

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

Appeal No. E/3931/2003 - EX[DB]
 E/1280-1286/2004-EX
 E/5530/2004-EX & E/1509/2008-EX

Date 16/08/2010

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

To :
 DHILLON KOOL DRINKS & BEVERAGES LTD.

G.T.ROAD, PILLAUR, PUNJAB

DHILLON KOOL DRINKS & BEVERAGES LTD.

Appellant

Vs

Respondent

C.C.E. JALLANDHAR(HQ. AT CHANDIGARH)

2010 EX[DB] dated 06-8-10

I am directed to transmit herewith a certified copy of Final order No. 600-609/
 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. JALLANDHAR(HQ. AT CHANDIGARH)

(VICE VERSA)

C.R.BUILDING, PLOT NO. 19, SECTOR 17-C, CHANDIGARH.

2. Adv. / Consult

MR.V. LAXMIKUMARAN

B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

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 Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3

8 Company Law Institute of India Pvt Ltd., No.2(Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17

9 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017

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.Above Star India Bazar.Satellite Road.Ahmedabad-15

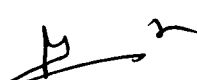
12 LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Harvana)

13 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070

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16. HON'BLE PRESIDENT


 Assistant Registrar
 (Excise Appeal Branch)

17. SH. KAMAL JEET SINGH, ADV.,

J-144, PATEL NAGAR-1, GHAZIABAD(UP)

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

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?	

1. Appeal No.E/3931/03-NB(A)

(Arising out of Order-in-Original No.78-81/CE/JAL/03 dated 18.09.2003 passed by the Commissioner of Central Excise, Jalandhar).

M/s.Dhillon Kool Drinks and Beverages Ltd.

Appellant

Vs.

CCE, Jalandhar

Respondent

2. Excise Appeals Nos.E/1280-1286/2004

(Arising out Order-in-Original No.130-136/CE/JAL/2003 dated 17.12.2003 passed by the CCE, Jalandhar)

M/s.Dhillon Kool Drinks and Beverages Ltd.

Appellant

Vs.

CCE, Jalandhar

Respondent

Present for the Appellant : Shri B.L.Narshimhan & Shri Kamaljeet Singh,
Advocates

Present for the Respondent: Shri B.K.Singh, Joint CDR

3. Excise Appeal No.E/5530/2004/NB (A)

(Arising out Order-in-Original No.78-81/CE/JAL/2003 dated 18.09.2003 passed by the CCE, Jalandhar)

CCE, Jalandhar

Appellant

Vs.

M/s.Dhillon Kool Drinks and Beverages Ltd.

Respondent

4. Excise Appeal No.E/1509/2008/EX (BR)

(Arising out Order-in-Appeal No.180/CE/Apl/Jal/2008 dated 15.04.2008 passed by the CCE(A), Chandigarh)

CCE, Jalandhar**Appellant****Vs.****M/s.Dhillon Kool Drinks and Beverages Ltd.****Respondent**

Present for the Appellant : Shri B.K.Singh, JCDR

Present for the Respondent: Shri B.L.Narshimhan & Shri Kamaljeet Singh,
Advocates

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

Date of Hearing: 07.04.2010
Date of Decision: 06.08.2010

Final **ORDER No.** 600-609/10-EX

PER: RAKESH KUMAR

The facts leading to these appeals by M/s.Dhillon Kool Drinks and Beverages Ltd., (hereinafter referred to as DKDBL) and by the Department are, in brief, as under:

1.1 DKDBL, a franchise bottlers of M/s.Pepsi Foods Ltd. manufacture aerated waters and post mix concentrate syrup in packing known as "Bag-in-Box" (BIB) under the brand name, Lehar Pepsi, Miranda, Teem, soda etc. chargeable to Central Excise duty under headings 2201, 2202 and 2108 of the Central Excise Tariff. The concentrate syrup in BIB is used in dispensing machines called Post Mix Machine for making Aerated waters of Lehar Pepsi, Miranda, Teem, etc. flavours. On receipt of the information that they are evading central excise duty by undervaluation by routing their sales through some dummy companies floated by them, the central excise officers visited their factory premises at Phillaur and business

premises at 1146, Sector 44, Chandigarh on 31.8.1994 and resumed certain records considered necessary for investigation.

1.2 During initial enquiry, it appeared that entire sales of BIBs and aerates waters were through M/s.Punjab Kool Drinks, Phillaur (hereinafter referred to as PKD), M/s. Chandigarh Kool Drinks, Chandigarh (hereinafter referred to as CKD) and M/s.Ranjitgarh Sales Pvt.Ltd., Chandigarh (hereinafter referred to as RSPL), and there is huge difference between the prices at which DKBL were selling the aerated waters & BIBs to PKD, CKD and RSPL and on which duty was being paid by DKDBL and the price at which PKD, CKD and RSPL were selling the goods to dealers. Investigation by the Department revealed the following facts:

(i) Proprietor of PKD was one Shri Hari Singh while the proprietor of CKD was Shri Partap Singh, son of Shri Hari Singh. Subsequently after death of Shri Hari Singh, his elder son Shri Avtar Singh was shown as proprietor of PKD. Shri Partap Singh and Shri Avtar Singh were the Directors of RSPL. Shri Hari Singh and his sons Shri Avtar Singh and Partap Singh were uneducated and engaged in agriculture. The initial investment of Shri Hari Singh and Shri Partap Singh in PKD and CKD was Rs.20,000/- each, and the initial investment of Shri Partap Singh and Shri Avtar Singh as the Directors of RSPL in the company was Rs.75,000/- each, while their firms/company were doing business in crores. Neither Shri Hari Singh nor his sons Shri Avtar Singh and the Shri Partap Singh appeared to be having any knowledge of the business of marketing of aerated waters.

(ii) Though DKDBL were showing the sale of the goods manufactured by them to PKD, CKD and RSPL, the records in

the factory of DKDBL indicated that the goods were being despatched directly to the customers of PKD, CKD & RSPL.

(iii) While PKD & RSPL had appointed Agents/Dealers against cash security ranging between Rs.5,000/- to Rs.1 lakh, no security was being taken by DKDBL from PKD, CKD and RSPL.

(iv) The premises and business of PKD was earlier owned by M/s.Dhillon Kool Drinks, Phillaur (hereinafter referred to as DKD) with Shri Hari Singh as its proprietor. W.e.f.1.4.94 it was shown to have been taken over by PKD.

(v) Payments made to Shri Sudhir Agarwal, Shri Om Prakash and Shri Surinder Passi, employees of PKD were reflected in the petty cash book/ cash book of DKDBL. Payments have been made by PKD to Shri Sachinder Kumar Goyal, Manager, (Accounts) of DKDBL, Shri Surjeet Goyal of DKDBL and Shri Ravi Lakhanpal, G.M. (Sales) of DKDBL, which are reflected in the expense ledger of PKD.

