognized in the decision of this Tribunal in the case of Herbertons Limited (supra). Therefore, the finding that rental charges for the bottles was a flow-back from trade to the manufacturer is also erroneous. That apart, the appellant has shown that the declared retail price contained provision for costs and profits in the trade chain. Thus, the declared prices were fully commercial retail prices."

4.4 As per the Standard of Weight and Measure (Packaged Commodities) Rules, 1977, following are the definitions of terms retail package, retail sale, and retail sale price:-

"2. Definitions:- In these rules, unless the context otherwise requires-

(p) 'retail package' means the packages which are intended for retail sale to the ultimate consumer for the purpose of consumption of the commodity contained therein and includes the imported packages :

Provided that for the purposes of this clause, the expression 'ultimate consumer' shall not include industrial or institutional consumers.

(q)'retail sale', in relation to a commodity, means the sale, distribution or delivery of such commodity through retail sales

agencies or other instrumentalities for consumption by an individual or a group of individuals or any other consumer.

(r)'retail sale price' means the maximum price at which the commodity in packaged form may be sold to the ultimate consumer and where such price is mentioned on the package, there shall be printed on the packages the words 'Maximum or Max. retail price.....inclusive of all taxes or in the form MRP Rs.....incl., of all taxes.'

Explanation: For the purposes of the clause 'maximum price' in relation to any commodity in packaged form shall include all taxes local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement, delivery, packing forwarding and the like, as the case may be;"

Rule 3 of Chapter II of PC Rules, 1977 reads as under :

3. Chapter to apply to packages intended for retail sale. - The provisions of this Chapter shall apply to packages intended for retail sale and the expression "package" wherever it occurs in this Chapter shall be construed accordingly.

The Explanations to Section 4A of the Central Excise Act, 1944 are as under :

Explanation 1 : For the purpose of this section, "retail sale price" means the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes, local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement, delivery, packing, forwarding and the like and the price is the sole consideration for such sale :

PROVIDED that in case the provisions of the Act, rules or other law as referred to in sub-section (1) require to declare on the packages, the retail sale price excluding any taxes, local or otherwise, the retail sale price shall be construed accordingly.

Explanation 2 : For the purposes of this section,-

- (a) where on the package of any excisable goods more than one retail sale price is declared, the maximum of such retail sale prices shall be deemed to be the retail sale price;*

(b) where the retail sale price, declared on the package of any excisable goods at the time of its clearance from the place of manufacture, is altered to increase the retail sale price, such altered retail sale price shall be deemed to be the retail sale price;

where different retail sale prices are declared on different packages for the sale of any excisable goods in packaged form in different areas, each such retail sale price shall be the retail sale price for the purposes of valuation of the excisable goods intended to be sold in the area to which the retail sale price relates.

Undisputedly the impugned goods are the ones which are notified as per Section 4A for assessment on the basis of Retail sale price declared by the Appellant. It is not the case of the revenue that the retail sale price as declared by the appellant was ever altered, tempered or obliterated by the appellant after clearance of the same from their premises. Revenue has sought to invoke the provisions of Section 4 (4) of the Central Excise Act, 1944 for inclusion of the crate rental charge in determining the assessable value. Admittedly these crate rental charges were charged by the appellant from their dealer in the course of clearance of the impugned goods to their distributors and not from the retail buyers of the goods. The charges so collected from the dealer and distributor was never the part of transaction relating to the retail sale made to the retail buyer. Revenue has in the entire proceedings not led an iota of evidence to show that these charges were collected by the appellant over and above the retail sale price declared by them from their retail buyers. It is not even the case of revenue that even dealers were selling the goods to retail buyers at prices over and above the declared retail sale price by the consumer. The clearances made by the appellant to the dealer/ distributor were not in the course of retail sale of the goods.

4.5 At the cost of repetition we reproduce the sub-section 4 to Section 4, below:

(4) Where any goods specified under sub-section (1) are excisable goods and the manufacturer -

(a) removes such goods from the place of manufacture, without declaring the retail sale price of such goods on the packages or declares a retail sale price which is not the retail sale price as required to be declared under the provisions of the Act, rules or other law as referred to in sub-section (1); or

(b) tampers with, obliterates or alters the retail sale price declared on the package of such goods after their removal from the place of manufacture, then, such goods shall be liable to confiscation and the retail sale price of such goods shall be ascertained in the prescribed manner and such price shall be deemed to be the retail sale price for the purposes of this section.

