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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/450 /2005-EX[DB]   Date 15/05/2009

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

To :
M/S SARASWATI AIR PRODUCTS LTD.
MISSION COMPOUND , DWARKAPURI,
MUJJAFARNAGAR
M/S SARASWATI AIR PRODUCTS LTD.   Appellant

Vs

C.C.E. MEERUT I   Respondent

I am directed to transmit herewith a certified copy of **Final order No. 327/2009- EX[DB]** dated 13-5-09 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
   C.C.E. MEERUT I
   EXCISE CHOWK, UNIVERSITY ROAD, MANGAL PANDEY NAGAR, MEERUT - 250005.
2. Adv. / Consult
   MR.RAJESH CHHIBBER
   FA/9, NEW KAVI NAGAR, GHAZIABAD
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
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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-EXCISE(DB)

Appeal No. E./450/2005-Ex.

[Arising out of Order-in-Appeal No.369-CE/MRT-I/04 dated 21.05.2004 passed by the Commissioner (A), Central Excise, Meerut.]

Date of Hearing:20.03.2009
Date of decision:20.03.2009

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?	
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?	

M/.s Saraswati Air Products Ltd. ...Appellant

Vs.
C.C.E., Meerut. ... Respondent

Present for the Appellant : Shri Rajesh Chibber, Advocate
Present for the Respondent : Shri A.K. Rastogi, DR

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

FINAL **ORDER NO.** 327/09-EX **DATED:**__________

PER: RAKESH KUMAR

This is an appeal against Order -in -Appeal No.369-CE/MRT-1/2004 dated 21.05.04 passed by CCE, Meerut-I by which the Commissioner (Appeals) while upholding the duty demand along with interest confirmed against the appellant by the Additional Commissioner vide Order- in -Original dated 31.10.2001, reduced the penalty under section 11AC of Central Excise Act, 1944 read with Rule 73Q of Central Excise Rules 1944 to Rs.3.00 Lakhs.

2. The facts of the case, in brief, leading to this appeal are as under.

2.1 The appellant are engaged in the manufacture of liquefied and compressed oxygen gas in cylinders, which is chargeable to Central Excise duty under tariff item 2804.19 of the Central Excise Tariff Act, 1985. The gas is sold by the appellant in their own cylinders and also in some cases, in the cylinders brought by the customers. In the course of scrutiny of the records by the jurisdictional Central Excise Officers during their visit to the factory on 17.9.99, it was found that (a) the appellant was charging some amounts from their customers by way of issuing debit notes for 'cylinder repairing and maintenance', 'cylinder testing', 'valves & spindles for cylinder', 'cylinder rent', 'freight' etc. and these amounts were far in excess of the actual expenditures, if any, incurred; (b) these amounts were being charged even from these customers also who had purchased gas in their own cylinders, (c) while the appellants were not doing any cylinder testing but still some amounts were being charged under this head, and (d)during the years 1995-96, 1996-97, 1997-98, while the actual expenditures incurred for cylinder repairing and maintenance, providing valves & spindles for cylinders etc. were Rs.6,56,908/- the amounts collected in this regard from the customers were Rs.80,80,842/- and thus the appellant had charged excess amount of Rs.74,23,934/- from the customers on which duty amounting to Rs.6,27,786 was chargeable.

2.2. After issue of show-cause-notice to the appellant proposing recovery of short paid duty alongwith interest and also imposition of penalty on them under section 11AC of Central Excise Act 1944 read with section 173 Q(1) of Central Excise Rules 1944, the matter was adjudicated by the Additional Commissioner vide Order- in -Original dated 31.10.01 by which the duty demand of Rs.6,27,786/- alongwith interest was confirmed against the appellant and besides this, penalty of equal amount was imposed on them under section 11AC of Central Excise Act 1944 read with Rule 173 Q (1) of Central Excise Rules 1944.

2.3 The Commissioner (Appeals) by the impugned Order- in - Appeal dated 21.5.04 while upholding the duty demand alongwith interest, reduced the penalty to Rs.3.00 Lakhs. It is against this order that the present appeal has been filed.

3. Heard both the sides.

3.1 Shri Rajesh Chibbar, Advocate, the Ld. Counsel for the appellant, pleaded that it is settled law that cylinder rental as well as expenses for their transport, expenses incurred on maintenance/repair or testing of cylinder are not includible in the assessable value of the goods and in view of this even if the amounts charged by the appellant for cylinder rental, maintenance and repairs of cylinders, cylinder freight, testing etc are more than the expenses actually incurred, the differential amount is not includible in the assessable value, that in this regard he places reliance on Hon'ble Supreme Court judgement in the case of Baroda Electric Meters Ltd. Vs. CCE, Baroda reported in 1997 (94) ELT 13 (SC) and that the Tribunal vide Order -in -Appeal No.634/89- A dated 16.10.1989 in the appellant's own case, relying upon the Hon'ble Supreme Court judgement in the case of CCE vs. Indian Oxygen, reported in 1988 (36) ELT-730 (S.C.), has held that cylinder rental charges collected by the appellant from their customers are not includible in the assessable value of the gas sold by them.

