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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/4225/2004 - EX[DB]

Date 01/12/2010

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

To :
M/S ONIDA SAKA LTD.
A-2, PHASE-II, NOIDA (U.P.)

M/S ONIDA SAKA LTD. Appellant

Vs

C.C.E. NOIDA Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 804 **2010 EX[DB]** dated 23.11.2010 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. NOIDA
   C-56/42, SECTOR-62, NOIDA-201307
2. Adv. / Consult
   SH. R. SANTHANAM, ADV
   C/O APPELLANT.
3. S.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.

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW

Date of Hearing: *16-06-2010*
Date of decision: 23/11/2010

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.	
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?	

Excise Appeal No.E/4225 of 2004

[Arising out of Order-in-Appeal No.212-14/CE/APPL/Noida/2004 dated 23.07.2004 passed by the Commissioner of Central Excise (Appeals), Noida (U.P.)].

M/s. Onida Saka Ltd. ...Appellant

Vs.

CCE, Noida ...Respondent

Appearance:
Rep. by Shri R.Santhanam, Advocate for the appellants.
Rep. by Shri K.P. Singh, SDR for the respondent.

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

FINAL Order No. 804/10-EX /Dated 23/11/2010

Per Rakesh Kumar

The facts leading to this appeal are, in brief, as under:-

1.1 The appellants in their factory at A-2, Phase-II, Noida manufacture Onida brand Colour Television Sets (CTVs) chargeable to central excise duty under sub-heading no.8528.00 of the Central Excise Tariff Act, 1985. The period of dispute is from May, 1998 to October, 1998 and during this period, the CTVs manufactured by the appellants were sold under the brand name "Onida". The brand name "Onida" was owned by MIRC Electronics Ltd. (hereinafter referred to as "MEL"), who were marketing the CTVs under this brand name. Since during the period of dispute, CTVs were covered by MRP based assessment under Section 4 A of the Central Excise Act, 1944, the MRP to be declared by the appellant was being informed to them by the MEL from time to time.

1.2. on 10.12.98, on receipt of an intelligence that the appellants are evading central excise duty by adopting various modus operandi including mis-declaration of MRP, the officers of Directorate General of Central Excise Intelligence (DGCEI) searched the premises of the appellants and seized various records. In course of stock taking, 141 CTVs involving central excise duty of Rs.1,54,575/- were found short vis-à-vis the balance recorded in the RG-I Register. Shri Ashok Chawla, Sr. Manager (Finance & Accounts) of the appellant company admitted the shortage of 141 CTVs and debited the duty on the spot in their PLA and RG-23 A Part-II Account.

1.3. In follow-up action, the officers also searched the registered office of the Appellant Company/MEL at GA-2, B-I Extension, Mohan Cooperative Indl. Estate, Badarpur, New Delhi, godown of OSL/MEL at B-136, A-76, Sawroop Nagar, New Delhi and premises of M/s. Shyam Lal Kishan Lal, Sadar Bazar, Delhi Cant, the distributor of Onida CTVs and seized some documents. Inquiries were also caused with the other distributor and dealers of Onida CTVs in Delhi to ascertain the actual retail sale price.

1.4. Scrutiny of the records and inquiry with various persons revealed that the Onida Brand CTVs were being manufactured by the group companies of Onida group and were being marketed by MEL under brand name Onida, that it is MEL which are the owners of Onida brand name and that the appellant company and the MEL were having common depots and office located at the same place. The price lists were being finalised by the Corporate office of MEL situated at Mumbai and MRP to be declared by the Appellant Company to the Excise Department was also being decided by the MEL. MEL were issuing the price circulars from time to time to their dealers informing them the prices at which CTVs were to be sold to the ultimate buyers. On scrutiny of the records, it was found that during the period of dispute, i.e. from May, 1998 to