Revenue has not adduced any evidence to show that the retail sale price as declared by the appellant was not the retail sale price at which the goods were sold to the actual retail buyers. In fact no enquiries of any nature have been conducted in this respect from the retail buyers or in the retail market. In absence of any such enquiry the conclusions arrived towards the misdeclaration of the retail sale price cannot be sustained, even if the same is based on certain invoices made by the appellant for clearance of the impugned goods to their dealer/ distributor. It should be noted that the clearances made to their dealers/ distributors was not in the course of retail sale but was in the course of wholesale trade for which the value should have been determined under Section 4. Apparently the in view of the provisions of the Section 4A, such an approach is not permissible.

4.6 In the case of ACME Ceramics [2014 (304) ELT 542 (T-Ahmd)] following has been observed:

"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 re-determination of RSP, the contentions of Id. 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.

"13. It is seen from the findings of the adjudicating authority in paras 55, 56 and 57 that the adjudicating authority has confirmed the demand based only on the ground of undervaluation and extrapolating the amount for the period December, 2001 and January, 2002 as being 65% of the MRP declared and confirmed the demand. As we have already held that this could not be done by adjudicating authority in the absence of any rules or authority under the section, the demand is not sustainable. We find that in paras 55 and 57, the adjudicating authority has recorded a finding which is as under :-

"55 Thus, in this case, the suppression of turnover is admitted and can be either on account of undervaluation or on account of volume."

"57 As the suppressed turnover is in value terms only, no enquiry need be made for establishing the turnover to the use of raw materials etc. The suppressed turnover, being the excess collection over and above the recorded value or income in their books, is related to the sale value which escaped assessment

under the Central Excise Act. Once the suppressed turnover is admitted beyond any doubt and the assessee opts to accept the tax liability under the Income-tax Act, no meaningful purpose would have been served to cause further detailed probing under the Central Excise Act and Rules.”

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.

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. As regards the finding by the Id. adjudicating authority that suppression could be on account of volume, we have already recorded that there is no corroborative evidence nor there is any finding as to the exact quantity of goods clandestinely cleared to come to the conclusion that the value of Rs. 3.75 crores is attributable to the specific quantity of goods on amount of clandestine removal. In the absence of any such details, we are of the considered view that the impugned order is unsustainable.”

13. Identical views were expressed by the Tribunal in the case of M/s. ABB Ltd. (supra), we would like to record here that the 3 decisions of the Tribunal i.e. M/s. Millennium Appliances India Ltd, M/s. Ravi Foods Pvt. Ltd., M/s. ABB Ltd. have held a view that prior to 1-3-2008, in the absence of any provisions for re-determining the RSP, in the form of prescribed rules, the Revenue authorities cannot re-determine the RSP under any of the provisions available to them. It has to be noted that there is no contrary view which has been taken by the Tribunal.

14. At this juncture, we would like to refer to the submissions made by the Id. Special Counsel for the Revenue that in the case

