

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

Dated: 22/09/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70856-70858/2016-EX[DB] dated 14/09/2016

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.

[Signature]
Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/3441/2004	ORIENTAL CARBON & CHEMICALS A-14, INDUSTRIAL AREA NO 1 SOUTH SIDE OF G.T.ROAD POST BOX NO 56, GHAZIABAD-201001
2	E/3442/2004	A.K.SINGH GM (SALES) ORIENTAL CARBON & CHEMICALS A-14, INDUSTRIAL AREA NO 1 SOUTH SIDE OF G.T.ROAD POST BOX NO 56, GHAZIABAD-201001
3	E/3443/2004	ANAND ARYA DIRECTOR A-14, INDUSTRIAL AREA NO 1 SOUTH SIDE OF G.T.ROAD POST BOX NO 56, GHAZIABAD- 201001
		Name and Address of Respondent
4		C.C.E. & S.T.-Ghaziabad 202...WING A C.G.O. COMPLEX-II, KAMLA NEHRU NAGAR, GHAZIABAD, UTTAR PRADESH-201002

Other Appellants and Respondents as per Annexure

Copy To

5 Advocate(s) / Consultant(s): SH NISHAT MISHRA, ADV
B2-3/4-31, SAROJANI APARTMENTS
SAROJINI NAIDU MARG
ALLAHABAD-211001

O/c

[Signature]
27/10/16
ISSUED ON

SIGN. (DESPATCH SECTION)
CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
38, M. G. MARG, ALLAHABAD-211001.

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), Vaidhyaram Street, T. Nagar, Chennai-17

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

11 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

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

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

14 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38

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

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

17 C.D.R.

18 Office Copy

19 Guard File

Asstt. Registrar

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

Appeal Nos. : E/3441-3443/2004-EX [DB]
With C.O. No. E/Cross/312/2004

Arising out of Orders-in-Original Nos. 07/Comm./GZB/2004 dated
31.03.2004 all passed by Commissioner of Central Excise, Ghaziabad.

For approval and signature:

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

-
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
-

Oriental Carbon and Chemicals, A.K. Singh, G.M. (Sales), Anand Arya,
Director. ...APPELLANT

VERSUS

Commissioner of Central Excise and Service Tax, Ghaziabad.
...RESPONDENT

APPEARANCE

Shri A.R. Madhav Rao, Mr. Nishant Mishra and Mr. Rajat Mittal,
Advocates for the appellants.
Shri D.S. Mann, Assistant Commissioner, (A.R.) for the Department.

CORAM:

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

DATE OF HEARING & PRONOUNCEMENT : 19-05-31-08-2016

DATE OF PRONOUNCEMENT : 14-09-2016

FINAL ORDER NO. 70856 - 70858/2016

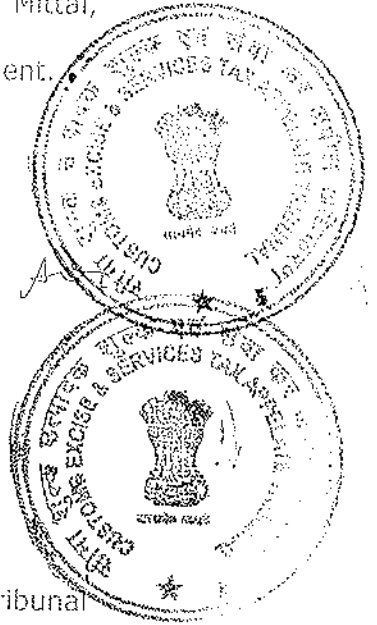
Per Mr. Anil Choudhary :

These appeals of assessee have come up before this Tribunal pursuant to order of Hon'ble High Court Allahabad in C.E.A. No. 31 of 2005, order dated 14/10/2015 whereby the earlier final order passed by this tribunal dated 19/10/2004 was held unsustainable and set aside and remanded back to this Tribunal with the following directions to pass an order a fresh in accordance with law: -

"(i) The Tribunal shall examine whether there was any evidence of removal of carbon black by the appellants without invoices clandestinely.

(ii) The Tribunal shall examine whether the appellants had received any additional consideration than the consideration mentioned in the invoices for the invoice quantity of carbon black including slightly excess quantity

(iii) If Tribunal finds that the appellants had not received any additional consideration for the slightly overfilled quantity of carbon black in the packing bags dispatched to



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buyers, then it shall examine whether Central Excise Duty can be demanded on such slightly excess/overfilled quantity of carbon black when the duty was payable on ad valorem basis".