October, 1998 period, prices of certain models of CTVs were reduced under exchange scheme, and such reduced price had been declared to the central excise department for the purpose of calculating assessable value. It was also found that MRP for the models under the exchange scheme, were lower than the MRP for those models during the period prior to May, 1998, when there was no exchange scheme. In this regard, inquiry was made from Shri Ashok Chawla, Sr. Manager (Finance & Accounts) of the appellant company, Shri Vijay Joshi, Vice President (Finance) of the appellant company and M/s. Monica Electronics Ltd., Shri Vijay Kumar, General Manager (Accounts) and Company Secretary of MEL, Shri B.S. Bisht, Regional Manager (North) of MEL, Delhi Branch, Shri Ashok Kumar Gupta, Manager (Commercial) of MEL, Shri Gurmeet Singh, Branch Manager, MEL Ghaziabad Branch and Shri G.K. Mittal, Director of the appellant company and their statements were recorded under Section 14 of the Central Excise Act, 1944, wherein they admitted that the MRP declared by the appellant to the Central Excise Department in respect of certain models was less than the actual MRP at which those models were being sold and that the duty short paid on account of wrong declaration on MRP would be paid to the Department. They also admitted that though the MRP had been lowered in respect of certain models under exchange scheme, in fact, there was no exchange of old TVs and the dealers/distributors did not sell any TVs under exchange scheme or exchange price. The statements of some of the distributors of Onida CTVs were also recorded wherein they stated that they were getting the CTVs from MEL at distributor's price and selling the same to their dealers at dealer's price and that they never received any old CTVs from their dealers nor they have sent old CTV on this account to MEL. They also stated that they never sold the CTVs under the exchange programme. From the above it appeared that though the appellant-company had decreased the MRP declared to the Central Excise in respect of certain models from May, 1998 under so called such exchange scheme, but there was no exchange and the TVs were still being sold at the higher price while the lower price had been declared to the Central Excise Department.

1.5. In view of the above facts, a show cause notice dated 28.10.99 was issued to the Appellant-company for

(a) recovery of short paid duty of Rs.17,04,388/- in respect of certain models of CTVs (20JX, 140N, 14TVES, 14ZC, 14ZD, 14ZE in respect of which MRPs were alleged to have been misdeclared;

(b) recovery of central excise duty amounting to Rs.1,54,575.54 on the CTVs found short and appropriating the amount already paid by the appellant towards this demand;

(c) interest under Section 11 AB of the Central Excise Act on the above mentioned short paid duty;

(d) imposition of penalty on the appellant-company under Section 11 AC of the Central Excise Act, 1944 and also under Rule 9(2) , 52 A, 173Q, 209 and 226 of the Central Excise Act, 1944; and

(e) confiscation of land, building, plant and machinery used in or in relation to the manufacture of excisable goods by the appellant company under Rule 173Q (2) of the Central Excise Rules, 1944.

1.5.1 M/s. MIRC Electronics Ltd., Shri Vijay Joshi, Vice President (Finance), Shri Vijay Kumar, General Manager, Company Secretary of MEL and Shri G.K. Mital, Director, OSL, were also asked to show cause as to why penalty should not be imposed on them under Rule 209 A of the Central Excise Rules, 1944.

1.6. The above show cause notice was adjudicated by the Addl. Commissioner vide Order-in-Original No.20/Addl.Commr./2003 dated 30.07.2003 by which (a) duty demand of Rs.1,54,575/- being excise duty chargeable to 141 CTVs found short was confirmed and the equal amount already paid was appropriated towards this demand; (b) duty demand of Rs.15,49,813/- was confirmed under proviso to Section 11 A (1) on account of short payment of duty by mis-declaration of MRP in respect of certain models alognwith interest, on this duty at the applicable rate under Section 11 AB ibid; (c) penalty of Rs.17,04,388/- was imposed on the appellant company under Section 11 AC (d) penalty of Rs.10 Lakh was imposed on MIRC under Rule 209A of Central Excise Rules, 1944 (e) penalty of Rs.1 Lakh was imposed on Shri Vijay Joshi, Vide President of the appellant company under Rule 209 A of the Central Excise Rules, 1944; (f) penalty of Rs.25,000/- was imposed on Shri Vijay Kumar, General Manager and the Company Secretary of MEL under Rule 209 A of the Central Excise Rules, 1944; (g) penalty of Rs.2 Lakh on Shri G.K. Mittal, Director of the appellant company was imposed under Rule 209 A of the Central Excise Rules, 1944 and (h) land, plant, building, machinery was confiscated under Rule 173 Q (2) of the Central Excise Rules with option to be redeemed on payment of redemption fine in lieu of confiscation of Rs.5 Lakh.

1.7. The appeals filed by the appellant company, MEL and Shri G.K. Mittal, Director of the appellant company against the above order of the Joint Commissioner were disposed of by the CCE (Appeals) by common order-in-appeal 212-14/CE/APPL/Noida/2004 dated 23.07.2004 by which the adjudicating authority's order was upheld and the appeals were rejected. It is against this order of the Commissioner of Central Excise (Appeals) that this appeal has been filed by the appellant-company.