of M/s. Schneider Electrical India Pvt. Ltd. (supra), Hon'ble Member (Technical) has differed with the views of Hon'ble Member (Judicial) who has relied upon all these three case laws. In our considered view, the differing Member has incorrectly applied the law in the case of M/s. Mahim Patram Pvt. Ltd. to take a different view from the views already existing. On perusal of the said decision of Apex Court in the case of M/s. Mahim Patram Pvt. Ltd., we find that the Apex Court was dealing with a dispute wherein in the absence of rules having been prescribed under the Central Sales Tax for determining the manner in which the sale price of transfer of goods under Works Contract was to be calculated, would the levy of Works Contract be sustainable in the State of Uttar Pradesh by computing the value of taxable turnover in accordance with the rules framed under Uttar Pradesh Trade Tax Act, 1948. The Apex Court while dealing with the issue noted that Central Sales Tax Act, 1956 provides that the authority who is empowered to assess, re-assess, collect, and enforce payment of any tax under General Sales Tax law of the appropriate state, shall on behalf of the Government of India, assess, re-assess, collect and enforce payment of tax under the Central Sales Tax Act and for this purpose, they may exercise all or any of the powers they have under the General Sales Tax law of the State; Section 3(3) of the Central Sales Tax provides that State Government may make rules not inconsistent with the provisions of the Act and rules made thereunder. The Uttar Pradesh State Government has framed Central Sales Tax (U.P. Rules) 1957, in exercise of the powers conferred under the CST Act, 1956, and Rule 9 of the said Rules provided that the provisions of Uttar Pradesh Sales Tax Act, 1948 and U.P. Sales Tax Rules, 1948 as amended from time to time or the rules made thereunder would apply to the dealer liable for assessment under Central Sales Tax Act and U.P. Sales Tax Rules, 1948, Rule 44(B) prescribed the manner of determining the turnover of the goods involved in execution of Works Contract. The relevant findings of the Apex Court were rendered on this factual aspect as contained in Para 27 of the judgment. In our considered view, the ratio decidendi from this judgment is that merely because the rules were not framed in Central enactment, it would not mean that no tax is leviable if rules have been framed under said

enactment and there is a provision for referential incorporation of the said act in the Central Act. We are of the view that the ratio laid down by Apex Court in the case of M/s. Mahim Patram Pvt. Ltd. does not in any manner support the case of the Revenue as well as the view of the differing member in the case of M/s. Schneider Electrical India Pvt. Ltd.; in the cases in hand the ascertainment/redetermination of RSP has not been enacted or prescribed in any other enactment and as no provisions have been incorporated by reference under Central enactment. In our view, there being no contrary judgment to the views expressed by the 3 decisions of the Co-ordinate Benches of the Tribunal on this issue, even assuming that there was misdeclaration of RSP, period prior to 1-3-2008 the RSP cannot be re-determined by the Revenue in any manner."

4.7 Since no evidence has been led by the revenue to establish that the RSP was mis-declared by the appellant by causing relevant enquiries in the retail market/ trade, we do not find that the provision of Section 4 (4) of the Central Excise Act, 1944 shall be applicable for redetermination of the assessable value in the manner as has been done in the impugned order, both prior and post 2008. We are aware that taking the note of the observations made by the tribunal in case of ACME industries and Schneider Electrical India Pvt. Ltd., Ahmedabad Bench has referred the matter to Hon'ble President in case of Nice Ceramics [2019 (367) E.L.T. 279 (Tri. - Ahmd.)] for consideration of the following question to be placed before larger bench

"In view of the above, we find that issue regarding liability to pay Central Excise duty of manufacturer vis-à-vis dealer also needs to be referred to the Larger Bench. In view of the above, following modification in the Order Nos. 5-27/2019, dated 10-1-2019 is made :-

In Para 7 of the order Nos. 5-27/2019, dated 10-1-2019 for the words -

"It is seen that the proposition is that if the dealers have altered the RSP then the liability should be on the dealers. We respectfully disagree with the proposition."

The following may be substituted :-

"Thus, in view the fact that, prima facie, alteration in RSP happened fraudulently at the behest of the appellant and therefore, the appellants should be affixed with the liability to pay Central Excise duty as manufacturers. However, since this view differs from the view taken by Coordinate Bench in the case of ACME Ceramics (supra), the matter needs to be referred to the Larger Bench for resolution of conflict."

9. In Para 9 of the order dated 10-1-2019, after sub-clause (2), the following clause may be added :-

"(3) In the facts and circumstances of the case, if the evidence establishes that the RSP was manipulated fraudulently at the behest of the appellant by any other person, can the liability of duty be fastened on the appellants."

The above reference to the larger bench does not restrict us from arriving at the finding of fact against the applicability of the Section 4 (4) of the Central Excise Act, 1944, in the case of appellant.

4.8 Since we do not find any merits in the impugned order on the merits of issue we are not recording any findings on the issue of limitation etc.

5.1 Thus the appeal filed by the revenue is dismissed.

5.2 Appeal filed by the appellant is allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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