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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/4551/2004-4554/2004,4570 &4590/2004 - EX[DB] Date 27/05/2009
E/CROSS/398-399 & 400-403/04-EX.

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

To :
C.C.E. JAIPUR-I
NCRB, STATUE CIRCLE, C-SCHEME, JAIPUR
302005

C.C.E. JAIPUR-I Appellant
Vs
M/S BHOORATHNAM & COMPANY Respondent

I am directed to transmit herewith a certified copy of **Final order** No. 386-391/2009-EX **EX[DB]** dated 26-5-09

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

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
M/S BHOORATHNAM & COMPANY
CHOMU-CHANDWAJI ROAD, VILL. MORIJA, TEHSIL CHOMU, JAIPUR
2. Adv. / Consult SH. V. K. AGARWAL, ADV., B-82, LAJPAT NAGAR-II, N. DELHI-24
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)
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Assistant Registrar
(Excise Appeal Branch)

~~M/S BHOORATHNAM & COMPANY~~
~~CHOMU-CHANDWAJI ROAD, VILL. MORIJA, TEHSIL CHOMU,~~
~~JAIPUR~~

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-DB

Appeal No. Excise /4551-54, 4570, 4590/2004-Ex. with Cross/398-399 and Cross 400-403/04-Ex.
[Arising out of Order-in-Appeal No.228-232(SN)/CE/JPR-I/04 dated 28.06.04 passed by CCE(Appeals), Jaipur].

Date of Hearing:26.03.2009
Date of decision: 26/5/09

For approval and signature:

HON'BLE Mr. D.N. PANDA, JUDICIAL MEMBER
HON'BLE MR. RAKESH KUMAR, TECHNICAL MEMBER

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether Their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

CCE, Jaipur ...Appellant

Vs.

M/s. Boorathnam & Co. ... Respondent

Present for the Appellant :Shri Amit Jain, DR
Present for the Respondent : Shri V.K.Agrawal, Advocate

Coram: HON'BLE Mr. D.N. PANDA, JUDICIAL MEMBER
HON'BLE MR. RAKESH KUMAR, TECHNICAL MEMBER

FINAL ORDER NO. 386-391/09-EX DATED:________

PER: RAKESH KUMAR

These are appeals filed by the Revenue against Order-in-Appeal No.228-232(SN)/ CE/JPR-I/04 dated 18.06.04 & 237/04 dated

28.06.04 passed by CCE (Appeals), Jaipur by which the appeals filed by the respondent against six orders passed by the Asstt. Commissioner/Jt. Commissioner confirming total duty demand of Rs.56,33,689/- were allowed. The facts leading to filing of these appeals are as under:-

2. The respondent, a partnership firm, have a factory in Village Morija, Teh: Chomu, Dist: Jaipur for manufacturing of P.S.C. Pipes & M.S. Pipes. M/s. Bhoorathnam & Co., Secunderabad a unit owned by the same partners entered into a contract with Public Health Engineering Department, Rajasthan for laying, erection and maintenance of 1100 mm Dia Prestressed Cement Pipe line from Darnasar to Sardar Shahar. During the period from April 1998 to October 2002, the Respondent supplied PSC pipes to their Secunderabad unit which used the same for laying the pipe line. During this period they paid duty on these pipes on the basis of cost of production plus 10% and in this regard they had also filed price declaration. The period of dispute from April 1998 to 30th June, 2000 is governed by the old section 4, as it stood during the period prior to 1.7.2000, read with Central Excise Valuation Rules, 1975 (hereinafter referred to as CEVR 1975) and the period w.e.f. 1.7.2000 is governed by the new section 4, which came into force w.e.f 1.7.2000 read with Central Excise Valuation Rules, 2000 (hereinafter referred as CEVR, 2000). The Department was of the view that during the period from

