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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/177 /1998 - EX[DB] & E/168/1999 Date 12/05/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S WINTECH TAPARIA LTD
THROUGH MANAGING DIRECTOR,25/1,YASHWANT NIWAS ROAD,INDORE(M.P.)
M/S WINTECH TAPARIA LTD

2.M/S,WINNER TECHNOLOGY(P)LTD.,
VILL. BAKANER,DISTT.KHARGONE,
TEHSIL-GUJARI

Appellant
Vs
Respondent

C.C.E. INDORE

I am directed to transmit herewith a certified copy of **Final order No.** 310-311/09- **EX[DB]** dated 20-4-09

passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
   C.C.E. INDORE
   MANIK BAGH PALACE, POST BOX NO. 10, INDORE 452001 (M.P.)
2. Adv. / Consult
   MR.A.R.MADHAV RAO
   B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-29

3 C.D.R
4 ~~J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise. I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
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14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
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18. HON'BLE PRESIDENT

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. I

Excise Appeal No. 177/1998 & 168/1999

[Arising out of Order-in-Original No. 208/Commr/IND-I/97 dated 13.10.1997 passed by Commissioner of Central Excise, Indore.]

For approval and signature:

Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Mr. M. Veeraiyan, 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?	:	Yes
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	No
3. Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4. Whether Order is to be circulated to the Departmental authorities?	:	No

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M/s. Wintech Taparia Ltd. — Appellant

Vs.

Commissioner of Central Excise Indore — Respondent

And

Commissioner of Central Excise Indore — Appellant

Vs.

M/s. Winner Technology (P) Ltd. — Respondent

Appearance:

Mr. B.L. Narasimhan, Advocate for the Appellant
Mr. V. Choudhary, SDR for the Respondent

CORAM:

Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

Date of Hearing/decision : 20.4.2009

FINAL **ORAL ORDER NO. 310-311/09-EA**

Per Justice R.M.S. Khandeparkar (for the Bench):

Heard Mr. B.L. Narasimhan, learned advocate for the appellant and Mr. V. Choudhary, learned DR for the respondent.

2. Since common questions of law and facts arise in both the appeals, they were heard together and are being disposed of by this common order.

3. These appeals arise from order dated 13.10.97 passed by Commissioner of Central Excise, Indore. By the impugned order, the learned Commissioner has, while holding that in relation to manufacturing activity carried out beyond the jurisdiction of Indore Commissionerate it will have no jurisdiction, rejected the contention of the appellant-assessee that the food processing line is not a manufacturing activity and does not bring about new product and therefore not excisable, and thereby confirmed the demand and levied the penalty.

4. On the strength of certain intelligence report that there was clandestine manufacture and clearance of excisable goods i.e. food processing machinery by the appellant -assessee, a show cause notice came to be issued on 7.4.92 to the appellant-assessee and after hearing the parties,

the impugned order came to be passed. It was held by the Commissioner that the food processing line is an activity which is covered by the definition of manufacturing activity and hence the same is dutiable to the extent such activity is carried out within the jurisdiction of Indore Commissionerate. So far as such activity is carried out beyond the territorial jurisdiction of Commissionerate of Indore, it lacks jurisdiction to deal with the matter . The Commissioner under the impugned order confirmed the demand of duty of Rs. 23,64,409/- in terms of Rule 9(2) of the Central Excise Rules, 1944 read with section 11 A(1) of Central Excise Act, 1944 and after granting credit to the tune of Rs. 40,639/- balance of Rs.23,23,769/- to be recoverable from the appellant-assessee. It also confirmed the demand of Rs.89,774/- being the duty payable on the Pallete Fryer with day tank. While dropping the claim of Rs. 92,573/-, some scrap which was valued at Rs. 67,500/- was ordered to be confiscated with option to redeem the same on payment of Rs.13,000/- and penalty of Rs.2 lacs was imposed in terms of Section 173Q of the said Rules while holding that assessee was also liable to pay interest in terms of Section 11AB of the Central Excise Act, 1944.

5. The main controversy in the matter relates to the question as to whether food processing line is to be held manufacturing activity and hence is excisable, more particularly bearing in mind circular No. 58/1/2002-CX dated 15.1.2002. While the Commissioner has held that various equipments placed together results into an emergence of new product with distinct function i.e. food processing and therefore it amounts to manufacture of goods in terms of Section 2(f) of the Central Excise 1944. The finding

arrived at by the Commissioner in relation to the description of the food processing unit apparently disclose the conclusion by the Commissioner to the effect that different equipments procured and received by the appellant on different dates and even from the places of supplier to the site at Indore the equipments so supplied could not be considered as supplied CKD condition. However, all such equipments supplied individually have been installed and erected at the work site of their customer resulting in emergence of food processing unit. The unit so manufactured comprises of machines/ equipments which are placed in one line at one place interconnected with pipes / power results in emergence of food processing unit duly fixed to the earth. With this finding, it has been held by the Commissioner that the entire activity is correctly covered by the definition of "manufacturing activity" and that, therefore, the argument that 'plant' as a whole cannot be bought and sold in the market and, therefore, not dutiable, cannot be accepted. On the contrary, all the equipments which are collected and connected to each other at the site can be dismantled and bought and sold in CKD condition. Referring to Rule 2(a) of Rules of interpretation of tariff laws, the Commissioner has held that the same provides that the goods in incomplete or unfinished condition can attain the essential character of the finished or complete goods even if removed in unassembled or disassembled condition. And, therefore, each site can be treated as a factory or manufacturing activity which is capable of being bought and sold in the SKD condition and therefore, duty is leviable on such goods.