2. Heard both the sides.

2.1. Shri R. Santhanam, Advocate, ld. Counsel for the appellant company pleaded that the models of CTVs in respect of which the duty demand has been raised, are not the models which are sold by the appellants, as these models are manufactured for MEL, are marketed by the MEL and the MRP declared to the Department for the purpose of Section 4 A of the Central Excise Act is the one, which is communicated to them by MEL, that the appellant-company and the MEL can not be treated as related persons and the concept of 'related person' is not relevant for the purpose of Section 4 A, that the appellant company had no knowledge as to whether the MRP to be declared communicated to them by the MEL was the actual MRP or not, that in any case, during the period of dispute, there was no provision in Section 4 A for enhancing the declared MRP, if the same is not found to be correct, that the cross examination of a number of persons whose statements had been relied upon by the Department in support of the allegation of mis-declaration of MRP was not allowed by the adjudicating authority and, therefore, those statements are of no evidentiary value and the allegation of mis-declaration of MRP is without any basis, that in this case, there is no evidence of any flow back from the distributors/dealers to the appellant and, therefore, in view of the Hon'ble Supreme Court's decision in the case of ***ITC Ltd. Vs. Union of India reported in 2004 (171) ELT 433 (SC),*** the MRP cannot be revised upward for demand the differential duty, that there were no shortage of the finished goods and the appellant had been forced to debit the duty under pressure from the Department and that in view of the above, the impugned order is not correct.

2.2. Shri Sunil Kumar, ld. Departmental Representative, defended the impugned order by reiterating the Commissioner (Appeals's) findings and emphasised that both, the order-in-appeal and the order-in-original, have been passed after hearing the appellant; (b) the appellant company and MEL are the companies belonging to same group and the appellant company was aware of the fact that even though, in respect of certain model of CTVs, a lower MRP had been declared under exchange scheme, in fact there were no sales under exchange scheme; and (c) the allegation of misdeclaration of MRP in respect of certain models is supported by the evidence in the form of statements of various officers/ employees of the appellant company, MEL and of their distributors and dealers.

3. We have considered the submissions from both the sides and perused the records. The first component of duty demand is Rs.1,54,575/- in respect of 141 CTVs found short vis-à-vis the balance in the RG-I register at the time of stock taking of the finished goods by the officers on 10.12.98. The stock taking had been conducted in presence of Shri Ashok Chawla, Senior Manager (Finance & Accounts) and at that time, he admitted the shortage and debited the duty on the spot in the PLA and RG.23 A Part-II Register. So far no explanation for this shortage has been given and the same has been admitted. In view of this, the

appellant's plea that there was no shortage is totally un-acceptable. Therefore, we do not find any infirmity in the impugned order upholding the duty demand of Rs.1,54,575/- in respect of 141 short found goods at the time of stock taking.

4. As regards the duty demand of Rs.17,04.388/- on account of mis-declaration of MRP, we find that the Department's allegation is that during the period of dispute, the appellant company in respect of the certain brands of CTVs manufactured by them for MEL reduced the declared MRP under an exchange scheme, but those models of CTVs were actually sold at the usual higher MRPs without receiving any old TVs in exchange. The evidence relied upon by the Department in support of this allegation is -- (a) statement dated 3.5.99 of Shri Gurmeet Singh, Branch Manager, MEL, Ghaziabad, wherein he admitted that CTVs in question were sold to the ultimate consumers at prices, which were higher than the declared MRP for exchange models and actually were old TVs were received in exchange scheme; (b) statement dated 19.2.99 of Shri Vijay Joshi, Vice President and statement dated 9.7.99 of Sh. Ashok Chawla on behalf of Shri G.K. Mittal, Director of the appellant company wherein he accepted that MRP in respect of certain models had been decreased for being sold under exchange scheme but those models had been sold at higher price without any exchange, (c) Statements dated 17.3.99 & 16.7.99 of Shri Ashok Kumar Gupta, Manager (Commercial),

