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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/705 /2010-706 /2010 - EX[DB] WITH E/S/729-30/2010-EX   Date 21/09/2010

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

To :
M/S SPECIAL AIR GASES,
PLOT NO. 26A, 26 KM MILE STONE, DELHI-ROHTAK ROAD, GHEVRA EXTENSION, NEW DELHI.

M/S SPECIAL AIR GASES,   Appellant
Vs
C.C.E. DELHI I   STAY ORDER NO.642-43/2010-EX   Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 643-44/ 2010 EX[DB] dated 23-8-10 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. DELHI I
   C.R. BUILDING, I.P. ESTATE, NEW DELHI 110002
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 Publictions 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 (Haryana)
13. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file
16. HON'BLE PRESIDENT.
17. MR. DEEPAK DUA, PROP
    M/S BOBBY AIR GASES, 15/43, FUN CINEMA ROAD,
    MOTINAGAR, NEW DELHI.

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

DATE OF HEARING : 23/08/2010.
DATE OF DECISION : 23/08/2010.

Excise Stay Application No. 729 of 2010 in appeal No. 705 of 2010

M/s Special Air Gases — Appellants

Versus

CCE, Delhi – I — Respondent

Excise Stay Application No. 730 of 2010 in appeal No. 706 of 2010

Shri Deepak Dua]
Prop. of M/s Bobby Air Gases] — Appellants

Versus

CCE, Delhi – I — Respondent

Appearance

Shri B.L. Narasimhan, Advocate – for the Appellants.

Shri B.K. Singh, Authorized Representative (Jt. CDR) – for the Respondent.

CORAM : **Hon'ble Shri Justice R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

STAY Order No. 642-643/10-Ex Dated : ____________

Per. Shri Justice R.M.S. Khandeparkar :-

Heard the learned advocate for the appellants and Jt. CDR for the respondent. As we propose to dispose of the appeals themselves, the application is allowed without insisting for any deposit in the matter, while directing the Registry to place the appeals themselves for hearing forthwith. The applications stand disposed of.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

DATE OF HEARING : 23/08/2010.
DATE OF DECISION : 23/08/2010.

Excise Appeal No. 705 of 2010

M/s Special Air Gases — Appellants

Versus

CCE, Delhi – I — Respondent

Excise Appeal No. 706 of 2010

Shri Deepak Dua]
Prop. of M/s Bobby Air Gases] — Appellants

Versus

CCE, Delhi – I — Respondent

[Arising out of the Order-in-Original No. 63/PKJ/CCE/ADJN./2009 dated 30/12/2009 passed by The Commissioner of Central Excise (Adjn.), New Delhi.]

For Approval and signature :

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri 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 would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : No
3. Whether their Lordships wish to see the fair copy of the order? : Seen
4. Whether order is to be circulated to the Department Authorities? : Yes

Appearance

Shri B.L. Narasimhan, Advocate – for the Appellants.

Shri B.K. Singh, Authorized Representative (Jt. CDR) – for the Respondent.

CORAM : **Hon'ble Shri Justice R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

FINAL Order No. 643 - 644/2010-EX. Dated : ____________

Per. Shri Justice R.M.S. Khandeparkar :-

Heard the learned advocate for the appellants and Jt. CDR for the respondent. This appeal is being heard in terms of order passed today in stay application No. 729 and 730 of 2010.

2. The appellants challenge order dated 30th December 2009 whereby the Commissioner, New Delhi has confirmed the demand and ordered for recovery of amount of Rs. 1,60,26,799/- and education cess amounting to Rs. 1,48,257/- alongwith interest thereon while ordering adjustment of Rs. 50,00,000/- already paid and has imposed penalty of equal amount besides penalty of Rs. 1,00,000/- against Shri Deepak Dua, Proprietor of M/s Bobby Air Gases, Moti Nagar, New Delhi, penalty of Rs. 25,000/- against Shri Vinod Chopra, Proprietor of M/s Sigma Gases, penalty of Rs. 25,000/- against Shri Satyaprakash, Partner of M/s Jai Bharat Industries, Hisar, penalty of Rs. 25,000/- against Shri Rajesh Swami, Authorized Signatory of M/s J.J. Steels Hisar, penalty of Rs. 25,000/- against Shri Manoj

Agarwal, Proprietor of M/s Manoj Steel Pipe Industries, Hisar, penalty of Rs. 25,000/- against Shri Kishan Lal Singla, Director of M/s Singla Steel Tubes P. Ltd., Hisar and penalty of Rs. 25,000/- against Shri Pawan Kumar Goyal, Partner of M/s Hari Har Pipe Ind., Hisar.