(vi) Leave Application of Shri Pravinder Jit Singh and Shri Om Prakash, both employees of PKD, had been sanctioned by Shri S.Goyal of DKDBL which indicated that the employees of PKD and CKD were working under the control of DKDBL.

(vii) DKDBL had collected agency security of Rs.1,85,500/- and empty security of Rs.1,85,000/- and empty deposit of Rs.14,35,168/- directly from the agencies of PKD, which indicated the overall control of DKDBL over the market of PKD.

(viii) Payments had been made by PKD directly to the Sundry Creditors of DKDBL.

(ix) The last column of production & clearance register being maintained by DKDBL showed the areas where PKD, CKD and RSPL had despatched aerated water which indicated that DKDBL had full control over the selling activities of PKD, CKD

and RSPL and it is the DKDBL which was selling the goods shown to have been sold to PKD, CKD and RSPL, directly to the customers.

(x) Scrutiny of books of accounts of DKDBL, PKD, CKD and RSPL revealed that there was transfer of funds between DKDBL and PKD/ CKD/ RSPL. Bank account of DKDBL showed amounts deposited by PKD in the bank account of DKDBL on account of "fund transfer." There are a number of entries in the books of both PKD/ CKD/RSPL on one hand and DKDBL and on the other hand, showing huge amounts transferred from PKD/ CKD/RSPL to DKDBL.

(xi) Sale of aerated water and soda by DKDBL to PKD during 4/94 to 12/94 period was Rs.12,58,23,266/- but the amount received from PKD during this period was Rs.13,74,551,365/-.

(xii) There was no written agreement between DKDBL and PKD/CKD/RSPL.

1.3 Inquiry was made with Shri Avtar Singh, proprietor of PKD and Director of RSPL; Shri Partap Singh, Proprietor of CKD and a Director of RSPL, Shri Hari Singh, Proprietor of PKD during certain period; S.K.Aggarwal, Accounts Manager of PKD; Shri Sachinder, Manager, Accounts, DKDBL; Shri Rajesh Khurana, GM (Finance) of DKDBL; Shri R.P.Singh, GM of DKDBL; Shri Sunil Sawhney, CEO, DKDBL; Shri Akhilesh Chauhan, Accounts Officer of PKD; Shri Sandeep Goyal, Deputy Manager Accounts, CKD; Shri Baljinder Singh, Sales Manager (PMX), CKD; Shri Ashok Arora, Executive Director of RSPL and Shri Anup Jaiswal, Manager Accounts of RSPL and their statements were recorded under Section 14 of the Central Excise Act, 1944 (hereinafter referred to as the Excise Act).

1.4 On the basis of the facts revealed from the documents recovered from the factory premises and business premises of DKDBL and the statements of the persons mentioned in para 1.3 above, the investigating officers was of the view that PKD, CKD and RSPL were dummy units floated by DKDBL for evasion of Central Excise duty as all the sales of aerated waters, soda & BIBs manufactured by DKDBL were through PKD, CKD and RSPL and there was huge difference between the price at which the goods were being sold by DKDBL to PKD, CKD and RSPL and on which duty was being paid and the price at which PKD, CKD and RSPL were selling the goods to independent buyers. It is on this basis that the following SCNs were issued.

1.4.1 SCNs dated 1/4/97, 30/5/97, 1/9/97 and 29/5/99 were issued for the period from September, 96 to October, 96, November, 96 to January, 97; February, 97 to March, 97 and from May, 94 to August, 96 periods respectively to DKDBL and PKD and CKD for -

- (a) demand of allegedly short paid duty amounting to Rs.7,19,143/-, Rs.13,47,850/-, Rs.18,97,819/- and Rs.7,98,27,724/- respectively in respect of clearances of aerated water and BIBs from DKDBL alongwith interest on the duty under Section 11AB of the Central Excise Act, 1944;
- (b) imposition of penalty on DKDBL under Section 11AC of the Excise Act and Rule 173Q (1) of the Central Excise Rules, 1944;
- (c) imposition of penalty on PKD and CKD under Rule 209A of the Central Excise Rules, 1944; and
- (d) Confiscation of land, building, plant and machinery of DKDBL under Rule 173Q (2) of Central Excise Rules, 1944.

In all these SCNs, it had been clearly alleged that all the sales of DKDBL of aerated waters and BIBs were through the dummy units CKD and PKD. Total duty demanded under these four SCNs was Rs.8,37,92,536/-.

1.4.2 In respect of clearances of DKDBL to RSPL, SCNs dated 4/6/99, 16/7/99, 20/10/99, 31/1/01, 19/6/01, 3/4/02 and 18/3/03 were issued to DKDBL and RSPL for the periods from November, 98 to March, 99; April, 97 to October, 98, April, 99 to September, 99; January, 2000 to June, 2000; July, 2000 to January, 2001, March, 2001 to November, 2001 and December, 2001 to October, 2002 respectively for -

(a) demand of allegedly short paid duty amounting to Rs.31,48,604/-, Rs.1,31,54,616/-, Rs.34,12,923/- ,Rs.51,70,725/- and Rs.8,43,317/- and Rs.69,39,386/- and Rs.45,09,195/- respectively in respect of clearances of BIBs from DKDBL alongwith interest on the duty under Section 11AB of the Excise Act;

(b) imposition of penalty on DKDBL under Section 11AC of the Excise Act, and

(c) imposition of penalty on S/Shri Avtar Singh, Partap Singh, Directors of DKDBL; Kewal Dhillon, Chairman, DKDBL; Sajjan Singh and B.S.Ghuman, Directors of DKDBL and Deepak Rai Walia, Executive Director, DKDBL, under Rule 209A of the Central Excise Rules, 1944/Rule 26 of the Central Excise Rules, 2001/2002.

Total duty demanded under these SCNs was Rs.3,71,78,766/-

1.4.3. SCN dated 5/12/03 was issued to DKDBL for recovery of allegedly short paid duty amounting to Rs.18,46,589/- in respect of clearance of BIBs by DKDBL during the period from November,2002 to October, 2003, alongwith interest on this duty at the applicable rate under Section 11AB and imposition of penalty on DKDBL under Rules 25 of the Central Excise Rules, 2002 read with Section 11AC of the Excise Act on the ground that while entire quantity of BIBs had been sold through depots, the duty had been paid on the price at the factory gate, instead of the depot price in accordance with the provisions of Section 4 (1) (b) of Excise Act, read with Rule 7 of the Central Excise Valuation Rules, 2000.