April 1998 to 30.06.2000, duty in accordance with the provisions of Rule 6(b)(ii) of CEVR, 1975, the duty should have been paid by the Respondent on the basis of cost of production plus actual profit which was to the tune of about 24.57% and during the period from 1.7.2000 onwards, in accordance with the provisions of rule 8 of the CEVR 2000, the duty should have been paid on the value equal to 115% of the cost of production. It is on this basis that show cause notices dated 13.7.2001 for the period from April 1998 to December 1998, SCN dated 2.8.99 for the period from Jan., 1999 to June 99, SCN dated 13.1.2000 for the period from July 1999 to September 1999, SCN dated 14.3.2000 for period from Jan., 2000 to May 2000 and SCN dated 30.10.2003 for the period from Jan., 2002 to 3.10.02 for demanding allegedly short paid duty amounting to Rs.13,00,358/-, Rs.20,90,331/-, Rs.9,83,574/-, Rs.8,04,311/-, Rs.3,75,128/- and Rs.79,987/- respectively alongwith interest on this duty u/s 11AB and also for imposition of penalty on the appellant u/s. 11AC of Central Excise Act, 1944/Rule 173Q(1) of Central Excise Rules, 1944 were issued. These six show cause notices were adjudicated by the Asstt. Commissioner/Joint Commissioner who confirmed the duty demands and imposed penalty on the Respondent. The Commissioner (Appeal) vide Order-in-Appeal No.228-232 (SN)/CE/JPR-I/2004 dated 18.6.04 and Order-in-Appeal No.237/(SN)/CE/JPR-I/04 dated 28.6.04 set aside the Asstt. Commissioner's/Joint Commissioner's Orders and allowed the appeals. In the order in appeal dated 18.6.04, the Jtd.

Commissioner's order dated 22/1/04 in respect of period from April 1998 to Dec., 1998 was set aside on the ground of time bar. It is against these two orders of the Commissioner (Appeals) that these six appeals have been filed by the Revenue. The Cross Objections filed by the Respondent in respect of these appeals filed by the Revenue are registered as CO/398-399/04 /Ex. and CO/400-403/04/Ex.

3 Heard both the sides.

3.1 Shri Amit Jain, Ld. DR pleaded that M/s.Bhoorathnam & Co., Jaipur and M/s.Bhoorathnam & Co. Secunderabad having same partners are one entity only, of which the Jaipur Unit is engaged in the manufacturing activity and Secunderabad Unit is engaged in trading/ pipeline laying activity; that the clearances made by Jaipur Unit to Secunderabad Unit have to be treated as clearances for captive consumption covered by Rule 6 (b) of CEVR, 1975, as this rule is applicable where the excisable goods are not sold by the assessee but are used or consumed by him or on his behalf in production or manufacture of other articles; that as per the provisions of rule 6 (b), the assessable value shall be based on the value of comparable goods produced or manufactured by the assessee or any other assessee or if such value is not available, on the cost of production or manufacture including profit, if any, which the assessee would have normally earned on the sale of such goods; that since in this case the PSC pipes of

1100 mm dia were being manufactured for specific use of Public Health and Engineering Deptt., Rajasthan for laying pipe line and as such the value of comparable goods produced by the Respondent or other assessees was not available, the assessable value should have been determined during the period till 30.6.2000 on the basis of the cost of production plus the profit which the Respondent would have normally earned on the sale of such goods; that since the Respondent instead of adding actual profit which was much higher value, have added only 10% profit, the demands for differential duty have been rightly confirmed by the Asstt./Joint Commissioner and the Commissioner (Appeals)'s Order setting aside these demands are not correct; and that so far as the duty demand for the period from 1.7.2000 onwards is concerned, during this period the old section 4 alongwith the CEVR 1975 had been replaced by new section 4 read with CEVR 2000 and as per the provisions of rule 8 of the New Valuation Rules in the cases of clearances for captive consumption, the assessable value of the goods was to be based on 115 % of the cost of production and since the Respondent during this period had paid duty on the basis of 110% of the cost of production, the difference between the duty on 115% of the cost of production and the duty on 110% of the cost of production would be recoverable from the respondent. He also pleaded that the SCN dated 13.7.01 demanding differential duty amounting to Rs.13,00,358/- for the period from April 1998 to December 1998 which has been issued by invoking extended period under the proviso to section 11 A (1) of Central Excise Act 1944 is within time as the Respondents are guilty of suppressing the relevant information. He, therefore, pleaded that the impugned order passed by the CCE (Appeals) is not correct and the same may be set aside.