3.2. Shri A.K. Rastogi, ld. Departmental Representative defending the impugned order pleaded that the amounts, in question, being charged towards maintenance and repairs of cylinders, Cylinder rental, cylinder testing, transportation of cylinder etc. are not genuine expenses, that the amounts being charged by the appellant from their customers under the heads of repair, maintenance & testing of cylinder, cylinder rental, freight etc. are highly inflated and this is being done in order to depress the assessable value, that this is clear from the fact that these charges were being recovered even from those customers who were bringing their own cylinders, that in these circumstances, the Hon'ble Supreme Court's judgement in the case of Baroda Electric Meters Ltd (supra) is not applicable, that the Tribunal in the case of Kota Oxygen (P) Ltd. vs. CCE, Jaipur reported in 2000 (121) ELT 369 (Tribunal) has held that when cylinder maintenance charges and cylinder rental charges, in respect of the sale of acetylene gas affected to purchasers in cylinders owned by them as well as to those buyers who lifted gas in cylinders belonging to the manufacturer were being charged at a fixed rate, the same would be includible in the assessable value and that the Hon'ble Supreme Court vide its order reported in 2001 (128) ELT A 68 (S.C.), has dismissed the SLP filed against this order of the Tribunal. In view of this he pleaded that the duty demand and imposition of penalty has been rightly upheld by the Commissioner (Appeals) in the impugned order.

4. We have carefully considered the submissions from both the sides and have perused the records. The issue which has been decided by the Tribunal vide Order-in-Appeal No.634/89-A dated 16.10.89 in the appellant's own case was as to whether the amounts towards cylinder rental charged by the appellant from their customers are includible in the assessable value or not and this Tribunal relying upon Hon'ble Supreme Court judgement in the case of CCE vs. Indian Oxygen Ltd. (Supra) had answered this question in negative. In that case, there was no allegation that the amounts being charged as cylinder rental have been highly inflated. The facts regarding charging of highly inflated amounts towards cylinder repair & maintenance,

'cylinder testing', 'cylinder freight', 'valve & spindles charge' from all the customers including those who purchased gas in their own cylinder, came to light when Jurisdictional Central Excise Officers started the investigation sometime in July 1999. We, find that amounts being collected by the appellant from their customer by issuing debit note, towards cylinder maintenance/repair charges, cylinder freight, cylinder testing etc. are far in excess of the actual expenditure incurred by them in this regard and these amounts are being charged even from those customers who brought their own cylinders and in whose case there is no question of any cylinder maintenance or testing. The issue involved in the case of Baroda Electric Meters Ltd. (supra) was as to whether the freight difference i.e. the difference between the freight expenses actually incurred and the freight amount charged from the customers on equalised basis, is includible in the assessable value and there was no allegation that the freight on equalised basis being charged from the customers, has been artificially inflated and that it is in these circumstances that the Hon'ble Supreme Court held that the differential amount of freight in excess of the expenses toward freight actually incurred is not includible in the assessable value as duty of excise is on manufacture, not on profit made by the assessee or transporter . However in this case, the facts are different. In this case, huge difference between the expenses towards cylinder testing & repair, maintenance, freight etc. actually incurred and the amount towards these charges recovered from the customers, coupled with the fact that these charges were being recovered even from the customers who brought their own cylinders, leads to inevitable conclusion that these expenses have been artificially inflated in order to reduce the assessable value of the goods. We are, therefore, of the view that it is the Tribunal's judgement in the case of Kota Oxygen (P) Ltd. (supra) which has been upheld by the Hon'ble Supreme Court which would be applicable to the facts of this case.

4.1 The Tribunal in another case of Tripty Drinks (p) Ltd. vs. Commissioner of Central Excise, Bhubaneswar - I reported in 2002 (147) ELT 586 has held that when the assessee were diverting the cost of aerated waters being cleared by them towards the cost of transportation, the Hon'ble Supreme Court's judgement in the case of Baroda Electric Meter (supra) would not be applicable and the excess transportation charges would be includible in the assessable value. In this regard pare 3.8 of the judgement is reproduced below:-

> "**3.8** From the above evidences, it becomes quite clear that the cost of the Aerated Waters was being diverted towards the cost of the transportation. When buyers are collecting the goods at the factory gate and are not taking the transportation either in the vehicle arranged by them on their own or in the vehicles provided by the manufacturers under the hire purchase agreement, there is no justification for the appellants to collect the extra amount from their buyers on account of transportation. Such collections have rightly been held to be additional consideration for sale of the goods, which flowed back from the wholesale dealers to the appellant company and have been rightly included in the assessable value for the purposes of determination of Central Excise duty. Learned Advocates have referred to the Hon'ble Supreme Court's decision in the case of *Indian Oxygen Ltd.* - 1988 (36) E.L.T. 723 (S.C.) and *Baroda Electric Meter Ltd.* reported in - 1997 (94) E.L.T. 13 (S.C.) as also to other decisions of the Tribunal on the point i.e. extra realisation on account of transportation charges that the actual amount incurred, will not form part of the assessable value. As

already observed, there is no dispute about the above legal position. The question which arises is as to whether recovery of more amounts on account of transportation than the actually incurred cost is profit made out of transportation business or whether such collections are on account of the value of the excisable items, being collected in the guise of transportation. The evidences as discussed above have clearly established that the appellants are not undertaking any transportation activities in the first two types of transportation means, where the customers are themselves arranging for the vehicles. In these circumstances, the question of realisation of any transportation cost from their customers does not arise at all. The ratio of the various case laws referred to and relied upon by the learned Advocate is thus not applicable to the facts of the present case. It is not a simplicitor case of realisation of extra freight than the actual quantum spent, but the allegations are diversion or cost of Aerated Waters towards transportation, which stand proved against the appellant company by production of affirmative and tangible evidence produced by the Revenue and as discussed above. Accordingly, we hold that the adjudicating authority's Order for inclusion of such amounts in the assessable value of the Aerated Waters, is legal and correct."

4.1.1 We also find that this judgment of the Tribunal has been upheld by the Hon'ble Supreme Court in its judgement reported in 2003(153) ELT A 98.

5. In view of the above discussion, we find no infirmity in the impugned order. The appeal is dismissed.

[Order pronounced on 13/5/07]

(JUSTICE R.M.S.KHANDEPARKAR)
PRESIDENT

(RAKESH KUMAR)
MEMBER (TECHNICAL)

Anita