(2011) 12 GUJ CK 0036

In the Gujarat High Court

Case No : Special Civil Application No. 4935 of 2011 with SCA No. 9381 of 2011

Commissioner of Central Excise and Customs APPELLANT

Vs

Suzlon Ceramic RESPONDENT

Date of Decision : 01-12-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11AC, 32F, 32F(7), 4

Citation : (2012) 282 ELT 338

Hon'ble Judges : S.G. Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Darshan M. Parikh, for the Appellant; Kamal Trivedi with Rakesh Gupta, Advocate for M/s. Trivedi and Gupta, for the Respondent

Judgement

Sonia Gokani, J.—Present petitions are directed against the very same order of Settlement Commission dated 18-1-2011. Although both the petitioners have preferred these petitions for different reasons, the challenge is to the impugned order of the Settlement Commission and therefore the same are being decided by way of this common judgment. Both these petitions arise in the following factual background :-

M/s. Suzlon Ceramics, the petitioner of Special Civil Application No. 9381 of 2011 is engaged in the manufacture of "Suzlon" brand ceramic tiles and is holding Central Excise Registration for manufacture and clearance of such excisable goods. Central Excise Duty is leviable as per the provisions of Section 4A of the Central Excise Act ("the Act" for short) on Ceramic Tiles, based on the maximum retail price affixed on the package in terms of the provisions of the Standards of Weights and Measures Act, 1976. A notification was issued being Notification No. 13/2002-C.E. (N.T.), dated 1-3-2002 providing for abatement of 45% from such MRP for the purpose of determining the assessable value of ceramic tiles. Vide another Notification No. 6/2002-C.E., dated 1-3-2002, Central Excise duty at the rate of 8% is attracted on the tiles manufactured in a factory not using electricity, provided no Cenvat credit is availed on the duty paid on input.

2. DGCEI gathered intelligence that at Morbi, over 200 manufactures of ceramic tiles, including the present petitioner No. 1 were engaged in large scale evasion of Central Excise Duty and other taxes by declaring only a part of actual Maximum Retail Price ("MRP" for short) and consequently, determining lower assessable value after availing abatement of 45% on such lower MRP Officers conducted coordinated search operations, which could not be completed on account of hostile atmosphere and attitude of the manufactures and their employees qua the officers discharging duties so much so that the search parties had to be withdrawn after filing FIRs at the local police station.

3. Considering this scenario, DGCEI called for books of accounts and other official documents from the petitioner by issuance of summons instead of continuing search operations at the premises/factories. Simultaneously, DGCEI conducted search at the premises of certain dealers of the tiles and gathered incriminating materials. On the basis of the statements and the documents, it was revealed that the prices of ceramic tiles were undervalued and the prices paid by the dealers were higher than the prices shown in the invoices of the manufacturers. The extra amounts of these prices and the transport charges were collected in cash by the manufacturers or their representatives ranging from Rs. 15 to Rs. 50 per box. This was also substantiated by searching the premises of M/s. Keval Enterprises Shroff, which facilitated the receipt of cash.

4. In absence of revaluation of actual selling price of the tiles (MRP) u/s 4A(4) of the Central Excise Act, 1944, the department revised the MRP of different grades of ceramic tiles. This weighted average of MRP of tiles was adopted by the officers to work out the duty short-paid by the petitioner due to undervaluation on the tiles acquired by them. The case pertained to the period from 1-4-2007 to 15-2-2008 for which the amount of duty worked out was Rs. 19,43,037/-.

5. The show cause notice was issued dated 29-6-2009 demanding the total amount of Central Excise Duty at Rs. 19,43,037/- invoking extended period of 5 years as per proviso of sub-section (1) of Section 11A of the Act as also for interest and penalty under Sections 11AB and 11AC of the Act respectively. For the partner of the applicant company, notice demanding penalty under Rule 26 of the Central Excise Rules, 2002 also was issued on the very same day i.e. 29-6-2009. Prior to this SCN, on dated 3-7-2008 demand of Central Excise duty of Rs. 32,891/- was made for clandestine removal of premium grade tiles totaling 4171 boxes.

An application was filed before the Settlement Commission on 15-4-2010 by the petitioner M/s. Suzlon Ceramics where the petitioner accepted the total duty of Rs. 9,34,452/-, as against the total demand of Rs. 19,75,928/-. The Department was of the opinion that the applicant was not declaring colours and designs of the tiles manufactured and sold, nor were they mentioned in the invoices. It objected to the method adopted by the petitioner for arriving at additional duty as also non-declaration of MRP of tiles sold for the period in question on their Central Excise invoices, the Settlement Commission after affording opportunities to both the sides settled the case u/s 32F(7) of the Act laying down the terms and conditions as follows :-

25. In view of the foregoing discussions, the following terms and conditions are laid down under sub-section (7) of Section 32F of the Act for settlement of the case :

Central Excise Duty : The differential duty in this case is settled at Rs. 15,82,961/- (Rs,. 15,50,070/- + Rs. 32,891/-) (Rupees Fifteen Lakhs Eighty Two thousand Nine Hundred Sixty One Only). The applicant has deposited Rs. 15,00,000/- (Rupees Fifteen Lakhs Only) and the balance shall be paid within the period of 30 days.

Interest : The applicant shall calculate the interest liability on the duty specified above and pay the same within 30 days. The Revenue is given the liberty to check the calculation for its correctness and realize extra amount, if any, as per law.

Fine : As the seizure involved is of a small quantity of tiles which are liable to confiscation, the Bench having regard to the facts and circumstances of the case, grants full immunity from fine in this case.

Penalty : Considering the facts and circumstances of the case, the Bench grants immunity from penalty in excess of Rs. 30,000/- (Rupees Thirty Thousand Only) to the applicant under the relevant provisions of the Central Excise Act, 1944, invoked in the SCN''s dated 3-7-2008 and 29-6-2009. The co-applicant, being a partner of the applicant firm, is granted full immunity from penalty.

Prosecution : The applicant and the co-applicant are granted immunity from prosecution under the Central Excise Act, 1944, in so far as this case is concerned.

6. The impugned order passed by the Settlement Commission dated 19-1-2011 is seriously challenged by both the sides in the present petitions preferred by each of them on various separate grounds enumerated in their respective petitions, which are not reproduced suffice to say at this stage that the basis of settlement and its conclusion is strongly objected to by both the sides.

7. This Court heard learned senior counsel Mr. Kamal Trivedi for the petitioner Suzlon Ceramics and others, and Mr. Parikh, appearing on behalf of the Department.

8. It is contended by the learned Senior Counsel Shri Kamal Trivedi for the petitioner Suzlon Ceramics that instead of accepting the declaration made by the petitioner, Settlement Commission completely discarded provisions of Section 4A of the Central Excise Act. Being the creator of the statute, it is not authorized to give a complete go-by to the provisions of law. The excise duty is required to be paid on the Retail Sale Price (RSP) declared on such goods less 45% abatement from such retail price. As per notification, the petitioner firm, according to the

petitioner, had sold the goods at the actual declared retail sale price on the goods and paid duty of excise on excisable value after applying abatement at the rate of 45% on such declared MRP of each removal. The Revenue could not point out that retail sale price fetched more than the declared retail sale price and that the same was within the knowledge of the petitioner, and investigation having failed to bring on record any such details, the prices declared shall need to be recorded. It is also the case of the petitioner that while approaching Settlement Commission it had re-worked retail sale price for each removal i.e. invoice wise by adding realized amount by way of cheque, average cash amount, cost of transportation, retailer''s profit and excise duty on the revised MRP plus VAT/CST. The petitioner contended that in most of the cases even after addition of cash amount in the amount received through cheques plus tax, it would not exceed retail sale price declared on the goods. It is only with an intention to buy peace of mind, the duty liability is accepted on higher side. It is the case of the petitioner that the Settlement Commission instead of verifying the correctness of declaration made by the petitioner, arbitrarily reduced duty liability by accepting ad-hoc retail sale price and allowed 10% notional reduction in weightage average retail sale price arrived at by the investigating agency on the basis of retail sale price declared by the petitioner firm for the subsequent year 2008-09. As the amount to be calculated was for the period being 19-4-2007 to 15-2-2008, this method was not acceptable to the petitioner.

9. It is also the say of the petitioner that as per the provisions of Central Excise Act and Rules framed thereunder the duty needs to be assessed before each removal. Instead, the Settlement Commission discarded this principle of invoice wise assessment and settled the amount on ad-hoc basis by simply reducing the retail price at 10% from the ad-hoc retail sale price i.e. weightage average of the retail sale price applied to grade-wise total clearance for the period under dispute as decided by DGCEI. It is also the say of the petitioner that for so doing, the Commission had arrived at a finding that the retail sale price declared by the petitioner firm was not as required u/s 4A of the Act. The petitioner, therefore, urged this Court to issue writ of mandamus for quashing the order of Settlement Commission dated 19-1-2011.