3.2. Shri V.K. Aggarwal, Advocate, the ld. Counsel for the Respondent pleaded that as regards the period of dispute – from Jan., 2002 to 2.10.02, the duty demand amounting to Rs.79,987/- for which has been raised by SCN dated 30.10.03, the new section 4 and New CEVR 2000 were in force and during this period the duty liability was to be discharged on 115% of the cost of production as against the duty paid by the assessee on 110% of the cost of production, that the quantum of duty demand however has still to be worked out as the duty demand of Rs.79,987/- raised by Show Cause Notice dated 30.10.2003 is based on 124.57% of the cost of production taking the Respondents' profit for this period as 24.5%, that as regards the duty demand for the period from April 1998 to May, 2000 raised by the five show cause notices, even if rule 6(b) (ii) is treated as applicable in respect of clearances to M/s.Bhoorathnam & Co., Secunderabad, during this period, in terms of the Board Circular No.258/92/96-CX dated 30.10.1996 the cost of production of goods has to be determined so as to include the cost of materials, labour cost and overheads including administration cost, advertising cost, depreciation, interest and ~~etc.~~, the profit which the assessee would have normally earned should be taken as the profit before tax from the audited balance sheet of the previous financial year and the profit margin has to be calculated as percentage of the cost of production in the previous year as per the formula prescribed by the Cost Accounts Branch of the Deptt. of Expenditure, that the Respondents' profit during the year 1997-98, 1998-99 & 1999-2000 was 14.14%, 13.62% and 12.50% respectively and during the year 2000-01 there was loss, that during the entire period of dispute the duty demand has been calculated by arbitrarily taking the profit margin as 24.57%; and that if the duty demand is worked out as per the Board's Instructions, the quantum would be much less. He also pleaded that the show cause notice dated 13.7.2001 demanding allegedly short paid duty amounting to Rs.13,00,358 /- for the period from April 1998 to December 1998 is time barred as – (a) prior to issuing the Show cause notice invoking extended period under the proviso to section 11A, four show cause notices dated 28.08.1999, 13.01.2000, 14.03.2000 and 22.08.2000 for the period [illegible] from Jan., 1999 to May, 2000 had been issued on the basis of the same facts under normal limitation period and, therefore, on the basis of the same facts, the SCN dated 13.07.2001 demanding duty for the period from April 1998 to December 1998 could not be issued invoking extended period by alleging suppression of facts and in this regard reliance placed on Hon'ble Supreme Court's judgement in the case of Nizam Sugar Factory vs. CCE, Secunderabad reported in 2006 (197)

ELT 456(SC). Besides this, it was also pleaded that the respondent had filed a price-list dated 07.01.1999 to the Department declaring the price at which different types of PSC Pipes were being sold by them to M/s.Bhoorathnam and Co., Secunderabad and earlier under letter dated 21.06.1996 to the Range Superintendent Cost Accountant's certificate regarding cost of production of PSC pipes of 1100 mm diameter, 5 mtr. Long, had been given to the Department, which shows that the Deptt. was aware of the fact that the Respondents were paying duty in respect of these Pipes on the basis of 110% of the cost of production. In view of this, it was pleaded that the Show cause notice dated 13.07.2001 demanding allegedly short paid duty for the period from April 1998 to December, 1998 is time barred.

4. We have carefully considered the submissions from both the sides and perused the records. The point of dispute in this case is regarding the assessable value of 1100 mm diameter, 5 mtr. long PSC Pipes cleared by M/s.Bhoorathnam & Co. Jaipur to M/s.Bhoorathnam & Co. Secunderabad during the period from April 1998 to May 2000 and Jan., 2002 to 03.10.2002, which, in turn, were used by M/s.Bhoorathnam & Co. Secunderabad for laying water pipe line for Public Health Department, Rajasthan. Though in the course of proceedings before the Adjudicating Authority and Lower Appellate Authority, it had been pleaded that M/s.Bhoorathnam & Co., Jaipur and M/s.Bhoorathnam & Co., Secunderabad are two independent entities

and transaction between them are on principal to principal basis, we find that in reply dated 19.08.2002 to the Show Cause Notice the Respondents have accepted that the partners of M/s.Bhoorathnam & Co., Jaipur & M/s.Bhoorathnam & Co., Secunderabad are common and this fact has been admitted in the course of hearing of this group of appeals. We also find that the Original Adjudicating Authority has also given the same finding that M/s.Bhoorathnam & Co. Jaipur and M/s.Bhoorathnam & Co. Secunderabad have common partners. In view of this, M/s.Bhoorathnam & Co., Jaipur & Secunderabad have to be treated as one entity only and clearances of PSC pipes by the respondent to M/s.Bhoorathnam & Co Secunderabad cannot be treated as in the course of sale. But since the goods cleared by Respondent to their Secunderabad Unit have not been sold by the Secunderabad Unit but have been used by that unit for laying pipelines for Public Health Department, Rajasthan, and since these goods have not been used for captive consumption for production or manufacture of other articles, the Rule 6 (b) as such would not be applicable. Since M/s.Bhoorathnam & Co. Jaipur and M/s.Bhoorathnam & Co., Secunderabad are one entity, they cannot be treated as related persons and therefore, Rule 6 (c) of CEVR Rule 19756(c) is also not applicable. We are, therefore, of the view that the assessable value in this case has to be determined under rule 7 of CEVR, 1975 for the period till 30.06.2000 and under Rule 11 of CEVR, 2000 for the period subsequent to 30.06.2000. Under Rule 7 of CEVR 1975/Rule 11 of CEVR 2000 the value has to be determined by the best judgement method consistent with the principle and general provisions of the Valuation Rules and sub-section (1) of section 4 of the Act. For this purpose, however, this matter has to be remanded to the Original Adjudicating Authority.