6. Learned advocate appearing for the appellant drew our attention to the said Circular No.58/1/2002-CX and in particular clause (iv), (v) and (vi) thereof, and submitted that the Board after taking into consideration various decisions of the Apex court which have been enumerated in the said circular has laid down certain criterias to identify whether particular project can be said to be a manufacturing activity and can be subjected to excise duty. The same discloses that the goods which are incapable of shifting from one place to another for the purpose of marketing, except by dismantling, and in the form of component parts cannot be considered as the movable or excisable goods.

7. Clause nos. (iv), (v) and (vi) of the said Circular reads as under:

(iv) Integrated plants/machines, as a whole, may or may not be 'goods'. For example, plants for transportation of material (such as handling plants) are actually a system or a net-work of machines. The system comes into being upon assembly of its component. In such a situation there is no manufacture of "goods" as it is only a case of assembly of manufactured goods into a system. This cannot be compared to a fabrication where a group of machines themselves may be combined to constitute a new machine which has its own identity/marketability and is dutiable (e.g. a paper making machine assembled at site and fixed to the earth only for the purpose of ensuring vibration free movement)

(v) If items assembled or erected at site and attached by foundation to earth cannot be dismantled without substantial damage to its components and thus cannot be reassembled, then the items would not be considered as moveable and will, therefore, not be excisable goods.

(vi) If any goods installed at site (example paper making machine) are capable of being sold or shifted as such after removal from the base and without dismantling into its components/parts, the goods would be considered to be moveable and thus excisable. The mere fact that the goods, though being capable of being sold or shifted without dismantling, are actually dismantled into their components/parts for ease of transportation etc., they will not cease to be dutiable merely because they are transported in dismantled condition. Rule 2(a) of the Rules for the Interpretation of Central Excise Tariff will be attracted as the guiding factor is capability of being marketed in the original form and not whether it is actually dismantled or not, into its components. Each case will therefore have to be decided keeping in view the facts and circumstances, particularly whether it is practically possible (considering the size and nature of the goods, the existence of appropriate transport by air, water, land for such size, capability of goods to move on self propulsion -ships- etc.) to remove and sell the goods as they are, without dismantling into their components. If the goods are incapable of being sold, shifted and marketed without first being dismantled into component parts, the goods would be considered as immovable and therefore not excisable to duty."

8.. Plain reading of the said guidelines laid down by the Board disclose that in case of goods which are installed at a site, if they are capable of being shifted and sold after removal from the base without being dismantled into its components /parts, irrespective of the fact whether the said goods are actually removed and dismantled as components/ parts whenever they are shifted, would be considered as the movable goods and, therefore, excisable.

However, if such goods are necessarily to be dismantled into component /parts for their transportation and shifting from one place to another place, then they cease to be movable goods and therefore, are not excisable goods. This being the sum and substance of the guidelines and the test to be applied to ascertain whether any product which is fixed at particular cite can be considered to be movable or not. It is to be seen whether the said test was applied by the Commissioner in the case in hand.

9. As already observed above, the Commissioner by merely referring to a description of the machinery has held that each individual machine was connected with pipes and power and the same has resulted in food processing line. The Commissioner has not considered the same in accordance with the guidelines laid down under the Circular. Of course, when the matter was decided by the Commissioner, the guidelines were not available before the Commissioner. The guidelines came into excistence after the decision by the Commissioner. The matter at that stage was not clear and divergent views were expressed in various decisions delivered by various Courts and Tribunals on the issue. Bearing this in mind and the difficulty which was faced by the Commissioner at the relevant time, the competent authority cannot be blamed for not applying the guidelines under the circular which came into existence much after passing of the order. At the same time, now the law being clear and Board having laid down certain guidelines, in our considered opinion, in the absence of guidelines being applied to the facts of case in hand, it would be proper to send the matter back to the Commissioner to carry out said exercise de novo.

10. We are aware that matter has been remanded by the Apex Court to this Court for a fresh decision consequent to Circular No. 58/1/2002-CX dated 16.1.2002 (herein after called as 'said circular'). For the reasons recorded herein, we find it necessary to give proper opportunity to the parties to place on record necessary factual materials in relation to the activities of the appellant which are termed as the manufacturing activities under the impugned order, so that the proper decision is arrived at in terms of the guidelines laid down in the said Circular issued by the Board.

11. It would be necessary for the learned Commissioner to consider whether the activity carried out by the appellant-assessee is a manufacturing activity, which will warrant the excise duty thereon, bearing in mind the said guidelines. Once the said basic issue is decided, various other issues which are sought to be raised by the parties will have to be addressed to by the Commissioner. In our view, such issues would include the points as to whether the classification of product in question can correctly be done under item 84.38 of the Central Excise Tariff Act, whether the extended period of limitation can be invoked under the provisions of section 11A of the Central Excise Act and the penalty can be levied, whether the modvat credit on the duty paid on inputs/ components as claimed by the assessee can be allowed, whether the value adopted should be treated as cum-duty price, as well as whether the modvat credit facility claimed by the appellant-assessee should be denied as sought to be contended by the Department and whether Commissioner, Indore could have proceeded in the matter in relation to the machinery and the activities carried out are beyond the

territorial jurisdiction of the Indore Commissionerate. All these issues will have to be decided subsequent to basic issue i.e. whether the activity carried out by the appellant is manufacturing or not and the same can be liable to be subjected to levy of excise duty under the Act.

12. In the result, therefore, without expressing our views on any of the points sought to raised in the matter and all the issues being kept open, the appeals are allowed, the impugned order is set aside and the matter is remanded to the Commissioner to decide the same de novo bearing in mind Circular No.58/1/2002 dated 16.1.2002 and observations made hereinabove. Both the appeals accordingly stand disposed of.

(Justice R.M.S. Khandeparkar)
President

(M. Veeraiyan)
Member(Technical)

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