10. Learned Senior Counsel Mr. Trivedi further submitted that before the Settlement Commission made reduction in declared price of MRP, it ought to have held in the order that disclosures on the part of the petitioner were incorrect. Methodology adopted by Commission does not find favour either with the statute or with the parties. He also further urged that the base used by the Settlement Commission is not in existence. Weightage average concept is unknown to the dispute and there is a material difference between the approach of the Revenue and that of the Settlement Commission. Question is also raised as to how the department worked-out in the show cause notice, the amount demanded along with interest and penalty. The methodology worked out by the petitioner is annexed at Annexure-B-3 to the petition (Special Civil Application No. 9381 of 2011). The Settlement Commission has come out with a completely

different method. He has sought to rely upon judgment of the Apex Court in the case of Union of India v. Ind-Swift Laboratories Ltd. reported in 2011 (265) E.L.T. 3 (S.C.) and in the case of Paul Industries (India) v. Union of India reported in 2004 (171) E.L.T. 299 (S.C.).

11. Per contra, it is vehemently contended by Learned Counsel Mr. Darshan Parikh that the reduction of 10% per year as has been done by the Settlement Commission would lead to absurdity of the figure as there would be a substantial reduction of 50% at the end of 5 years and if that year wise reduction is further extended, effect would be of getting a negative sum eventually. He also further urged that it would not only have cascading effect as there are 200 other manufacturers who are waiting on the fence, but the same would lead to a chaotic situation for the Revenue. He urged this Court to consider the fact that though DGCEI needs to investigate in the allegation of large scale evasion of the tax and duties, the officials were not permitted to do so by the manufacturers, their employees etc. This very attitude, on the part of the manufacturers, which included the petitioner, requires to be deprecated severely and in the wake of this glaring facts, deduction of 10% as is done by the Settlement Commission is, in no any manner found sustainable from any angle. It is also the say of the Revenue that only theoretical basis is adopted by the Settlement Commission and thereby he has travelled outside his jurisdiction.

12. The Revenue challenged this order by reiteratively emphasizing that this was classic case of large scale evasion of Central Excise Duty and other taxes where the officials were not permitted to carry out even its functions of enquiring into this evasion. Not only they were obstructed from doing their duty, but the officials were also manhandled and, therefore, it was decided to call for the documentary evidence from other units. It is further the say of the Revenue that from the dealer of the petitioners sufficient incriminating material also was found and this clandestine removal of huge number of boxes of ceramic tiles has given rise to the show cause notice. Weightage average, according to the Revenue, had been arrived at for different grades of ceramic tiles in as much as the actual MRP, for each number of ceramic tiles, was not disclosed. It is the say of the Revenue that on studying the MRP pattern of other reputed manufacturers of the tiles, it could be revealed that price of the ceramic tiles remained static or decreased during the subsequent year and the current MRP in the year 2008-09 were never higher than the MRP prevailing during the earlier year and thus the weightage average of MRP of tiles adopted by the officers to workout the duty short paid due to undervaluation, was properly made.

13. What has been most objected is the reduction of 10% from the MRP arrived at on weighted average basis towards notional price revision and towards inflation of other cost escalation factors. It is the say of the Revenue that without any basis, Settlement Commission deemed the artificial 10% increase in price in the next year and thereafter reduced the weightage average MRP by 10% to arrive at MRP for the year 2007-08 ignoring completely the considerations like

grade, colour and design and, thereby erred in reducing MRP for the year 2007-08.

14. Revenue also emphasized that the Settlement Commission is a premier Alternative Dispute Resolution body whose approach is to resolve disputes through consensus between two conflicting parties. This mechanism allows tax payers to come forward clean by disclosing truly its income but, this mechanism cannot work de hors the objectives and intent of statute.