5. Another point raised by the Respondents is that the duty demand for the period from April 1998 to December, 1998 raised by show cause notice dated 13.07.2001 by invoking extended period under the proviso to section 11A(1) of Central Excise Act 1944 is time barred, as prior to the issue of the show-cause notice, on the basis of same facts, four other show-cause notices dated 02.08.1999, 13.01.2000, 14.03.2000 and 22.08.2000 were issued, under normal limitation period, without making any allegation of suppression of facts misstatement etc. against the Respondent and in this regard reliance has been placed on Hon'ble Supreme Court in the case of Nizam Sugar (supra). On going through the show-cause-notice dated 13.07.2001 for the period April 1998 to December 1998 and earlier show-cause-notices dated 02.08.1999, 13.01.2000, 14.03.2000 and 22.08.2000 for the period from Jan., 1999 to May, 2000, we find that all these show-cause notices are identically worded except that in the show-cause-notice dated 13.07.2001 the allegation of suppression of fact has been made and on the ~~these~~ basis proviso to section 11 A(1)of Central Excise Rules ~~have~~ been invoked. Hon'ble Supreme Court in the case of Nizam Sugar (supra) had held that when all the relevant facts were in the

knowledge of the authorities when the first show cause notice was issued, while issuing the second and third show cause notices the same or similar facts could not be taken as suppression of facts on the part of the assessee, as these facts were already in the knowledge of the authorities. In this case since on the basis of certain set of fact, first, the SCN dated 2.8.99, 31.1.2000, 14.3.2000 and 22.8.2000 for the period from Jan., 1999 to May 2000 were issued under normal limitation period without making any allegation of misstatement suppression of facts against the respondent, on the basis of same set of facts SCN dated 13.07.2001 for the previous period from April 1998 to December, 1998 could not be issued. Besides this, we also find that during the period prior to 1.7.2000 the respondents were filing price declaration under rule 173-C, wherein the price of different types of PSC pipes being cleared to M/s.Bhoorathnam & Co., Secunderabad, which were based on the cost of production plus 10% profit margin were being filed and no objection had been raised by the Department, that the profit margin of the previous financial year must be adopted instead of uniform profit margin of 10%. In view of these circumstances, we are of the view that so far as show-cause-notices dated 13.7.2001 is concerned, the same is time barred, ~~as~~ and CCE (Appeals)'s order setting aside the Joint Commissioner's Order dated 22.1.04 on the ground of time bar is correct.

6. In view of above discussion, we-

(a) uphold the part of the impugned order in appeal dated 18.6.04 in so far as it sets aside the Jt. Commissioner's order in original dated 22.1.04 in respect of duty demand for period from April 1998 to Dec., 1998 and accordingly the Revenue's appeal No.E/4551/04-NB against this part of the impugned order is dismissed; and

(b) set aside the remaining part of the impugned order in appeal dated 18.6.04 and also the impugned order in appeal dated 28.6.04 in respect of duty demands for the period from Jan. 1999 to May 2000 and Jan., 2002 to Oct., 2002 and remanded the matter to the Assistant Commissioner for de-novo adjudication for re-determining the assessable value of the goods cleared by the Respondents, under Rule 7 of CEVR 1975/Rule 11 of CEVR 2000 and re-determining the differential duty ~~as~~ and also the quantum of penalty under Rule 173Q(1) of the Central Excise Rules, 1944/Rule 25(1) of Central Excise Rules 2002, which ~~sho7uld~~ should be in accordance with the re-determined duty demand.

7. The Revenue's appeal No.E/4552/04, E/4553/04, E/4554/04, E/4570/04 & E/4590/04 and the Cross Objection No.Co/398-399/04-Ex. And CO/400-403/04-Ex filed by the Respondents stand disposed off as above.

(Pronounced in the open Court on 26/5/09)

(D.N. PANDA)
JUDICIAL MEMBER

(RAKESH KUMAR)
TECHNICAL MEMBER

Anita