1.5 The SCN dated 5/12/03 was adjudicated by Joint Commissioner vide order in original No.14/CE/JC/04 dated 5/2/04 by which the duty demand of Rs.18,46,589/- was confirmed alongwith interest under Section 11AB and penalty of equal amount was imposed on DKDBL under Section 11AC. On appeal by DKDBL, the CCE (Appeals), vide order in appeal No.73/CE/JAL/05 dated 25/2/05 remanded the matter to Joint Commissioner for de novo adjudication with certain directions. On appeal by the Department against the CCE (Appeals)'s order dated 25.02.2005, the Tribunal vide order dated 12/7/2005 upheld the Commissioner (Appeals)'s order. However, on an appeal being filed by the Department to Hon'ble Punjab & Haryana High Court against the Tribunal's order under Section 35G of the Central Excise Act, 1944, Hon'ble Punjab & Haryana High Court, vide order dated 4/10/07 sent the matter back to CCE(Appeals) for decision in accordance with law. The CCE(Appeals) decided the matter in accordance with Hon'ble High Court's directions and vide order in appeal No.180/CE/APPL/JAL/07

dated 15/4/08 accepted the contention that DKDBL are eligible for deduction from depot price in respect of -

- (i) rental on PMX machine supplied by DKDBL to customers; and
- (ii) Sales tax, octroi, cash & quantity discount, salary and wages towards distribution and freight and cartage. The Commissioner (Appeals) also set aside the order of penalty and directed the jurisdictional Assistant Commissioner re-quantify the duty as per directions in the appellate order. Against this order of Commissioner (Appeals), the Department has filed appeal No.E/1509/2006-EX before the Tribunal challenging the deductions on account of - (i) freight expenses (upto 28/2/03), (ii) PMX machine rental charges and (iii) Salary and wages towards distribution.

1.5.1 The SCNs dated 16/7/99 together with the SCNs dated 4/6/99, 29/10/99, 31/1/01, 19/6/01, 3/4/02 and 18/3/03 were adjudicated by Commissioner of Central Excise, Jalandhar vide order in original No.130-136/CE/JAL/03 dated 17/12/03. The Commissioner, while holding that RSPL was a dummy unit floated by DKDBL and price to charged by RSPL from its customers would be the assessable value, also accepted the DKDBL's contention that the duty demanded in the seven SCNs are based on the price list price for BIBs, while assessable value has to be determined by deducting from that price, the sales tax, octroi & central excise duty, cash and quantity discounts, freight and cartage from the premises of RSPL and "salary and wages" towards distribution of BIBs. After permitting these deductions and treating the price difference between DKDBL's price to RSPL and RSPL's price to dealers/Agents as cum duty price and permitting abatement of central excise duty from the same , he -

(a) confirmed duty demand of Rs.1,15,70,406/- against DKDBL alongwith interest; and

(b) imposed penalty of equal amount on DKDBL under Section 11AC. The penal proceedings against S/Shri Avtar Singh, Partap Singh, Kewal Dhillon, Sajjan Singh Dhillon, B.S.Singh Ghuman and Shri Deepak Rai Walia were dropped.

The Commissioner while quantifying the duty demand had disallowed the deduction claimed by DKDBL towards machine hiring charges and repair and maintenance charges of PMX machines installed at the premises of vendors/ retailers.

1.5.2 The SCNs dated 1/4/97, 30/5/97, 1/9/97 and 29/5/97 were adjudicated by the Commissioner of Central Excise, Jalandhar vide Order-in-Original No.78-81/CE/JAL/03 dated 18/7/03. In common adjudication proceedings, DKDBL raised two important points-

(i) While in respect of BIBs, there were no sales to persons, other than PKD, CKD and RSPL, in respect of aerated waters including soda, there were sales to independent buyers at the factory gate at the same price at which the goods were being sold to PKD and CKD and hence DKDBL's price to PKD and CKD in respect of aerated waters must be accepted as the assessable value.

(ii) Even in respect of BIBs, if the price at which the goods were sold by PKD and CKD to dealers/vendors is adopted as the sale price to independent buyers, for determining the assessable value from that price, the sale tax, octroi, outward freight, salary and wages towards distribution of BIBs, cash & quantity discount and rental and repair and maintenance charges of PMX machine installed by DKDBL at the premises of vendors must be deducted for determining the assessable value.

1.5.2.1 Though in the SCNs it had been clearly alleged that all the sale of aerate waters and BIBs were through CKD and PKD and there was no sale at the factory gate of DKDBL to independent buyers, the Commissioner during the course of adjudication, in view of DKDBL's plea that they also have sales to independent buyers at the factory gate, called for a report from the jurisdictional Deputy Commissioner, who confirmed the existence of sales of aerated water to independent buyers at the same price at which the same were being sold to PKD and CKD. The Commissioner, on this basis, dropped the duty demand of Rs.7,98,27,729/- in respect of sales by DKDBL of aerated water through PKD and DKD, treating the DKDBL's price to PKD and CKD as the correct assessable value, even though he held that PKD and DKD are dummy companies floated by DKDBL and just extended arms of DKDBL. The fact that there is huge difference between the price at which DKDBL sold aerated waters to PKD and CKD and the price at which PKD and CKD sold the same aerated water to their customers was not discussed at all while giving a finding that the sale to "independent buyers" were genuine. As regards the sale of BIBs, the assessable value was determined by permitting deduction of - (a) cash and quantity discount, (b) outward freight from the premises of CKD & PKD, (c) sale tax/octroi and (d) salary & wages towards distribution, from the CKD PKD's price to their customers. The Commissioner did not allow the deduction of PMX machine rental and repair/maintenance charges. However, he treated the price difference between PKD/CKD's price and DKDBL's price to PKD/CKD as the cum duty value and allowed the abatement of central excise duty. On this basis, out of total duty demand of Rs.8,37,92,536/- duty demand of only Rs.21,78,833/- was confirmed and the remaining duty demand was dropped. The Commissioner also demanded interest on duty under Section 11AB and imposed

penalty of Rs.10 lakhs on DKDBL under Section 11AC and penalty of Rs.5 lakhs on them under Rule 173Q (1) of the Central Excise Rules, 1944. The land, building, plant and machinery of DKDBL was ordered to be confiscated under Rule 173Q (2) with an option to be redeemed on redemption fine of Rs.10 lakhs.

1.6 Against the Commissioner's order in original No.130-136/CE/JAL/2003 dated 17.12.2003, seven appeals No.E/1280-1286/-04-NB(A) were filed by DKDBL. Against the order in original No.78-81/CE/03 dated 18.09.03, an appeal No.E/3931/03-NB(A) was filed by DKDBL. However, against the order dated 18.09.2003 the Department also filed an appeal No.E/5530/04-NB(A) challenging only the part of the Commissioner's order permitting the deduction on account of salary and wages towards distribution of BIBs.

1.7 The appeals No. E/1280-1286/-04-NB(A) and appeal No.E/3931/03-NB(A) filed by DKDBL were decided by the Tribunal by a common order No.794-801/04-NB(A) dated 26/7/04 wherein the Tribunal observing that (a) if the deductions in respect of PMX machine hire charges and repair/maintenance charges are allowed, no duty would be chargeable and (b) the issue of deduction of PMX hire charges, is no longer res integra, as it has been settled by the Tribunal in the case of Pepsico India Holdings Pvt.Ltd. vs. CCE, Mumbai reported in 2004 (163) ELT 478 wherein it was held that lease charges on dispensing machine are not includible in the assessable value of concentrate syrup; allowed the appeals without going into the question as to whether PKD, CKD and RSPL are dummy units and whether extended period of limitation is applicable.

1.8 The Department filed appeals before Hon'ble Supreme Court against the Tribunal's order No.794-801/04-NB(A) dated

26/7/04 under Section 35L(b) of the Excise Act. Hon'ble Supreme Court vide order dated 3/2/2009, set aside the Tribunal's order and remanded the matter to the Tribunal observing as under:

"By consent, the impugned judgement of the Customs, Excise and Service Tax Appellate Tribunal dated 26th July, 2004 in Appeal No.E/3931/03-NB(A) and Appeal No.E/1280-1286/04-NB(A) is set aside and the matters stand remitted to the Tribunal for decision in accordance with law on the following questions, namely,

***(i) limitation (extended period of limitation) and
(ii) whether PKD and CKD are the marketing companies of the respondent assessee or whether they are "Dummy Companies" as alleged by the Department.***

In this Connection, we may add that depending on the answer to Question No.(ii) the Tribunal will have to decide on the point of differential duty. The Tribunal has also to decide as to whether the rental charges for vending machine are deductible from the price and to what extent.

Accordingly, Civil Appeals stand allowed with no order as to costs.

We request the Tribunal to expeditiously hear and dispose of the appeals, preferably with nine months."

1.9 In accordance with the above directions, the Appeal No.E/3931/03-NB(A) and Appeal No.E/1280-1286/04-NB(A) have been taken up for decision de novo alongwith the linked Departmental Appeals No.E/1509/08-EX (Br) and No.5530/04-NB(A) pending before the Tribunal.

2. Heard both the sides.

2.1 Shri B.L.Narsimhan, Advocate, the learned Counsel for the appellants, made the following submissions:-

(1) PKD, CKD and RSPL are not dummy units as they were separately assessed under Income-tax Act and Sales Tax Act.

The transaction between DKDBL and PKD, CKD and RSPL were on principal to principal basis based purely on commercial considerations. There is no concrete evidence to prove that the DKDBL were controlling the selling activity of PKD, CKD and RSPL. There is no finding by Commissioner that DKDBL and PKD/ CKD/RSPL were related persons within the meaning of this term, as defined in Section 4 of the Excise Act. In view of this , the price at which DKDBL were selling BIBs to PKD, CKD and RSPL was the correct assessable value, not the price charged by PKD, CKD and RSPL from their buyers.

(2) In respect of aerated waters, which constituted of majority of clearance, the adjudicating authority has accepted the price at which the goods were being sold to PKD and CKD. The same principle should be applied in respect of clearances of BIBs also.

(3) The Tribunal in the case of Pepsico India Holdings Pvt.Ltd. vs. CCE, Mumbai reported in 2004 (163) ELT 478 (Tribunal) has held that lease charges of dispensing machines are not includible in the assessable value of concentrate syrup, as sale of syrup and leasing of dispensing machines are two different activities. This judgement of the Tribunal has been upheld by Hon'ble Supreme Court vide judgment reported in 2009 (234) ELT 385 (SC). Moreover, aerated waters generated at vendors' premises by PMX machine are fully exempt from duty. Therefore, the rental for PMX machine and charges for their maintenance/ repairs are not includible in the assessable value.

(4) The salary and wages towards distribution of BIBs are not includible in the assessable value and the Commissioner had rightly allowed these deductions.

(5) The goods were cleared under valid invoices and the clearances were reflected in the RT-12 returns. There was no wilful mis-statement or suppression of facts on the part of DKDBL. Therefore neither longer limitation period under proviso to Section 11 A (1) of the Excise Act was applicable, nor was penalty under Section 11AC imposable.

2.2 Shri B.K.Singh, the learned Joint Chief Departmental Representative, made the following submissions:-

(1) As observed by the Commissioner in paras 6 ,8, 9 & 10 of the Order in Original No.78-81/CE/JAL/2003 dated 18/9/03 and in para 7, 8, 9, 11, 12, 13,14, 15 & 16 of Order-in-Original No.130-136/CE/JAL/2003 dated 17/12/03, PKD, CKD and RSPL do not have independent existence but are extension of DKDBL.

(2) PKD, CKD and RSPL do not have any permanent office and all the business of PKD, CKD and RSPL is being handled in the office of DKDBL. The proprietor of PKD & CKD and present Directors of RSPL – Shri Hari Singh, his sons Shri Avtar Singh and Partap Singh are uneducated persons engaged in agriculture having no knowledge and experience of manufacture of aerated waters/BIBs. While the proprietor of PKD and CKD had investment of only Rs.20,000/- each, the two Directors of RSPL Shri Avtar Singh and Partap Singh had investment of Rs.75,000/- each from which it is impossible to generate turnover running into crores.

(3) While PKD, CKD and RSPL were taking cash security even upto Rs.1,00,000/- depending upon the volume of business from their dealers, no security whatever had been taken by

DKDBL from PKD, CKD and RSPL while there were no written arguments between DKDBL and PKD/CKD/RSPL.

(4) Goods shown to have been sold to PKD, CKD and RSPL were, in fact, being directly despatched to the customers of PKD, CKD and RSPL. Verification of production register at the plant of DKDBL at Phillaur revealed that vehicle Nos. and name of places such as Ludhiana, Gurgaon, Amritsar, Jalandhar, Hoshiarpur, Moga, etc. had been mentioned in respect of the goods shown to have been sold to PKD, CKD and RSPL, which showed that entire marketing of PKD, CKD and RSPL was being controlled by DKDBL.

(5) There are numerous instances of financial accommodation between DKDBL and PKD, CKD and RSPL. DKDBL supplied all empty bottles and crates to PKD, CKD and RSPL without any consideration or security.

(6) Though RSPL declared the address of the Directors which was also declared as Regional office of the company, on verification it was found that no such office of RSPL existed at that place.

(7) Tribunal in the case of Collector of Central Excise, Kanpur vs. J.K.Cotton Spinning & Weaving Mills Co.Ltd., reported in 1988 (35) ELT 524 (Tri.) and Hon'ble Supreme Court in case of J.K.Cotton Spinning & Weaving Mills Co.Ltd. vs. Collector of Central Excise, Kanpur reported in 1997 (91) ELT 524 (SC) have held that intermediary firms, having little capital, no godown are mere shadow firms, which are only a device to depress the assessable value and in such case, Assessee's selling price of the goods to such shadow firms is to be

ignored as selling price of the goods and the same is to be ascertained on the basis of the price at which such shadow firms sell the goods to independent buyers. Same view has been taken by the Tribunal in case of Rasoi Limited vs. Collector of Central Excise, Calcutta reported in 1987 (30) ELT 490 and Track Air Conditioning Systems Ltd. vs. Commissioner of Central Excise, Bangalore reported in 2005 (180) ELT 327 (Tri.-Bang).

(8) In the order in original No.78-81/CE/JAL/03 dated 18/9/03, the Commissioner's order permitting deduction of expenses incurred towards distribution of product salary and wages given to establishment of PKD & CKD, is incorrect and contrary to the judgement of Hon'ble Supreme Court in case of Union of India vs. Madras Rubber Factory reported in 1995 (77) ELT 433 (SC), wherein it was held that marketing and selling organisation expenses are includible in the assessable value.

(9) The rental and repair & maintenance for PMX machine installed by DKDBL at the premises of buyers of BIBs from PKD, CKD and RSPL is includible in the assessable value of BIBs. The judgement of Hon'ble Supreme Court in case of M/s. of Pepsico India Holdings (supra) is not applicable to this case as while in the case of M/s. of Pepsico India Holdings, the vending machines had been installed by the holding company, but the marketing charge were payable to the marketing company, not to the holding company, as in the instant case. It is apparent that the BIBs are of no use if the same is not dispensed through the vending machine. Thus, the vending machine is relatable to the marketing of the product and the money which is spent for installation, maintenance and repairs has to form

part of the assessable value of BIBs, as the machines are owned by the manufacturing company – DKDBL and are necessary for the marketing of the product.

3. We have carefully considered the submissions from both the sides and perused the records. The Appellant-DKDBL manufacture aerated waters of various flavours sold under brand names – Lehar Pepsi, Miranda, Teem, soda etc. and soft drink concentrate syrup, packed in a packing called Bags in Box (BIBs). The BIBs are put in post mix dispenser machines (PMX machines) in the vender's premises which dispense a measured quantity of aerated waters by dilution and carbonation of the concentrate. The dispute in these appeals is about the valuation of BIBs. According to the Department, entire quantity of BIBs manufactured by DKDBL is sold to PKD, CKD & RSPL who, in turn sell the same to their customers – soft drink vendors. DKDBL have installed PMX machine at the vendor's premises. The price at which PKD, CKD & RSPL sell the BIBs to their customers is 90% to 120% higher than the price at which the same are purchased by PKD, CKD & RSPL from DKDBL. The Department's allegation is that PKD, CKD & RSPL are just dummy units floated by DKDBL to depress their assessable value and duty should be charged at the price at which the BIBs are sold by PKD, CKD & RSPL to independent buyers. The contention of DKDBL, on the other hand is that -

- (a) PKD, CKD & RSPL are independent units and transactions between these as PKD, CKD & RSPL are on principal to principal basis; and
- (b) When in respect of aerated waters, the Department has accepted their price to PKD & CKD as the correct assessable value, there is no reason to doubt their price to PKD, CKD & RSPL in respect of BIBs.

Another contention of DKDBL is that even if the price charged by PKD, CKD & RSPL from their customers is treated the correct price of the goods, the same should not be taken from their price list as--

- (a) on the price list price, quantity and cash discount are given; and
- (b) the price list also includes the sales tax, octroi, PMX machine rental & repair maintenance charges, outward freight and salary & wages towards distribution, when deduction must be allowed.

3.1 The Commissioner while allowing the deduction of sales tax & octroi, cash and quantity discount, freight expenses from the premises of PKD, CKD & RSPL and salary and wages towards distribution, has disallowed the deduction of PMX machine rental and repair/maintenance charges. Besides this, the Commissioner has treated the difference between the DKDBL's price in respect of BIBS to PKD/CKD/RSPL and RSPL's price for the same to independent buyers as cum duty price and has permitted abatement of central excise duty from the same. While the Commissioner's order disallowing the deduction of PMX machine rental and repair/maintenance charges has been challenged by the Appellant – DKDBL in Appeal No.E/3931/03-NB(A) and E/1280-1286/04-NB(A), the Commissioner's order allowing deduction of "wages & salary towards distribution has been challenged by the Department in Appeal No.E/5530/04-NB(A). The points which as per direction of Hon'ble Supreme Court in its order dated 3/2/07 have to be decided in Appeal No. E/3931/03-NB(A) and E/1280-1286/04-NB(A) filed by DKDBL are as under:

- (1) Whether PKD, CKD & RSPL are genuine and independent marketing companies, marketing the aerated waters and BIBs manufactured by DKDBL or they are just dummy units floated by

DKDBL to depress their assessable value and if the PKD, CKD and RSPL are dummy units, whether DKDBL's price to PKD, CKD and RSPL is to be taken as the assessable value or the price at which PKD, CKD and RSPL sell the BIBs to independent buyers is to be adopted the basis for determining the assessable value?

(2) Whether deduction of rental on PMX machine & charges for maintenance/repair of these machines admissible for determining the assessable value of BIBs and if so, to what extent?

(3) Whether deduction of "salary & wages towards distribution" is admissible for determining the assessable value of BIBs?

(4) Whether extended limitation period under proviso to Section 11A(1) is available to the Department for recovery of short paid duty, if any recoverable.

(5) How the duty demand are to be quantified.

3.1.1 In Appeal No.E/5530/04-NB(A) filed by the Department, the point of dispute is regarding deduction of "salary & wages towards distribution" and in the Appeal No.E/1509/06-EX(Br) filed by the Department, the points of dispute are regarding the deduction of (a) "salary & wages towards distribution", (b) PMX machines rental and their repair & maintenance charges and (c) outward freight for the period prior to 1/3/03.

3.1.2 Our findings on the above points are as under:

4. **Whether PKD, CKD and RSPL are genuine and independent marketing companies, marketing the aerated waters and BIBs manufactured by DKDBL or the same are dummy units floated by DKDBL for depressing the assessable value and if the PKD, CKD and RSPL are dummy units, whether DKDBL's price for BIBs to PKD, CKD and RSPL is to**

be taken as the assessable value or the price at which PKD, CKD and RSPL sell the BIBs to independent buyers is to be adopted as the basis for determining the assessable value.

4.1 The evidence in support of the Department's allegation that PKD, CKD and RSPL are not independent marketing firms/companies but are extensions of DKDBL has been discussed in detail by the Commissioner in paras 6,7,8,9 & 10 of the order in original No.78-81/CE/JAL/03 dated 18/9/03 and para 7, 8, 9, 10, 11, 12, 13,14, 15 & 16 of the order in original No.130-136/CE/JAL/03 dated 17/12/03. The proprietor of PKD was one Shri Hari Singh and later on, after his death, his son Shri Avtar Singh became its proprietor. The proprietor of CKD is one Shri Partap Singh, son of Shri Hari Singh. The promoter – directors of RSPL are Shri Avtar Singh and Shri Partap Singh. Shri Hari Singh was an agriculturist and so are his sons Shri Avtar Singh and Shri Partap Singh and all of them are uneducated. None of them have any experience of marketing of products like aerated water or soft drinks concentrate syrup. They do not appear to have even financial capacity to run marketing company, as while investment of Shri Hari Singh/Shri Avtar Singh and Shri Partap Singh in PKD and CKD respectively is Rs.20,000/- each, the investment of these persons in RSPL is Rs.75,000/- each. There is no explanation as to why the firms/companies like PKD, CKD & RSPL with capital of Rs.20,000/- and Rs.1.5 lakh respectively, owned/controlled by agriculturists without any education and without any experience of marketing of soft drinks have been given by DKDBL the business of marketing of aerated waters/BIBs manufactured by them worth crores of rupees and that too without any formal written agreement and without taking any security from them. Other than the statements of Hari

Singh, Shri Partap Singh and Shri Avtar Singh that they were signing cheques and other documents for PKD, CKD and RSPL, there is no evidence indicating that these persons were in control of PKD, CKD and RSPL and were running the business of these marketing firms/company. In fact the following evidence on record indicates to contrary –

- (1) Shri Partap Singh in his statement dated 7/9/98 has stated that as per his knowledge all the work of RSPL was being looked after and controlled by DKDBL.
- (2) All empty bottles & crates were being supplied by DKDBL to PKD, CKD and RSPL without any security or advance deposit. While PKD, CKS and RSPL were taking security from their buyers ranging from Rs.5000/- to Rs.1,00,000/- depending upon the quantum of their sales to their dealers, no security deposit was taken by DKDVL from PKD, CKD & RSPL, who market their goods worth crores of rupees and that too when there is no formal legally binding agreement between DKDBL and PKD/CLD/RSPL.
- (3) Sundry Debtors of RSPL made payment to DKDBL on their behalf. RSPL paid cash to DKDBL at frequent intervals for meeting day to day expenses.
- (4) While DKDBL as per their franchise agreement with Pepsi Foods Ltd. were required to incur certain quantum of advertisement expenses for promotion of various brand names of pepsi; there was no written agreement, whatsoever between DKDBL and RSPL, but still RSPL were sharing the advertisement expenses of DKDBL. From balance sheet of RSPL it is seen that major portion of expense incurred has been shown as under the head –

'marketing overhead" which includes incurring advertisement expenses.

- (5) While DKDBL had installed post mix machines (PMX machines) at the premises of dealers of PKD, CKD and RSPL, it is the RSPL, PKD and CKD who were looking after the repair and maintenance of their machines.
- (6) The balance sheets of RSPL, were showing meagre profits. Similar was the position in respect of PKD & CKD.
- (7) While the invoices were being issued in the name of PKD, CKD and RSPL, the goods were being directly despatched by DKDBL from their factory at Phillaur to the customers of PKD, CKD and RSPL in different regions. The Register of production and clearances at the plant of DKDBL, mentioned against each despatch, the vehicle No. as well as the name of the destination like Ludhiana, Gurgaon, Amritsar, Jalandhar, Hoshiarpur, Moga, etc. which shows that the DKDBL were keeping track as to where the goods sold by them to PKD, CKD and RSBL, were being sold by PKD, CKD & RSBL. If PKD, CKD & RSPL were genuinely independent marketing companies, there was no reason for DKDBL to track the sales of PKD, CKD & RSPL.
- (8) There are numerous instances by DKDBL of payments of salary etc. to the employees of PKD and vice versa. Even the leave of the employees of PKD & CKD was being sanctioned by the office of DKDBL. No satisfactory explanation has been given for this.
- (9) There are a number of entries in the books of both PKD and DKDBL which show that huge amounts have been transferred from PKD to DKDBL without mentioning the nature and reasons of such fund transfer. Apart from this,

there are many entries in the books of accounts of DKDBL, which show the amount deposited by PKD in the books of account of DKDBL on account of "Fund transfer". No satisfactory explanation has been given for this fund transfer.

4.1.1 It is unconceivable that a manufacturer of aerated waters and concentrate syrups, whose marketing requires considerable expense and financial investment, would hand over the same to firm/company owned/controlled by uneducated persons without any financial capacity and without any experience of marketing of such products and that too, without any formal legally binding agreements and without taking any security from them. From the above facts, it is clear that it is the DKDBL who are the real persons behind PKD, CKD and RSBL.

4.2 In view of the above, we hold that CKD,PKD & RSPL do not have independent existence but are mere extensions of DKDBL and transactions between DKDBL and CKD,PKD & RSPL are not on principal to principal basis. As there is huge difference between the price at which DKDBL sell the goods to CKD,PKD & RSPL and on which duty is paid by DKDBL and the price at which CKD,PKD & RSPL sell the goods to independent buyers, it is clear that these firms/company have been created by DKDBL to depress their assessable value. We, therefore, hold that for assessment of duty on BIBs manufactured and cleared by DKDBL, it is the price charged by CKD,PKD & RSPL from their buyers after permissible deductions, if any, which will be the assessable value of the goods and not the price at which DKDBL are showing the sale of BIBs to CKD,PKD & RSPL.

4.3 It has been pleaded that since in respect of clearances of aerated waters by DKDBL, their price to CKD & PKD has been accepted as the correct assessable value, there is no reason to reject the DKDBL's price to CKD, PKD & RSPL in respect of BIBs. On going through the Commissioner's order in original No.78-81/CE/JAL/03 dated 18/9/03 in this regard, we find that even though PKD and CKD have been held by the Commissioner to be dummy units floated by DKDBL to depress their assessable value and even though aerated waters were being sold by PKD and CKD to their customers at prices about 50% higher than the price at which the same were being sold by DKDBL to PKD & CKD, the Commissioner has accepted DKDBL's price to CKD & PKD in respect of aerated waters as correct transaction value on the ground that there were sales by DKDBL at factory gate of the same aerated waters to other independent buyers at the same price and on this basis, the duty demand on cum duty Rs.7,78,27,729/- in respect of clearance of aerated water has been dropped. We do not agree with the Commissioner's decision as -

(a) when PKD and CKD have been held to be just dummy units floated by DKDBL and mere extensions of DKDBL, it is the price at which PKD and CKD were selling the goods to independent buyers, which will be the assessable value, not the obviously under-declared price to PKD & CKD on which duty was being paid;

(b) just because there were some sales of aerated waters to buyers claimed to be "independent buyers" at the same price, the DKDBL's price to PKD & CKD does not become the correct assessable value, as there is neither any investigation nor any finding on this point as to whether so-called sales to "independent buyers" were genuine or whether such sales had been artificially created;

(c) it is inconceivable that a manufacturer will sell his goods to customers at a price 50% lower than the price at which he can sell his goods to others; and

(d) and even if the "independent buyers" are genuine, they may constitute a separate class of buyers whose price could not be adopted as assessable value in respect of sale to other buyers, but there is absolutely no discussion in the Commissioner's order on this point.

