REGISTERED / AD

FAX : 0532-2400149

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 09/11/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/71048-71049/2016-EX[DB] dated 05/07/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the **Central Excise and Salt Act, 1944.**

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/70055/2015	**TYCON AUTOMATION PRIVATE LIMITED** B-54 SECTOR-63, ELECTRONIC CITY NOIDA,UP 201301
2	E/70056/2015	**DINESH KUMAR BHARDWAJ** C/O TYCON AUTOMATION PRIVATE LIMITED, B-54, SECTOR-63, ELECTRONIC CITY,NOIDA UP-201301

	Name and Address of Respondent
3	C.C. & C.E. & S.T.-Noida C-56/42...SECTOR 62, NOIDA, UTTAR PRADESH-201307
4	C.C. & C.E. & S.T.-Noida C-56/42...SECTOR 62, NOIDA, UTTAR PRADESH-201307

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Other Appellants and Respondents as per Annexure

Copy To

5Advocate(s) / Consultant(s):

NITYA TAX ASSOCIATES
B-3/58, 3RD FLOOR,
SAFDARJUNG ENCLAVE, NEW
DELHI-110029

23-11-16

6 Bar Association, CESTAT, Allahabad

7 Director Publications, Customs, Excise, I.P. Estate, Delhi

8 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

9 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

10 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

11 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

12 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

13 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

14 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

15 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

16 C.D.R. 17 Office Copy 18 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
REGIONAL BENCH : ALLAHABAD

Appeal No. : E/70055 & 70056/2015-[DB]

Arising out of OIO No.12/COMMR/NOIDA-1/2015-16 dated 30.06.2015 passed by Commissioner, Central Excise, Noida-1.

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : No
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes
3. Whether His Lordship wishes to see the fair copy of the Order? : Seen
4. Whether Order is to be circulated to the Departmental Authorities? : Yes

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1) Tycon Automation Private Ltd.
2) Shri Dinesh Kumar Bhardwaj , Tycon Automation Pvt. Ltd.

...APPELLANTS

VERSUS

C.C.E., Noida ...RESPONDENT

APPEARANCE

Shri Puneet Bansal & Shri Prateek Jain, Advocates for the appellant
Shri Chatru Singh, Asstt. Commr. (A.R.) for the Department

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

DATE OF HEARING : 05.07.2016

DATE OF PRONOUNCEMENT : 19. 08. 2016

FINAL ORDER NO. 71048 - 71049/2016

Per Mr. Anil Choudhary :

The appellants are manufacturer of control panels (automation solutions), are in appeal against Order-in-Original passed by Commissioner of Central Excise, Noida whereby the demand of Excise duty have been raised on bought out items.

2. The brief facts are that vide show cause notice dated 28/5/2014, for the period May, 2009 to March, 2014 demand of Rs.1,96,00,112/- was proposed as it appeared to revenue that the appellant have short paid Excise duty by not paying duty on the bought out items supplied directly to the customers from their separate trading premises, during the course of investigation. On perusal of the purchase orders submitted by one of the client of the appellant, it appeared that the client had been placing orders on the appellant including composite order for supply of control panel along with drive and thereafter its installation, erection and commissioning. It also appeared that the appellant is supplying control panel to their buyers consisting of inbuilt drive. These panels are used for controlling the operation of plant and machinery as per the requirement. The control panel supplied by appellant cannot work without the bought out items namely drive installed in the same. On inspection of the control panel, it appeared to Revenue that the panel is designed to suit the requirement of the drive. Without drive the control panel is just a display box. Both, the control panel and the drive are dependent on each other and the entire machinery cannot function or work without any of them. Reliance was