2. That the brief facts are that the appellant are engaged in the manufacture of carbon black falling under heading 2803.00 of the schedule to the Central Excise Act, 1985 on which duty is payable on ad valorem basis. The nature of carbon black is such that it sticks to almost all surfaces with which it comes into contact. Specifically the carbon black sticks on to the metal surfaces of the silos as well as the packing material. Due to inherent nature of the carbon black as it sticks on to any surface on contact, the exact quantum of loose carbon black produced each day cannot be measured precisely. The appellant therefore, calculates the daily production of loose carbon black on the basis of the raw materials consumed.

3. The main raw material used in the process of manufacture is the carbon black feedstock (CBFS) also called as conversion oil. The CBFS's of various grades and consequently the yield of carbon black also varies. The consumption of raw material is calculated with the help of oil flow meter which shows reactor wise oil consumption in kilograms per hour. Based on input output ratio the total production is calculated which is called book production as it is based on a standard formula and on the actual quantity of raw materials consumed. Further, to ascertain the quantum of production the stock in the silos

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is measured by way of dip measurement. Every day at the start of the morning shift the physical level of carbon black in the silos is ascertained by the dip measurement method. Such a level taken manually cannot obviously be the same at any one point mainly because of the sticky nature of the product and the heaped manner in which the carbon black is present inside the silos. The volume of the tank as ascertained by dip measurement is multiplied with the pour density of the respective black. The production so arrived at is termed as physical level of carbon black. A comparison of the result of the dip measurement with the production as ascertained from the consumption of raw materials is done to determine whether the yield of carbon black is largely on expected lines. The input output ratio between the carbon black feedstock and carbon black is normally of the order of two is to one, thus the yield percentage being in the range of 50%. The entire exercise is an exercise in approximation. The yield also depends on the grade of conversion oil used in the manufacture. In order to get over this uncertainty in the exact quantum of carbon black produced, the appellants adopt the method of accounting the carbon black manufactured in terms of the quantities packed in the three ply paper bags.

4. Further due to the sticky nature of carbon black it is impossible to precisely pack 25 KG of carbon black in each paperback. The carbon black is packed in individual paper bags by means of automatic



packing machine on drawing the loose carbon black stored in the silos. The carbon back so packed in the bag would be slightly excess or less than the standard weight of 25 kg., which every bag is supposed to contain. As carbon black is highly priced at about Rs.22,000/- to 28,000/- per kg. approx during the relevant period, the customer would not grudge if they receive a quantity slightly more than the quantity indicated in the invoice. On the other hand the customer will create a furor^o if they receive a quantity lesser than the quantity indicated in the invoice. On receipt of a slightly lesser quantity than invoiced, the customer does not make payment for the shortage leading to disputes between the parties. Due to receipt of repeated complaints from the customers of shortage, the appellant invariably for the sake of goodwill overfill the bags marginally so that in no instance of weighment of the bags by the customers, the content is less than 25 kg. of carbon black. The extra quantity of carbon black that is added or packed is to the extent of 0.3 to 0.4% of the total weight.

5. There is one more reason why the appellants filled slightly excess quantity of carbon black. Being hygroscopic in nature it easily picks up or absorbs moisture if exposed to high relative humidity. While the normal result of an exposure to humidity is gain in weight, it may so happen that even after such a gain the overall weight when ascertained at the customers end is less than the standard weight mentioned in the invoice.

6. The appellant prepares a warehouse report on day to day basis. This warehouse report contains details of the production of the different grades as indicated in the loose sheets (the production in this document refers to the physical level as available in the tank), the quantity of carbon black bagged, otherwise called as 'pulled', in the factory of the appellant and the quantity of carbon black dispatched grade wise. The warehouse report has also summary of the total quantity of carbon black dispatched on that particular day. The appellant maintains the statutory RG-I register wherein the quantities of the carbon black produced, as also the quantities of carbon black dispatched on payment of duty are entered. Since the production of carbon black cannot be ascertained in precise terms, recognizing the reality the Central excise Department had indicated to the appellants as early as in October, 1978 that the stage of accounting of carbon black in the RG-I Register is at the stage when the carbon black is packed in the bag and is ready for storage and clearance. The entry of production in the RG-I Register is made in terms of tons which is calculated by multiplying the number of bags with the standard weight of 25 kg. In the invoices issued the appellant also indicates the weight of the packing material that is paper bags. The total gross weight that is the weight of carbon black in standard tonnage and the weight of the packing material is also indicated in the invoice. There is also a clear indication that the gross weight is in approximate terms. Since the appellants overfill their bags to a marginal extent, the total



quantity received by the customer would be slightly more than the quantity indicated in the invoice. For instance if 9 m.t. is contracted for sale to a customer the quantity of carbon black that is actually received by him would be in the range of 9 m.t. plus 0.3% of 9 m.t. or 5 kg. or a total quantity of 9005 KG. This excess quantity of 5 kg. works out to about 0.32 to 0.5% of the total weight. The customer of the appellant does not pay the appellant any consideration for this excess quantity. In other words if the rate of 1 m.t. of carbon black is contracted at Rs. 100 per m.t. then the total invoice value in the case of a sale of 9 m.t. would be Rs. 900. The actual quantity of carbon black received by the customer will be 9004 kg approximately, but the appellant would receive only Rs. 900. In other words, in real terms, the amount of 900 is the sale price not for 9000 kg but for 9004 kg. Since duty is payable on carbon black on ad valorem basis, the amount on which the appellants are liable to pay duty is Rs. 900 and the appellants have duly discharge the duty accordingly.

7. That the officers of Central Excise Department visited the factory of the appellant on 30 May, 1996 and scrutinized the documents as well as undertook stock verification of the quantities of finished products and raw materials. Pursuant thereto SCN dated 28 April, 1998 was issued alleging that appellant had clandestinely cleared excess quantity of carbon black without accounting for in their RG-I Register. The allegations in the SCN were made on the basis of private

records maintained by the appellant. The fact being that although in the RG-I Register quantity per bag was shown as 25 KG but in the private record the quantity was slightly more indicated for the reasons as discussed hereinabove.

8. The SCN was adjudicated on contest and the proposed demand confirmed relating to the extended period 1993-94 to 1995-96 amounting to Rs. 85, 57, 626 along with the equal amount of penalty under section 11 AC of the Act. Further, penalty was also levied on Shri Anand Arya, Director of the appellant and Shri A.K. Singh, G.M. (Sales) of the appellant under Rule 209A of CER, 1944. Being aggrieved, the appellant had moved before this Tribunal earlier and vide final order dated 19/10/2000 the matter was remanded for *de novo* consideration with the observation that the Revenue had not conducted any enquiry regarding the trade practice of overfilling the bags in respect of the commodity carbon black. Pursuant to remand learned Commissioner vide Order-in-Original dated 31 March, 2004, again confirmed the demand of Rs.85,57,626/- with equal amount of penalty under section 11 AC of the Act and further penalty of Rs.2.5 lakhs each was imposed on Mr. Anand Arya, Director and Mr. A.K. Singh, G.M. (Sales). Being aggrieved the appellant had again moved before this Tribunal and vide final order dated 19/10/2004 reported at 2005 (183) E.L.T. 412 held that usable carbon black in excess has been packed and cleared. The duty of excise is levied and collected on

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manufacture irrespective of the fact whether any value is realised or not. As an excess quantity of carbon black has been removed, Central Excise duty is payable by the appellants. Tribunal also upheld the demand of duty with penalty. Further observing that the penalty imposed is on higher side reduced the same to Rs.20 lakhs. Further, held that no penalty is imposable on the other two appellants Shri Anand Arya, Director and Shri A.K. Singh, G.M. (Sales) in absence of any *mens rea* on their part.

9. Being aggrieved the appellant had approached Hon'ble Allahabad High Court in appeal and the Hon'ble High Court have been pleased to set aside the order dated 19/10/2004 of this Tribunal with directions as aforementioned; and also made the following observations:-

"(i) The Adjudicating Authority in pursuance of the remand order of this Tribunal made inquiries and collected some information at the back of the appellant with respect to the trade practice of overfilling of the bag. The Adjudicating Authority neither confronted the appellant with the alleged inquiry report regarding trade practice of overfilling not afforded opportunity to rebut by giving any copy of such report.

(ii) The High Court also noticed that the appellant have raised the issue that the duty on carbon black is on ad valorem basis. The department had conducted investigation with one of the purchaser namely Modi Tyres who had informed that no excess amount was paid for the excess quantity received. It is also not disputed by the

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*Commissioner that the appellant have not received any excess amount for such excess quantity of carbon black packed. Reliance was placed on the rulings of this Tribunal in **Rackitt & Colman of India Ltd. Vs. C.C.E., Calcutta 1993 (44) ECR 33** and **Manisha Pharmo Plast Ltd. 1999 (108) E.L.T. 273**, wherein it have been held that where the assessment is linked to value, the realisation of the price is the same even if the packed quantity is slightly more than the quantity projected, will not have any Revenue implication."*

10. The Tribunal found force in the second contention of the appellant aforementioned and further the Tribunal had in its first order observed that the question whether overfilling was a trade practice needed to be examined in depth. In the final order passed in second round passed by this Tribunal on 19 October, 2004, the Hon'ble High Court observed that the finding of the Adjudicating Authority that the appellant's contention regarding trade practice of overfilling carbon black does not seem to be correct, in view of the inquiry report from High Tech Carbon, Renukoot and Philips Carbon Black Ltd., Durgapur which states that precise measurement of carbon black at the time of packing is possible as it is filled automatically in bulk bags and paper bags from storage tanks. The Hon'ble High Court also found that the Adjudicating Authority neither confronted the appellant with the alleged inquiry report nor afforded any opportunity to rebut. Further, this fact have not been disputed by the Revenue also. Accordingly, the Hon'ble High Court was of the view that the Order-in-Original was

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passed in violation principles of natural justice. The Hon'ble High Court also observed that the Tribunal have completely ignored in the second round, its observation in the first final order, where the assessment is linked to value, and the price received is the same even if packed quantity is slightly more than the quantity projected, than this would not have any Revenue significance. The ruling of Hon'ble Supreme Court in case of *Commissioner of Central Excise, Mumbai vs. Fiat India Private Ltd. 2012 (283) E.L.T. 161* was also noted where the Hon'ble Apex Court upheld as under :-

"24. Section 3 of the Act provides for levy of duty of excise and Section 3(i) thereof states that there shall be levied and collected in the prescribed manner, a duty of excise on excisable goods manufactured in India at the rates set forth in the first Schedule. Neither Section 3 nor the first Schedule lays down the manner in which ad valorem price of the goods has to be calculated. This is found in Section 4 of the Act. Section 4 of the Act lays down the measure by reference to which the duty of excise is to be assessed. The duty of excise is linked and chargeable with reference to the value of the excisable goods and the value is further defined in express terms by the said Section. In every case, the fundamental criterion for computing the value of an excisable article is sold by the manufacturer, where the buyer is not a related person and the price is the sole consideration. If these conditions are satisfied and proved to the satisfaction of the adjudicating authority, then, the burden which lies on the assessee under Section 4(1)(a) would have been

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discharged and the price would not be ignored and the transaction would fall under the protective umbrella contained in the Section itself."

The Hon'ble High Court further observed that no evidence was brought on record by the Revenue before the adjudicating authority that the appellant had received any amount as additional consideration in respect of overfilling excess quantity of carbon black. It was also not the case of Revenue that the report of investigation conducted by them with one of the purchaser namely Modi Tyres, who confirmed that no excess amount was paid for the excess quantity was not on record. Further, there is no finding of the adjudicating authority that the appellants have received any excess amount for the excess quantity of carbon black so packed. Hon'ble High Court also observed that specific pleas raised by the appellant in this regard have not been considered by the learned Commissioner leading to miscarriage of justice.

11. Heard the learned counsel for the appellants Mr. A.R. Madhav Rao, Advocate assisted by Mr. Nishant Mishra and Mr. Rajat Mittal, Advocates. Also heard learned A.R. Shri D.S. Mann, Assistant Commissioner for the Revenue.