Therefore, Commissioner's order accepting the DKDBL's price to PKD & CKD as the correct assessable value, and dropping the duty demand of Rs.7,98,27,724/-, even though not challenged by the Department, is not correct and the same cannot be the basis for accepting DKDBL's price to PKD, CKD and RSPL in respect of BIBs as the correct assessable value.

5. **Whether deduction of (i) rental on PMX machines installed by DKDBL at retailer's premises and charges for repair and maintenance of these machines and (ii) expenses incurred by PKD, CKD & RSPL or salary & wages towards distribution are admissible for determining the assessable value of BIBs.**

5.1 It has been pleaded by DKDBL that if the assessable value of the BIBs manufactured and cleared by them to PKD, CKD and RSPL, is determined by the Department on the basis of the price charged by PKD, CKD and RSPL from their customers, from this price, the expenses on account of outward freight, cash & quantity discounts, salary & wages towards distribution, taxes and rental & repair/maintenance expenses of PMX machines installed by DKDBL at retailer's premises must be deducted to arrive at the assessable value, as price charged by PKD, CKD and RSPL from their customers

includes all these expenses. While the Commissioner has disallowed the deduction of PMX rental & repair/maintenance expenses, which has been challenged by the appellant- DKDBL, he has allowed the deduction of taxes, cash & quantity discounts, outward freight from PKD/ CKD/RSPL's premises and salary and wages towards distribution, out of which, the deduction of salary & wages towards distribution has been challenged by the Department.

5.2 Coming to the question of exclusion of salary & wages of staff engaged in distribution, from the assessable value, the Commissioner while holding that these expenses are not includible in the assessable value of BIBs, has relied upon Hon'ble Supreme Court's judgement in case of Assistant Collector of Central Excise vs. Madras Rubber Factory Ltd. reported in 1987 (27) ELT 553 (SC). However, this judgement of Hon'ble Supreme Court, on a review petition having been filed by the Government, had been recalled by the Hon'ble Supreme Court vide order dated 1/5/87 reported in 1989 (41) ELT 703 (SC) and subsequently the Hon'ble Supreme Court, in its judgement dated 8/5/95 in the same matter, reported in 1995 (77) ELT 433 (SC) held that expenses on maintenance of sales depots are includible in the assessable value. Earlier, Hon'ble Supreme Court in its judgement in case of Union of India vs. Bombay Tyre International reported in 1983 (14) ELT 1896 (SC) had held that marketing and selling organisation expenses are includible in the assessable value. In view of settled legal position on this issue, we hold that salary & wages of the staff of CKD, PKD & RSPL engaged in marketing and distribution of the goods is includible in the assessable value of the goods and the Commissioner's order permitting these deductions is not correct.

5.3 Coming to the question as to whether the PMX machines rental and their maintenance and repair expenses are includible in the assessable value of BIBs, we find that PMX machines have been installed by DKDBL at the retailer's premises and it has been pleaded that PMX machines rental and their maintenance and repair expenses are included in the price charged by PKD, CKD & RSPL from their customers.

5.3.1 What is manufactured and cleared by DKDBL is post mix concentrate syrup for aerated waters being sold under brand name, Lehar Pepsi, Miranda, Teem, etc. The syrup is a mixture of soft drink concentrate and sugar chargeable to duty under heading 21.08 of the Central Excise Tariff. It is sold in 20 litres packing in a special type of container called Bag in Box (BIB). The soft drink syrup in BIBs can be used only with post mix Dispensing Machines (PMX machines), in which the concentrate syrup is diluted, carbonated and a measured quantity of the aerated water generated is dispensed. The PMX machines have been installed by DKDBL at the retailer's premises for which they charge rental & maintenance charges. The manufacture and sale of soft drink concentrate syrup and leasing of PMX machines are two separate activities having no link with each other. A retailer of aerated waters purchasing concentrate syrup in BIBs from a manufacturer can either purchase his own PMX machine or can take the machine on lease from the concentrate manufacturer or from some other person. Just because the concentrate syrup can not be used without PMX machine, it does not mean that PMX machine performs some function, ancillary or incidental to the manufacture of concentrate syrup, as manufacture of concentrate syrup chargeable to duty under heading 21.08 is complete when it is packed in a marketable packing – BIB and what is generated in PMX

machine at retainer's machine is aerated waters chargeable to duty under heading 22.02 and making aerated waters from the concentrate syrup in the dispensing machine, cannot be said to be a process ancillary or incidental to the manufacture of concentrate syrup. We are, therefore, of the view that PMX machine rental & repair/maintenance expenses are not includible in the assessable value of concentrate syrup in BIBs and if the same are included in the price charged by PKD, CKD and RSPL from their customers for the BIBs, their deduction must be allowed. We find that the same view has been taken by the Tribunal in the case of *Pepsico Holdings (P) Ltd. vs. CCE, Mumbai* reported in 2004 (163) ELT 478 and *H.P. Horticultural Produce M. & P. Corporation Ltd. vs. CCE, Chandigarh* reported in 1998 (103) ELT 160 (Tri.). Needless to say that this deduction will be permissible only if the PMX machine rental & repair/maintenance charges are not separately charged by DKDBL from the retailers and are included in the price of BIBs.

5.3.2 As regards, the extent of deduction to be allowed in respect of PMX machines rental & repair/maintenance charges, while the same has to be allowed on actual basis, the evidence regarding, the quantum of deduction claimed and its correctness has to be produced by the appellant. With regard to correctness of the amount claimed as PMX machine rental, we are of the view that the same must be comparable with amortised value per BIB of the PMX machine plus reasonable profit margin of the machine's owner renting the machine.

6. **Whether extended limitation period under proviso to Section 11A (1) of the Central Excise Act, 1944 is available to the Department for the recovery of short paid duty.**

6.1 Since as discussed in para 4.1 & 4.2 above, PKD, CKD & RSPL are nothing but dummy entities created by DKDBL to depress their assessable value for evading central excise duty and since the facts regarding real nature of transaction of DKDBL with PKD, CKD & RSPL came to the knowledge of the Department only after a departmental investigation, longer limitation period under proviso to Section 11A(1) of the Excise Act, 1944 would be available to the Department for recovery of short paid duty and for the same reason, the provisions of Section 11AB and Section AC would also be attracted.