3. The appellants are engaged in manufacture of industrial gases classifiable under Chapter 28 of the 1st Schedule of the Central Excise Tariff Act, 1985. In the course of investigation, it was revealed that the appellants during the period from 2002-2003 to 2006-2007 had removed finished goods without payment of duty amounting to Rs. 1,61,75,056/- and hence show cause notice dated 19th April 2008 came to be issued to the appellants. Prior to that another show cause notice dated 7th September 2007 was sought to be issued in relation to the goods which were sought to be seized under Panchnama dated 9th March 2007. The proceedings were contested by the appellants. However, the impugned order came to be passed, as stated above.

4. The learned advocate for the appellants, while candidly admitting that the ground on which he seeks to canvass against the impugned order was not raised in defence before the lower authority, submitted that the appellants had in fact purchased liquid nitrogen in tankers and refilled the same in small containers and were under the belief that it amounted to manufacture and had been paying the duty on such activity. He further submitted that the appellants were in fact mislead by the Chapter Note 10 to Chapter 28 of the Tariff Act which relates to

repacking of the commodity from both pack to retail packs. Under the wrong belief that refilling of the small containers with gas brought in tankers amounted to repacking within the meaning of said expression under the chapter note of said chapter, the appellants had been paying duty on the said activity. However, pursuant to the decision of the Tribunal in the matter of **Ammonia Supply Company vs. CCE, New Delhi** reported in **2001 (131) E.L.T. 626 (Tri. – Del.)** and decision of the Apex Court in the matter of **CCE, Mumbai vs. BOC (I) Ltd.** reported in **2008 (226) E.LO.T. 323 (S.C.)** and the Circular issued by the Board being Circular No. 910/30/2009-CX dated 16-Dec-2009 having been brought to the notice of the appellants, it has now been released that the activity carried out by the appellants in the form of refilling of the gas in small containers from the tankers does not amount to repacking within the meaning of the said expression under the said chapter note and, therefore, it would not attract the excise duty as the activity would not amount to manufacture within the meaning of the said expression under the said Act and the Rules made thereunder. He further submitted that even the Commissioner (Appeals) while dealing with the proceedings in relation to the seizure of the cylinders in the course of the investigation in the matter, relying upon the decisions of the Tribunal in the case of Ammonia Supply Company vs. CCE, New Delhi (supra) as well as the said Circular issued by the Board has held that the activity undertaken by the appellants fall outside the purview of the said chapter note. Being so, according to the learned advocate, the Commissioner erred in saddling the appellants with the duty liability and subjecting the appellants to pay the penalty. In the facts and circumstances of the case, according to the learned advocate, the impugned order is liable to be set aside and the amount already paid which has been appropriated under the impugned order should be directed to be paid to the appellants.

5. On the other hand, learned Jt. CDR submitted that the chapter note is not merely confined to the activity of repacking. The chapter note also relates to the activity of labelling and re-labelling as well as any other treatment which would render the product marketable to the consumer. Being so, according to the learned Jt. CDR merely because the refilling of small tankers may not amount to repacking that itself will not be a justification for setting aside the impugned order and holding that the appellants were not engaged in the manufacturing activity. He further submitted that the department is already in the process of challenging the order of Commissioner (Appeals) in relation to the order passed by the Commissioner (Appeals) in the matter of proceedings relating to the seizure of the gas containers. Since, the appellants have not raised the issue which is now sought to be raised, the department had no opportunity to counter the same with necessary material, which is required to be placed on record. In case the appellants wants to raise such an issue, according to the Jt. CDR the matter will have to be remanded to the Commissioner to decide the same in accordance with the law

with liberty to the parties to put-forward the contention in such issue.

6. Perusal of the impugned order clearly discloses that the point which is now sought to be canvassed was never raised by the appellants before the Adjudicating Authority. In fact advocate for the appellants had candidly admitted the same while raising the issue. At the same time, issue sought to be raised goes to the root of the matter and certainly needs to be considered in accordance with provisions of law. Whether a particular activity amounts to manufacture within the meaning of the provisions of law applicable to the parties is not a pure question of law. It is a mixed question of fact and law. Being so certainly when such an issue is raised, the party raising such issue as well as the other side will be entitled to place necessary materials in support of the rival contentions. Obviously, therefore, opportunity will have to be given to the parties to place materials in support of the rival contentions on record. This is not to suggest that the authorities can travel beyond the scope of show cause notice. Nevertheless when the assessee raises his specific defence in answer to the allegations to the show cause notice, certainly to counter the defence the department would also be entitled for a fair opportunity and it would obviously include opportunity to place materials on record to counter such defence. Considering the same, as rightly pointed out by the Jt. CDR, it would be appropriate to remand the matter to the Commissioner to decide the same afresh after taking into consideration, the defence plea

now sought to be raised by the appellants in the matter, without expressing any opinion on the said issue, and leaving all the issues open for consideration by the Commissioner. In this view of the matter, the impugned order is hereby set aside and the matter is remanded giving liberty to both the parties to place before the Commissioner materials in support of the rival contentions which are now sought to be raised and elaborately stated hereinabove. The appeal is accordingly allowed. The amount already deposited with the department shall remain with the Department, subject to final decision by the Commissioner.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK