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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

Date 22/12/2009

Appeal No. E/720 /2005 - EX[DB]

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

To :
C.C.E. GHAZIABAD
C.G. O. COMPLEX-II, KAMLA NEHRU NAGAR,
GHAZIABAD 201302 — Appellant

Vs

C.C.E. GHAZIABAD

M/S MODI GAS & CHEMICALS LTD. — Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1393/ 2009 **EX[DB]** dated

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 MODI GAS & CHEMICALS LTD.
MODINAGAR GHAZIABAD U.P
2. Adv. / Consult SH. A.P. GUPTA, CONSULTANT
A2/42, ALOK PARK, MODINAGAR

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
12 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15 LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
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18. HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

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

COURT - I

Excise Appeal No. E/720/05
[Arising out of Order-in-Appeal No. 177-CE/GZB/2004 dated 27.12.2004 passed by the Commissioner (Appeals), Central Excise, Ghaziabad].

Date of Hearing/Decision:3.12.2009

For approval and signature:

Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Mr.Rakesh Kumar, 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?	Yes
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 Their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

CCE, Ghaziabad ...Appellant

Vs.

M/s. Modi Gas & Chemicals Ltd. ... Respondent

Present for the Appellant :Shri Anil Khanna, DR
Present for the Respondent : Shri A.P. Gupta, Consultant

Coram: Hon'ble Mr.Justice R.M.S. Khandeparkar, President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

FINAL **ORAL ORDER NO.** 1393/09-EX **DATED:3.12.2009**

PER: JUSTICE R.M.S.KHANDEPARKAR

Shri Anil Khanna, ld. Departmental Representative present for the appellant and Shri A.P. Gupta, ld. Consultant present for the respondent.

2. The appellants challenge the order dated 27th December, 2004 passed by the Commissioner (Appeals), Gaziabad

whereby the appeal filed by the respondent assessee was allowed and the order passed by the Original Authority was set aside. The Asstt. Commissioner, Gaziabad by its order dated 3.10.04 had confirmed the duty demand of Rs.69,650/-, alongwith demand for interest and imposition of penalty of equal amount.

3. The respondents herein are engaged in the manufacture of Carbon Dioxide Gas falling under the Central Excise Tariff Act 1985. The respondents were asked to furnish the details of the cylinder rent and testing charges w.e.f. 1st July, 2000 by the Jurisdictional Range Superintendent by its letter dated 7th Feb., 2004. As no response was received, reminders were issued on 25th of Feb., 8th of March, 18th of March and 6th April of 2004. Meanwhile the respondents by its letter dated 22nd March, 2004 informed the concerned Range Superintendent that they were not charging any testing charges from their customers and they were only charging cylinder rent from their customers except those customers, who were purchasing the gas in their own cylinders. The respondent by their further letter dated 7th April 2004 informed the details of cylinder rent for the financial year 2002-03 and 2003-04 as Rs.2,15,357/- and Rs.2,19,954/- respectively. Consequently, show cause notice was issued on 8th June, 2004 requiring the respondent to show cause as to why sum of Rs.69,650/- should not be demanded and recovered from them as excise duty for the said period alongwith interest thereon and as to why penalty should not be imposed. The respondent contested the proceedings and consequently, the order dated 31st August,

2004 came to be passed by the Adjudicating authority confirming the demand for Rs.69,650/- alongwith interest thereon and imposition of penalty of equal amount. Being aggrieved, the matter was carried in appeal before the Commissioner (Appeals) by the respondents. The said appeal was allowed and order passed by the Adjudicating Authority was set aside. Hence the present appeal.

4. The ld. DR taking us through the impugned order submitted that the Commissioner (Appeals) erred in setting aside the order passed by the Adjudicating Authority merely on the basis of the decision of the Tribunal in **M/s. Grasim Industries Ltd.** vs. **CCE, Indore** reported in 2004 (164) E.L.T. 257 and of the Supreme Court in **CCE** vs. **Indian Oxygen Ltd** reported in 1988 (36) ELT 730 (S.C.), ignoring the fact that both the said decisions were in relation to the provisions of law as it stood prior to 1st July, 2000 and the scope of the expression "transaction value" as has been introduced in Section 4 of the Central Excise Act 1944 w.e.f. 1st July, 2000. He further submitted that the transaction value includes any amount that a buyer is liable to pay, in connection with the sale and considering the same expenditure incurred by the buyers towards the rental value of the cylinder could not have been excluded from the assessable value. He further drew our attention to Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 and submitted that the same clearly prescribes the procedure for ascertaining the assessable value as it clarifies that amount collected towards sale of the goods would include various items

which are specified under the explanation clause to said rules. Attention was also drawn to Circular No.643/34/2002-CX dated 1st July, 2002 and particularly para 4(c) thereof, wherein the Board has clarified that rental charges or cost of maintenance of reusable metal containers like gas cylinders etc. are includible in the transaction value. Attention was also drawn to the decision in the matter of **Saraswati Air Products Ltd.** vs. **Commissioner of Central Excise, Meerut** reported in 2009 (243) ELT 397 (Tri. Del.).