7. **Quantification of Duty demand-**

7.1 For calculation of differential duty, the assessable value of the BIBs has been determined by the Commissioner by permitting the deduction of – (i) taxes (ii) cash quantity discounts, (iii) outward freight from the premises of PKD, CKD, & RSPL, and (iv) salary & wages towards distribution from the price charged for the BIBs by PKD, CKD & RSPL from their customers and the deduction of rental and repair/maintenance charges of PMX machines installed by DKDBL at retailer's premises has been disallowed. However, as discussed above, while the deduction of salary & wages towards distribution is not permissible, the PMX machine rental and their repair/maintenance expenses, have to be excluded from the assessable value of BIBs. We also find that the Commissioner instead of confining the deduction of excise duty only to the duty paid by DKDBL on their sale price to PKD/CKD/RSPL, has treated the entire differential value, on which duty is being demanded as cum duty value and on this basis has permitted the abatement of excise duty from the differential value by following Hon'ble Supreme Court's judgement in case of Assistant Collector of Central Excise & others vs.

MRF Ltd. (supra). But in the judgement relied upon by the Commissioner, the price was cum duty price, for which assessable value was to be determined by applying the formula-

$$\text{Assessable value} = \frac{\text{cum duty price}}{1 + \text{rate of excise duty}}$$

This formula is not applicable as the differential value i.e. the difference between the price including duty charged by DKDBL from PKD, CKD & RSPL for BIBs, and the total price charged by PKD, CKD & RSPL from their customers, on which duty is sought to be recovered after permissible deduction, does not include the element of central excise duty. Since this is a case of deliberate evasion of duty by depressing the assessable value and not a case where short payment is due to some bonafide misunderstandings on the part of the appellant, the judgment of Hon'ble Supreme Court in case of CCE, Delhi vs. Maruti Udyog Ltd. reported in 2002 (141) ELT 3 (SC) would not be applicable. Same view has been taken by the Tribunal in case of Asian Alloys Ltd. vs. CCE, Delhi-III, reported in 2006 (203) ELT 252 and Sarla Polyester Ltd. vs. CCE, Surat-II reported in 2008 (222) ELT 376. Moreover, Hon'ble Supreme Court in the case of Amrit Agro Industries Ltd. Vs. Commissioner of Central Excise, Ghaziabad reported in 2007 (210) ELT 183 (SC) has held that unless it has been shown by the manufacturer that the price of the goods includes the excise duty payable by him, no question of exclusion of duty element from the price for determination of value under Section 4(4)(d)(ii) will arise.

7.2 In view of the above discussions, for quantification of duty demand, the assessable value has to be determined by permitting from the price list price, the deductions of (a) taxes actually paid; (b) cash and quantity discounts, if any, given to

customers; (c) outward freight from the premises of PKD/CKD/RSPL to their customers' premises; (d) rental and repairs & maintenance expenses of PMX machines if the same are included in the price charged. No deduction of salary & wages towards distribution is to be permitted. However, the evidence regarding the trade discounts given to the customers and their quantum, taxes paid, quantum of outward freight from the premises of PKD/CKD/RSPL to the customers' premises and rental/repair & maintenance expenses PMX machines and correctness of the PMX machine rentals has to be produced by the appellants for claiming their deduction from the sale price of PKD/CKD/RSPL. For this purpose, the matter has to be remanded to the Commissioner.

8. Appeal No.E/1509/08-EX (BR) filed by the Department.

8.1 As regards the appeal No.E/1509/08-EX(BR) filed by the Department, the period of dispute in respect of this appeal is from November, 2002 to October, 2003 when DKDBL were clearing the concentrate syrup in BIBs to their depots from where the same were being sold. While in the respect of their clearances, they, as per provisions of Rule 7 of the Central Excise Valuation Rules, 2000, were required to pay duty on the price of the goods at the depot at the time of removal from the factory, the duty was being paid by them on the factory gate price. It is on this basis, that duty demand of Rs.18,46,589/- was confirmed against them by the Joint Commissioner. However, Commissioner(Appeals), accepting DKDBL's plea that the depot price of BIBs includes sales tax, octroi, cash & quantity discount, freight expenses, salary & wages towards distribution and rental and repair/maintenance charges in respect of PMX machines, allowed the deduction of these expenses and directed the Joint Commissioner to re-determine the assessable value. The

Department is in appeal against the CCE(Appeals)' order permitting the deduction of "salary & wages towards distribution, PMX machines rental and repair/maintenance charges" and "outward freight" for the period prior to 1/3/2003, as the same was not separately mentioned in the invoices.

8.2 As discussed in para 5.2 and para 5.3 above, while deduction of "salary & wages towards distribution is not permissible, PMX machines rental and repair/maintenance expenses, if included in the price of BIBs, is deductible for determining the assessable value.

8.3. As regards the freight expenses for the period prior to 1/3/2003, since the goods were sold from depot, as per the provisions of Rule 7 of the Central Excise Valuation Rules, 2000, duty was chargeable on the price of the goods at the depot. Therefore, the freight expenses from the factory gate to depot would be includible in the assessable value and its deduction cannot be allowed for determining the assessable value. However, the freight expenses from the Depot to customers premises cannot be included in the assessable value of the goods when the goods have been sold from depot, as the assessable value of the goods under Section 4 (1) of the Act as it stood during the period of dispute, is the price for delivery of the goods at the time and place of removal and if in case of sale from depot, the freight expenses from depot to customers premises are included, the price would cease to be the price at the place of removal. Therefore, the freight expenses from the depot to customer's premises would have to be deducted for arriving at the assessable value. However, the evidence with regard to the quantum of freight expenses from depot to customer's premises would have produced by the appellant.

8.4 In view of the above discussions, the matter has to be remanded to original adjudicating authority for re-quantification of duty after permitting exclusion from the assessable value of -

(a) PMX machine rental and repair and maintenance expenses (if included in the price of BIBs); and

(b) outward freight for depot to the customer's premises and also if taxes actually paid and cash & quantity discounts, which had been allowed by CCE(Appeals) and are not under challenge.

Needless to say, the Respondent (DKDBL) have to produce evidence with regard to the quantum of deduction in respect of these expenses.

9. In view of the our above discussions -

(i) So far as Appeal no.E/3931/03-NB(A) and E/1280-86/04-NB(A) filed by DKDBL and E/5530/04-NB(A) filed by the Department are concerned, the matters are remanded to the adjudicating authority for quantification of duty demand in terms of our directions in para 7.1 and 7.2 of the order, and ~~for~~ penalty to be imposed on DKDBL u/s 11AC on that basis; and

(ii) So far as appeal No.E/1509/08-Ex (BR) is concerned, the matter is remanded to the original adjudicating authority for quantification of duty demand in terms of our direction in para 8.1 & 8.2 of the order.

9.1 Since the issues involved in all these appeals are common, the de novo adjudication for the purpose of quantification of duty demands must be done by the Commissioner in respect of

Appeal No.E/1509/08-EX also, even though in this case, the original adjudication had been done by the Joint Commissioner.

(Pronounced in the open court on 6/8/10)

(JUSTICE R.M.S.KHANDEPARKAR)
PRESIDENT

(RAKESH KUMAR)
MEMBER (TECHNICAL)

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