15. Before adverting to the contentions raised by both the sides, it needs to be mentioned, at the outset, emphatic challenge is made to the impugned order of the Settlement Commission as both the sides are unhappy and the method adopted by the Settlement Commission intrigues both of them. Insistence of both the sides is not to sustain the said order with a further request that it must be held that the Commission has travelled beyond its jurisdiction. In such a situation, firstly, the authority, sought to be relied upon, if is looked at, before the Apex Court in the case of Paul Industries (India) v. Union of India (supra), challenge was to the decision of dismissal of the writ petition by the High Court challenging the correctness of the order passed by the Settlement Commission. The Apex Court held that the High Court was obliged to go into the question as to whether the original order passed by the Settlement Commission was in accordance with law or not. It was argued before the Apex Court that while passing the original order and fixing the duty, the Settlement Commission did not take into consideration the value of lowest transaction. The Apex Court held that since questions raised were pure questions of law, High Court was not justified in not going into the merits of the original order. Relying on this decision, learned Senior Advocate Mr. Trivedi submitted that the question raised in these petitions is a pure question of law, in as much, as under the existing provision of Central Excise Act and other provisions applicable to the present case, there was no authority with the Settlement Commission to arrive at the MRP in a manner in which it has done and thereby finalized the amount of Rs. 15,82,961 /-.

16. The second question pertains to a decision of the Apex Court where the Apex Court has held that so far as findings of fact recorded by the Commission or question of fact are concerned, the same is not open for examination either by High Courts or the Supreme Court.

It is not for the High Court to substitute its own opinion when the order of the Settlement Commission was not challenged on merits.

The Apex Court has held as under :-

21. An order passed by the Settlement Commission could be interfered with only if the said order is found to be contrary to any provisions of the Act. So far findings of the fact recorded by the Commission or question of facts are concerned, the same is not open for examination either by the High Court or by the Supreme Court. In the present case the order of the Settlement Commission clearly indicates that the said order, particularly, with regard to the imposition of

simple interest @ 10 per cent per annum was passed in accordance with the provisions of Rule 14 but the High court wrongly interpreted the said Rule and thereby arrived at an erroneous finding.

22. so far as the second issue with respect to interest on Rs. 50 lacs is concerned, the same being a factual issue should not have been gone into by the High Court exercising the writ jurisdiction and the High Court should not have substituted its own opinion against the opinion of the Settlement Commission when the same was not challenged on merits.

17. It can be read from this judgment that request made by both the sides is to interfere with the order of the Settlement Commission on the ground that the said order is found to be contrary to the provisions of the Act applicable to the case of the petitioner. However, the Court shall have to also interfere with the findings of the facts recorded by the Settlement Commission, in as much, as the provisions which are made applicable to the fact are found erroneous. As the question appears to be essentially more a question of law than the question of fact, for answering the disputed question raised before this Court by both the sides, it would be pertinent to reproduce, at this stage, the provisions of Central Excise Act. Section 4A of the Central Excise Act reads as under :-

Section 4A. 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 chargeable to duty of excise with reference to value, 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 the 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 and 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.

18. These provisions are meant for valuation of the excisable goods with reference to the retail sale price. What is required of a manufacturer is to declare the retail price of the goods which are governed by Notification in the Official Gazette specifically the retail sale price declared on excisable goods less the amount of abatement as may be declared by the Government by Notification in the Official Gazette. Thus in other words, after deduction of the abatement, as may be declared by the Government, on the excisable goods, the reference to the value will be retail sale price of such goods.

In the event of any clandestine removal of such excisable goods by the manufacturer without declaration of the retail price of such goods on the package or if the sale price is declared, which is not the actual sale price of such goods, or if there are events of tampering with or altering retail sale price on the package of such goods, the authority is empowered to ascertain the retail sale price of such goods in a prescribed manner.

19. For the purpose of this Section, retail sale price is the price at which excisable goods in the packed form is sold to the ultimate customer and that should be inclusive of all taxes, freight, transport charges, commission, etc. Thus, it is important to have retail sale price on the packed goods which is sold to the customer and for all practical purpose that should be inclusive of all the taxes and charges and such a price is the only consideration for the purpose of sale to the customer and would have bearing on duty to be collected.

It is also vital to note here that in the event of clandestine removal, where the sale price of such goods on the package is not declared or the same is tempered with or obliterated, Retail Sale Price needs to be ascertained for which rules have been made, known as the Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008 notified by Central Board of Excise & Customs vide Notification No. 13/2008-C.E. (NT.), dated 1-3-2008, have come into being. These rules have substituted earlier Notification No. 54/96 of 1996 dated 31-10-1996 and Rule 4 of these rules read as thus :-

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 obliterates 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.