5. The ld. Consultant appearing for the respondent on the other hand, submitted that the supply of gas is different from provision for storage of gas in the form of the container and it is undisputed fact that the rental charges are recovered only from those customers to whom the gas is supplied in the cylinders belonging to the respondents and not to those who purchase the gas in their own cylinders. Further drawing our attention to the decision of the Apex Court in the matter of **Collector of Central Excise** vs. **Indian Oxygen Ltd**. reported in 1988 (36) ELT 730 (S.C.), **Grasim Industries** vs. **Commissioner of Central Excise, Indore** reported in 2004 (164) ELT 257 (Tri. Del.) in the matter of **Commissioner of Central Excise, Meerut – I** vs. **Bisleri International Pvt. Ltd.** reported in 2005 (186) ELT 257 (S.C.) he submitted that the consistent view that has been taken in relation to the rental charges is that the same cannot form part of the price of the product. Considering the same, according to ld. Consultant, no fault can be found with the impugned order.

6. The ld. DR also drawn our attention to the decision in the matter of **Kota Oxygen (P) Ltd**. vs. **Commissioner of Central Excise, Jaipur** reported in 2000 (121) ELT 369 (Trib.) and corresponding order of the Supreme Court reported in 2001 (128) ELT A68 (SC).

7. Undisputedly the matter relates to the period subsequent to 1st July, 2000. Obviously, therefore, the provisions of law as it stood after 1st July, 2000 would apply and the assessable value and hence the same will have to be ascertained by considering the transaction value as defined under section 4 of the said Act. The Larger Bench of the Tribunal in the matter of **Commissioner of Central Excise, Mumbai-III** vs. **Supreme Petrochem Ltd.** reported in 2009 (240) ELT 38(Tri. - LB) has clearly held that in cases referring to the period after 1st July, 2000, the assessable value has to be ascertained by taking into consideration the transaction value as defined under section 4 of the said Act, whereas the cases prior to 1st July, 2000 would be governed by the law laid down by the Apex Court in the **Indian Oxygen** case. Considering the said decision of the Larger Bench, the ruling of the Two Member Bench of the Tribunal in **Grasim Industries** case cannot be held to be laying down correct proposition of law.

8. The term transaction value has been defined in section 4 as under:-

> *"Section 4. Valuation of excisable goods for purposes of charging of duty of exicise. (1) Where under this Act, the duty of excise is chargeable on any*

excisable goods with reference to their value, then, on each removal of the goods, such value shall –

(a) in case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed."

Plain reading of the said definition of the transaction value would reveal that while ascertaining the assessable value for the purpose of the proceedings under the said Act apart from the amount charged as price for the goods, any amount that the buyer is liable to pay by reason of or in connection with the sale of the goods would form part of the assessable value. Undoubtedly such amount will have to be in connection with the sale of the goods. If the goods cannot be sold without container, obviously any amount collected in relation to the container of the brought out product would form an amount in connection with sale of the product and, therefore, it would form part of the transaction value.

9. Merely because in some cases, same buyers may arrange their own containers for carrying the product to be purchased that would not make a difference in the matter of ascertaining the transaction value in cases where the manufacturer collect the amount from the buyers in connection with the sale of the product. To exclude such amount from

the assessable value would virtually result in rewriting or amending the definition of the term expression "transaction value" in the said Act.

10. As rightly pointed out by the ld. DR, that the above situation is further clear from Rule 6 of the Central Excise Valuation(Determination of Price of Excisable Goods) 2000 Rule 6 read thus:-

> *"Rule 6: Where the excisable goods are sold in the circumstances specified in clause (a) of sub-section(1) of section 4 of the Act except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee.*

Explanation.......................

(i) ....

(ii) ....

(iii) *value of material consumed, including packaging materials in the production of such goods;*

11. It is also pertinent to note that the Board in Circular dated 1st July, 2000 while dealing with the question as to whether rental charges or cost of maintenance of reusable metal containers like gas cylinders etc. are to be included in the transaction value, has clearly opined that since the amount has been charged by reason of or in connection with the sale of goods, such amount has to be added to the assessable value.

12. Considering the definition of the term "transaction value" as is found in section 4 of the said Act and read with the said Rule 6 and the Board Circular, it is abundantly clear that once a manufacturer collects any rental charges in relation to the containers of the product sold, it cannot be said that such charges cannot be included in the assessable value.

13. The Apex Court in **Commissioner of Central Excise, Meerut-I** vs. **Bisleri International Pvt. Ltd**. case had held thus:-

> "Para 14: So far as ROC is concerned, the Commissioner found that the rent equivalent to interest was collected by the assessee on account of delay in returning of empty crates/bottles. The purpose of charging interest was to get back empty bottles/crates immediately as otherwise the assessee was required to make additional investment towards stock inventory on crates/empty bottles. Further, the said levy did not form the price of the aerated water and, therefore, ROC was not includible in the assessable value. In the circumstances, the Commissioner was right in applying the ratio of the judgement of this Corut in the case of Collector of Central Excise vs. Indian Oxygen (supra)." "Obviously, the decision was based on the ruling in Indian Oxygen's case. Further, the matter related to the year 1994. It was in relation to the concept of normal price as was found in Section 4 prior to the amendment thereto and introduction of concept of transaction value. Obviously, therefore, the decision would not apply to the facts of the case in hand.

14. If one peruses the impugned order, it is apparent that the Commissioner (Appeals) has set aside the order passed by the Adjudicating Authority merely on the basis of the ruling in **Grasim Industries'** case and of the Supreme Court in **Indian Oxygen** case. As already stated above, both these cases can be of no help to decide the matter in issue which is essentially required to be decided in terms of law which is in force w.e.f. 1st July, 2000 and both the decisions relate to the law as it was prevalent prior thereto.

15. The Adjudicating Authority had decided the matter on the basis of the decision in **Kota Oxygen (P) Ltd**. case. In **Kota Oxygen's** case the Tribunal had held thus:-

> "**8.** *It is settled law that if ex-factory wholesale price is available, that should be the assessable value. In the present case, the goods were being sold at ex-factory basis. Therefore, that value should have been adopted as the assessable value for all clearances. No deduction was also required to be made from the price at which gases were sold to dealers who purchased them in their own cylinders, as the price of those gases represented only the value of those gases and did not include any elements which are extraneous to the price of the goods. The entire removals should have been assessed at that price and duty demanded accordingly. The facts of the case also belie the appellants' claim. The appellants' invoices showed two collections at fixed rates under the headings "cylinder maintenance charges" and "fixed rental charges". However, these levies were being made even in respect of sales where the goods were collected by the buyers in their own cylinders. That*

is to say cases which did not occasion such levy. Further, these collections were also several multiples of the cost incurred. Thus, giving credence to the Revenue's allegation that value of the gas was being collected under the headings of convenience.

9. *From what is stated above, it is clear that the profits from realisation under the two headings "cylinder maintenance charges" and "fixed rental charges" were not profits or gains from ancillary or allied ventures, excludible while determining the assessable value. The entire production was also liable to be assessed at the price at which the gases were sold to buyers who collected the gases in their own cylinders. We, therefore, find no merit in the appellants' submission that the demands are not justified. The appellants' conduct also justifies the allegation that material facts were suppressed with intent to evade payment of duty thereby justifying raising of demand for the extended period as permitted under proviso to Section 11A(1). The invoices covering the sales which were submitted to the central excise authorities also, indicated a different arrangement than the actual one - even when delivery of gases was in the buyer's cylinders and the price did not include payment for any other services, part of the price was shown in the invoices as representing maintenance and cylinder fixed rentals. These circumstances fully justify the allegation of intentional evasion of duty. Consequentially, the demand of duty and penalty under Rule 173Q are confirmed. With regard to penalty under Section 11AC of the Central Excise Act, we find that this section was not in force during most of the duty demand period. The duty demand is for the period of March, 1994 to March, 1997. Section 11AC came into force only from 28-9-1996. Therefore, no penalty under this Section could have* *been imposed on account of duty evasion prior to 28-9-1996. In view of this, the penalty imposed under Section 11AC is set aside.*

16. The assessee, M/s. Kota Oxygen being aggrieved by the said order, had carried the matter in appeal before the Apex Court. However, the same was dismissed by the Apex Court. It is pertinent to note that the appeal was dismissed after leave to appeal was granted. Obviously, therefore, order of the Tribunal merged in the order of the Supreme Court in terms of the law laid down by the Apex Court in the case of **Kunhayammed** vs. **State of Kerala** reported in 2001 (129) ELT 11 (S.C.). Being so, without considering the same, the Commissioner (Appeals) was not justified in interfering with the order passed by the Adjudicating Authority. In fact, we find no justifiable ground to differ from the view expressed by the Adjudicating Authority in the matter and hence the appeal succeeds.

17. Accordingly, the appeal is allowed, impugned order is thereby set aside; the order passed by the Adjudicating Authority is confirmed with consequential relief.

(JUSTICE R.M.S.KHANDEPARKAR)
PRESIDENT

(RAKESH KUMAR)
MEMBER (TECHNICAL)

Anita