also placed by Revenue on the statement of Mr Dinesh Kumar Bhardwaj, Director of the appellant wherein he stated, explaining the function of important parts. He stated that PLC/DCS is a programmable Logic controller/distributed control system and used for control and monitoring of any application. DCS is used for complex process, application systems; that the drive is speed control device, it controls the speed of the motor for running the process of the machines. Explaining further about drive, he stated that there are different types of drive based on rating and voltage, that are fitted in the control panel manufactured by us as per the requirement/order of the customer. Drive is a speed control device, it controls the speed of the motor for running the process of the machine, that the drives are being supplied by them directly to their customers from A.B.B. as per their orders. The invoice is raised by A.B.B. in their name with customer as consignee. That subsequently a separate commercial invoice is raised by their trading unit to the customer for recovering the payment and the value shown in their commercial invoice is higher than the invoice price of A.B.B. The price variation varies from invoice to invoice. In some cases where the drive have been supplied directly, the same is received by them from the customer for testing purpose. That they are aware of the valuation rules for the purpose of arriving at the transaction value for the purpose of payment of duty on manufactured goods. Though they are expert, they do not undertake erection of control panels. However, on request of a customer they supervise the erection work. That they only undertake commissioning of the control panel at the customer's site for which they are paying service tax as per law on the same. The SCN was adjudicated and the proposed demand confirmed holding that the value of drives and other bought out items shown as sold to their customers against commercial invoices, through their trading unit is liable to be added to the value of control panels manufactured by the appellant in terms of Rule 6 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. The interest was also demanded and further penalty was imposed of equal amount. The amount of pre-deposit made during investigation and enquiry of Rs.50, 47,000/- was appropriated. Further a penalty of Rs.20 lakhs was imposed on the Director of the appellant, Shri Dinesh Kumar Bhardwaj, the other appellant before this Tribunal.

3. The learned counsel for the appellant Mr. Puneet Bansal appearing along with Mr. Prateek Jain have urged that the appellant is a provider of automation solutions for monitoring or controlling machines or process lines in manufacturing units like paper, sugar etc. They only manufacture the control panel. The other items required namely drive, computer, printer, C.C.T.V. camera etc. etc. are all bought out items which are supplied either by the third party manufacturers or from their trading unit directly to the customers. The appellant do not undertake installation of the Control Panel at the customer site. Installation is either undertaken by the customer itself or by other third party service provider engaged by the customers. In a few cases the customers engaged the appellant for supervision of the installation or for commissioning. Namely, the appellant undertakes the following three types of transactions: -

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(a) Pure Manufacturing Sale– where the customer only buys control panels from the appellant which are manufactured by the appellant and where none of the items are traded by the appellant. The appellant pays applicable excise duty and CST/VAT on the control panel.

(b) Pure Trading Sale–where the customer buys control panels, drives and bought out items from the appellant where none of the items are manufactured by the appellant. The appellant pays applicable CST/VAT on the traded goods.

(c) Composite Sale– where customer buys control panels, drives and bought out items from the appellant where only control panels are manufactured by the appellant. The appellant pays applicable excise duty and CST/VAT on the control panel and applicable CST/VAT on the traded goods supplied from their trading unit.

4. So far the traded goods are concerned, most of the sales are done by way of in Transit Sale Model where the goods are directly shipped from the vendors to the customers and billed to the appellant. The trading unit of appellant further raises invoice for such goods on the customers. For example for drives, in Transit Sale is done under a channel partner agreement with A.B.B. Ltd., wherein the appellant purchases drives from A.B.B. Ltd. and get it shipped directly to the customers' premises. None of the bought out items are received by the appellant in its manufacturing premises. The fact of non receipt of bought out items is acknowledged and an undisputed fact by the Revenue. By way of an alternate argument it was also stated that almost all the bought out items are excise duty paid by the respective manufacturer and even if it is assumed that the appellant is liable to pay duty on the same, in that case the appellant will be entitled for input Cenvat Credit on such items. In a very few cases the appellant receives back the drive (from the customers) in its manufacturing unit