20. It would be also relevant at this stage to make a mention of Notification No. 13/2002-C.E. (N.T.), dated 1-3-2002 which is a notification in exercise of the powers conferred u/s 4A for allowing the abatement of 45% from MRP for determining the assessable value of Ceramic tiles. Ceramic tiles manufactured without availing Cenvat credit paid on input and manufactured in a factory without electricity attracted Central Excise duty at 8%. It can be thus seen that the petitioner Suzlon Ceramics was clearing its excisable finished goods on payment of 8% ad valorem duty at the value determined by them after availing abatement of 45% of the MRP declared in their Central excise invoices. From the rival contentions it is noticed that large scale clandestine removal was noted by the Department, by the manufacturers of ceramics, which included present petitioner, evading the Central Excise Duty and other taxes by declaring only a part of actual MRP. Resultantly, it had the effect of determining the lower assessable value after availing the abatement of 45% on such MRP. Since it was not possible for the DGCEI to conduct the coordinated search operations in the wake of sever resistance as mentioned hereinabove, the documents were called for. The course adopted by the officers of the department was to rely on the searches conducted at the premises of the dealers of the manufacturers and record their statements and thereby it issued the show cause notice levying the differential duty of Rs. 19,43,037/- including the demand of additional interest and penalty. Present petitioner M/s. Suzlon was keen to settle the case. It approached the Settlement Commission but they maintained that there was enhanced extra consideration of Rs. 35/- per box as against the single average of the highest and the lowest extra consideration. However, they do not subscribe to the correctness of the basis on which the demand for differential duty had been raised. According to the petitioner it had admitted the enhanced liability to the tune of Rs. 13,46,967/- by raising extra consideration of Rs. 35/- per box.

They worked out the detailed consideration to such admitted additional duty liability but they severally objected to the concept of weightage average of MRP, in as much as Rule 4 of the Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008 had been followed for the same. According to the Revenue the petitioner had not come up with full admission of the duty liability and had not disclosed the actual MRP at which the goods were sold to the dealer. In absence of any information, the only alternative was to take weightage average of each variety of grade and tiles cleared after 2008 when the prices were revised. The invoicing pattern gave details of the tiles cleared after 15-2-2008 and the weightage average for 1 year therefore was taken to give more reliable basis and that was the best possible alternative available to the Revenue.

21. The Settlement Commission though having noted that the petitioner had not tendered any explanation for not disclosing the actual selling price, it worked out a possibility for the petitioner by finding that such records were not maintained and the details, which formed the basis for computation of short levy, may not be available and appreciated the fact that the details were voluntarily submitted by the petitioner and there was no indication that such records containing data on actual price realization were present. Settlement Commission did not insist on the actual sale price although making a mention that such actual duty liability would have been ideal situation but due to the absence of the requisite information, this was not feasible.

22. The Settlement Commission also noted the objection on the part of the Revenue to the revised duty liability accepted by the petitioner on the ground that it did not represent the whole range of transactions. It also appreciated the fact that the information gathered from the dealers by way of the statements, represented only less than 10% of the total 1451 invoices issued at the relevant time of 19-4-2007 to 15-2-2008. It was also suspected that there may be extra consideration, which may be higher than the consideration found in the statement and the Bench also considered such arguments.

23. The Commission was also of the opinion that the weightage average of MRP, which is the price adopted by the Revenue provided a good basis if the same falls within the principles of valuation laid down u/s 4A(4) of the Central Excise Act read with Valuation Rules under Notification No. 13 of 2008. Noting all these aspects, the Bench ruled thus :-

21. The Bench agrees with the applicant that the criteria of the weighted average of subsequent clearances for the period of one year does not fall within the ambit of Rule 4 of the said Rules. However, the Rules also provide for a residual provision under Rule for valuation in accordance with the principles and general provisions of the Section 4A(4) of the Act. The main concern of the applicant in adopting the weighted average price of subsequent period is that revised price should be higher in the normal course compared to the existing price. The Bench finds that this argument is quite reasonable and that whenever there is price

revision, due allowance is given towards inflation and other cost escalation factors such as higher price of inputs. Taking these aspects into consideration, the Bench finds that it is reasonable to accept a notional upward price revision of 10% for the subsequent period in this case to arrive at the MRP for the relevant period. Accordingly, the Bench considers that the most practical approach to settle the revised duty liability is by extending the proportionate reduction in weighted average MRP of the subsequent period i.e. (2008-09) by a factor of 10% to arrive at the average MRP for the relevant period under the SCN, that in 19-4-2007 to 15-2-2008.

22. Accordingly, the additional duty liability on account of undervaluation given in Annexure D to the SCN has been reworked as follows :-

Quality of the floor tiles manufactured and cleared as per invoice and CD

No. of Boxes cleared on payment of duty

MRP adopted for assessment Under Central Excise (Rs.)