12. The learned counsel for the appellant states, referring to the pricelist filed in the financial year 1992-93 wherein the cost of packing was declared to be included in the price of the carbon black and such



pricelist was approved by the appropriate authority under the provisions of Rule 173 of CER, 1944 vide order dated 19/11/1993. Hence the part of impugned demand relating to packing material is bad and fit to be set aside as it amounts to demanding duty again without there being any revision or modification of the accepted pricelist. It is further pointed out that the bureau of Indian Standards (BIS) in their publication Indian Standard Specifications for High Abrasion Furnish-Carbon Black addition 2.2 (2003-04), IS:7497-1985 have provided in para-3: - packing and marking: 3.1 the material shall be supplied in bags. The net mass of the bags shall be 25 ± 0.25 kg. In the subsequent Indian Standard IES 10357:1990 in respect of carbon black in para-5 packing and marking it is the mentioned-the material shall be supplied in bags. The net mass of each bag shall be 25 ± 0.5 kg. The learned counsel further states that the stand of the appellant is supported by the bureau of Indian Standards who have also accepted the chances of variation and have accepted the variation of ± 0.5 kg. Under these fact also the contention of the appellant that they were filling slightly more in the bags to the extent of 0.80 for the sake of goodwill and commercial consideration is neither wrong nor amounts to clandestine removal.

13. It is also an admitted fact on record that there is no revision of the pricelist under Section 35A of the Act during the relevant period as aforementioned. It is further a fact on record that an enquiry made by



the Revenue from the customer of the appellant namely Modi Tyres, there is admission on the part of the customer of receipt of slightly excess quantity than the quantity in invoice. Further, admitted fact on record is that the appellants have neither charged or received any extra consideration for the same. Accordingly, prays for allowing the appeal with consequential benefits.

14. The learned A.R. for Revenue relies on the impugned order. It is further contended that, that as the appellant is entitled to modvat on packing material that is no question of double duty on the same. So far the reliance have been placed by the appellant's counsel on Circular No.876/14/2008-CX dated 20/10/2008 regarding allowance of maximum permissible error on net quantity by weight declared in package of cement wherein the CBEC have explained that cement is required to be packed in bags containing 50 kg. Generally bagging in cement factories is done by automatic filling machines, adjusted to pack 50 kg in a bag. However, sometimes the actual quantity filled in a bag may be little more or less than 50 kg due to inherent nature of product and the quality of machines. Due to these reasons the standard of Weight and Measure (Packaged Commodities) Rules, 1977 provides for 1% of variation (excess or short) for cement bags of 50 kg. Therefore, it has been decided that same practice of variation 1% should be allowed for cement filled in bags for the purpose of levy of Central Excise duty. Pending disputes, if any, may also be decided

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accordingly. Learned A.R. contents that the circular is of the year 2008 and the period in dispute relates to 1993-94 to 1995-96 the same is not applicable.

15. Having considered the rival contentions, we find that under the facts and circumstances in view of the standard practice followed by the appellant of filling slightly excess quantity to avoid any commercial disputes with their buyers, no case of clandestine removal is made out. We also hold that the evidence collected by the learned Commissioner behind the back of the appellant cannot be relied upon and the same have got no evidential value in absence of giving proper opportunity to object or explain the same. Moreover, the said evidence collected from other companies/manufacturers in the same line of business is also not reliable in view of the standard laid down by the BIES as noted herein above, which provides for variation of actual net weight of carbon black. On appreciating the rival contentions and the facts on record we also hold that the appellant have not received any additional consideration for the extra quantity packed. In this view of the matter, we hold that the issue is squarely covered in favour of the appellant by the precedent decision of this Tribunal in the case of Manisha Pharmo Plast Private Ltd. (*supra*) and Rackitt & Colman of India Ltd. Vs. C.C.E., Calcutta (*supra*). Accordingly, we hold that no excise duty is payable by the appellant on the excess quantity packed which is negligible and for sake of commercial consideration. Under the facts



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and circumstances, we also hold that the extended period of limitation is not invocable. Accordingly, we allow these three appeals and set aside the impugned order. The appellant will be entitled to consequential benefits including refund of pre-deposit made with interest as per Rules during pendency of this appeal. Such refund shall be granted from the date of receipt of a copy of this order. *within 45 days*

(Order was pronounced in the open Court on 14-09-2016)

Sd/-
(ANIL G. SHAKKARWAR)
MEMBER (TECHNICAL)

Sd/-
(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Patel/-

प्रमाणित प्रति / Certified True Copy
24.10.16
सहायक रजिस्ट्रार / Asst. Registrar
सीमा शुल्क, वस्तु एवं सेवा कर
अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, अलीगढ़-201001
38, M. G. MARG, ALIGADH-201001