to check its compatibility with the control panel. After checking compatibility, the drives are separately returned back to the customer. In such cases the control panels are removed on payment of duty without the drive fitted into it. Usually the appellant has its own drives available in their factory premises which are used for carrying out compatibility testing. It is further urged that control panel is a metal enclosure containing various components and display control/monitoring equipment. It is an independent product manufactured by the appellant as well as available in the market. Control Panel has space left in it for fitment of the drive. The drive controls the speed of the motors. Essentially the drives are part of motors, though fitted inside the control panel at the customer's site. The drive being distinct item cannot be treated as an essential part of the control panel. Other bought out items required by the customer for setting up automation have no connection with the control panel, as such. Further the drive and other bought out items are optional traded items which are supplied by the appellant to customers based on their request. It is further evident that during the period of dispute, the appellant executed 117 purchase orders out of which only 56 purchase orders were composite. Even out of the 56 composite orders the appellant supplied drives only in the case of 33 such orders. The appellant have also relied on the opinion, in response to show cause notice, by Professor Hari Om Gupta, Ex. Professor of IIT, who visited the factory and the trading premises of the appellant and in his opinion explained the function of Control Panel, drives and other bought out items and have concluded that drives and other bought out items are independent items and not essential part of control panels. In the investigation conducted by revenue from the customers of the appellant namely Kamakshi Papers, Dev Priya Products and Bajaj Kagaj Private Ltd., it is important to note that the customers of the appellant are interested in automation system and not stand alone control panel, drive or bought out items. It is further evident from the letter of 'Kamakshi Papers' written to Revenue in response to query clarifying that drive is not part of control panel. In case of B.K.P.L., drive and control panell were both traded by the appellant as control panel was not manufactured by the appellant in that case. Dev Priya Products purchased drives and control panel separately from the appellant. It is further urged that for the goods not manufactured by the appellant and simply traded from their trading division, no excise duty is leviable. It is also not the case of Revenue that the bought out items had entered the factory or the manufacturing premises and under such admitted position, no excise duty is leviable on the traded goods. It is further urged that the show cause notice was issued on 28/5/2014 for the period May, 2009 to March, 2014, there being no element of suppression of facts or any contumacious conduct, the extended period have been wrongly invoked and the demand for extended period is fit to be set aside. It is also admitted fact that the appellant maintains separate accounts for both their manufacturing unit and the trading unit and on this score also, levy of Excise duty on traded goods is not tenable and fit to be set aside. It is further urged that Rule 6 of the Valuation Rules have got no application in the facts of the case and the same have been applied wrongly. The said rule is applicable in such case where price is not the sole consideration for sale of manufactured goods. There being no such finding in the appellant's case, the application of said rule is misconceived and bad. It is further urged that there is no allegation of clearance of the bought out items from the factory and for this reason also the demand is fit to be set aside.

5. The learned D.R. for Revenue relied on the impugned order. It is further urged by learned D.R. that the control panels supplied by the appellant cannot work without bought out items namely drive, which is installed in the control panel, post clearance. Further, the control panels are designed to suit the requirement of the drive and without the drive, the control panel is incomplete and cannot function. As such, the impugned order is fit to be upheld. The appellant have managed their affairs in such a manner of fitting the drives in its manufactured goods namely control panel, subsequent to clearance in order to avoid the payment of Central Excise Duty. Reliance is placed on the ruling in the case of Electronics and Controls Power Systems Private Ltd. Vs. CCE, Bangalore, 2010 (257) ELT 578, wherein it was held that bought out items namely batteries supplied with UPS as optional item, wherein the issue was decided against the assessee.

6. Having considered the rival contentions. We find that it is an admitted case of revenue that the appellant have not brought the bought out items in their factory of manufacture and it is further admitted fact that the control panels are not cleared along with bought out items from the factory of manufacture. Under such circumstances,

we hold that there is no application of Rule 6 of the Valuation Rules, 2000. We further hold that there is no mis-declaration of the transaction value by the appellant. Under the facts and circumstances that the appellant have placed the orders on third-party vendors for supply of the bought out items directed to their customers and have paid the applicable sales tax/VAT, the same does not attract levy of excise duty. We also take notice of the fact that in para No. 27.14 of the impugned order the Adjudicating Authority observed as follows: -

> *"I find that the bought out items have not been brought to the factory premises and have not been used in the manufacturing of the goods - control panels. The bought out items were directly sent to their customers and being essential and inseparable part of the control panel, they were installed at the site by them."*

7. Thus we find that it is an admitted fact that the bought out items have never entered the factory premises of the appellant so as to become part of the manufactured control panel nor the same have been cleared along with the control panels. Accordingly, we allow these appeals and set aside the impugned order. The appellant will be entitled to consequential benefits in accordance with law including refund of amount deposited during investigation. Accordingly, the personal penalty on the Directors Mr. Dinesh Kumar Bhardwaj is also deleted.

(Pronounced in the open Court)

Sd/- Sd/-

(ANIL G. SHAKKARWAR)
MEMBER (TECHNICAL)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Patel/-

प्रमाणित प्रति / Certified True Copy
17.11
सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण / (C.E.S.T.A.T.)
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