Revised average MRP for 1-2-2007 to 15-2-2008 (Col6*100/110)

Differencein the assessable value of the purpose of calculating differential duty (Rs.)

Differential duty (8% + 2% + 1%) Rs.

1

2

3

4

5

6

Premium

418844

100

158.18(174)

1,34,03,008/-

11,04,408/-

Gold

94347

80

144.55(159)

33,49,319/-

2,75,984/-

Silver

56109

60

112.73(124)

16,27,161/-

1,34,078/-

Reject

6621

40

74.55(82)

1,25,799/-

10,366/-

1

3200

0

174@

3,06,240/-

25,234/-

Total

579121

$

1,88,11,527/-

15,50,070/-

@ The said quality of tiles have been cleared without payment of duty and the MRP adopted by DECEI for the said quality has been accepted by the applicant in their revised worksheet at S. No. 1335.

$ Figures in bracket represent the weighted average MRP worked out by Revenue for raising the demand.

23. The above figure, though lower than the duty demanded in the SCN, is higher than the enhanced duty liability admitted by the applicant. The Bench considers that the duty liability worked out as above is the most reasonable and it is the best possible in the given facts and circumstances of the case where the actual data on the prices are not available.

24. Thus it can be said that the Settlement Commission though on one note having been convinced that the petitioner had not made the actual data of MRP available before the Commission and had deliberately evaded the duty by way of under-valuation and cash transaction and also having convinced that the Revenue, had built up the case, substantially on the basis of the data and documents, only on the ground that the petitioner was very cooperative and had come forth for the settlement proceedings, worked out a formula which is foreign to the existing law.

25. Admittedly for the period for which the MRP was being worked out was from 19-4-2007 to 15-2-2008. At the relevant point of time, the Central Excise Rules, 2008 were not in existence. But at the same time, instead of going as per the provisions of the law the notional price revision of 10% for subsequent period, for arriving at MRP for the relevant period, and in the name of practical approach for the subsequent period, has made reduction in the weighted average MRP by the factor of 10% is wholly unacceptable and, therefore, as rightly submitted by the learned advocate for the Revenue, the possibility cannot be ruled out that eventually this reduction could bring weighted average MRP to nil and it would result into ridiculous preposition. As the policy adopted by the Settlement Commission is neither legal nor in any manner conducive to the object of the Act and as the same is challenged by both the sides and as fallacy of reasoning had been well made out, we are of the firm opinion that this entire basis cannot be sustained and the same needs to be set aside. In this premise, the order of the Settlement Commission shall have to be quashed in these proceedings. We are conscious of the decision of the Apex Court given in case of Union of India v. Ind-swift Laboratories Ltd. (supra) that findings of facts recorded by the Commission or questions of facts are concerned, the same are not open to examination by the High Court. However, the same can be interfered with when order is contrary to the provision of the Act. Having found the order of Settlement Commission contrary to the settled principles and provisions of law, the same is being interfered with.

26. Of course, the Court shall not substitute its reasonings nor will it enter into the arena meant for the Settlement Commission on the basis of materials presented by both the sides so as to work out detailed calculations for settling of rival claims of the parties. It would be sufficient to quash the order and direct the Settlement Commission to adjudicate the issue by following directions of this Court which are as under :-

(1) The impugned order of the Settlement Commission passed on 19-1-2011 is hereby quashed. Both the parties are directed to approach the Settlement

Commission within 8 weeks of receipt of this judgment.

(2) The petitioner M/s. Suzlon Ceramics shall produce the actual details of MRP (Maximum Retail Price) of subsequent years, subsequent to 15-2-2008.

(3) MRP of subsequent years, if is not available, as the Settlement Commission also noted in its order, MRP of similar quality shall be produced by the petitioner. Similar formula, as is given under Rule 4A of Central Excise Rules, 2008 shall be worked out by the Settlement Commission to arrive at MRP.

(4) On arriving at such MRP the differential duty shall be worked out on Revised MRP from 19-4-2007 to 15-2-2008 and on the basis thereof, the interest, fine and penalty shall be also worked out for being levied on the petitioner, if found necessary by the Commission.

It is being further clarified that consequently the immunity otherwise available from the prosecution under the Central Excise Act, 1944, would not be available to the petitioner in wake of this challenge. However, nothing observed hereinabove shall influence the Settlement Commission in adjudicating the issue presented before it independently, and also pass necessary order granting immunity if the Commission so deems it fit.

In this premise, both the petitions are accordingly disposed of. Parties shall bear respective costs of their petitions.