MEL, wherein he admitted that the models of CTVs in respect of which lower MRP had been declared under exchange scheme, had been sold at prices higher than the declared MRP without any exchange, (d) statement dated 15.1.99 of Sh. Rakesh Kumar, Partner of M/s Light & Sound, a dealer wherein he stated that during the period of dispute, models of CTVs had been sold at reduced price under exchange scheme and no old TV had been received from retailers and (e) statement dated 15.1.99 of Shri M.K. Aggarwal, Authorised, Authorised Representative of M/s. Indian Overseas Company, New Delhi a dealer of MEL, wherein he stated that though lower MRP under exchange scheme had been declared in respect of certain models of CTVs, those models were sold at the usual higher price without receiving any old TV in exchange. None of the above statements have been retracted and hence are admissible as evidence. Since the statement of the above persons have not been retracted, there was no necessity for permitting their cross examination. Tribunal in the case of Debu Saha vs. Collector of Customs reported in 1990 (48) ELT 302 (Tri.), relying upon the Apex Court judgement in the case of State of Mysore vs. Shibabsuppa reported in 1963 AIR page 375, has held that in quasi judicial proceedings the authorities are not bound by the strict rules of evidence and procedure and that in all the cases, the cross examination need not be granted, as it depends on the circumstances of each case. Therefore, just because the cross examination of the above mentioned persons were not allowed, it does not diminish the evidentiary value of their statements. From these statements, it is clear that in respect of certain models of CTVs, though lower MRP had been declared to the central excise department under exchange scheme, those models were never sold under that exchange scheme at lower prices but were sold at the usual higher price, even though the assessable value for payment of duty had been determined on the basis of lower MRP and the appellant company had knowledge about this. Just because during the period of dispute, there was no provision in Section 4 A for enhancing the declared MRP, if the same was not found to be correct, it does not mean that during that period, an assessee coming within the purview of Section 4A was free to declare any false MRP and evade the duty, as it is well settled law that nobody can be allowed benefit from his wrong doing.

4.1 The appellant have cited Hon'ble Supreme Court's judgement in case of ITC Ltd. vs. UOI (supra), but this judgement is not applicable to the facts of this case and in this case the officers of the appellant company (the manufacturer), MEL (brand name owner and marketing the CTVs manufactured by the appellant company), distributors and dealers have categorically admitted that in respect of certain models of CTVs through a lower MRP had been declared under exchange scheme actually those model were sold to consumers at the usual higher MRP without any exchange.

5. In view of the above, we are of the view that duty demand of Rs.17,04,388/- and penalty on this count on the appellant company and others has been rightly upheld.

6. In view of the above discussions, we do not find any infirmity in the impugned order. The appeals are dismissed.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

Ckp.

FAX : 011-26108426 REGISTERED / AD

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

Dated: **07/11/2012**

To

1. Appellant as per address in table below
2. Respondent as per address in table below

Misc Order No. **MO/1142-1144/2012** dated **19/10/2012**

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section **35-C(1)** of **the Central Excise and Salt Act, 1944.**

Assistant Registrar
EXCISE Appeal Branch

S.No	Application	Appeal	Name and Address of Appellant	Name and Address of Respondent
1.	E/ROM/3698/2012, E/ROM/3712/2012, E/ROM/3713/2012	E/4225/2004, E/4261/2004, E/4262/2004	**ONIDA SAKA LTD.** A-2, Phase-II, Noida (U.P.)	**C.C.E. NOIDA** C-56/42, Sector-62, Noida-201307

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2. Other Appellants and Respondents as per Annexure

Copy To
1. Advocate(s) / Consultant(s):

R. Santhanam
C-3/210,
JANAK PURI,
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110058

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2. Bar Association, CESTAT, Delhi **3.** Director Publications, Customs, Excise. I.P. Estate, Delhi

4. M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

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

6. Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

7. Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

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

9. TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

10. Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Ameer Pet, Hyderabad – 500038

11. C.D.R 12. Office Copy 13. Guard File 14. Second Folder

Assistant Registrar
EXCISE Appeal Branch

15. SH. G.K. MITTAL,
G-38, MASJITH MOTH,
N. DELHI-48

16. M/S. MIRC ELECTRONICS LTD.,
A-19, B-1 EXTENSION, MOHAN CO-OP.
INDL. ESTATE, MATHURA ROAD,
BADARPUR, N. DELHI-44

CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. 3

Excise ROM / 3698, 3712 -3713 / 2012 in
Appeal No. Excise / 4225, 4261 - 4262 / 2004

Date of Hearing /decision: 19.10.2012

M/s. ONIDA Saka Ltd. Applicant
Shri G.K. Mittal
Mirc Electronics Ltd.

Vs

C.C.E. NOIDA Respondent

Appearance:
Shri R. Santhanam, Advocate for the Appellants
Shri R.K. Verma, DR for the Respondent

CORAM:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Rakesh Kumar, Member (Technical)

Misc. **ORDER NO. 1142-1144/2012-Ex(BR)**

Per Archana Wadhwa (for the Bench):

Learned Advocate, Shri Santhanam appearing in support of ROM application draws our attention to Misc. order No. 548-549/2012-EX(DB) dated 15.5.2012 vide which his ROM application was allowed. The said ROM which was disposed of vide the said Order related to the issue of non-consideration of one of the points in the appeal relatable to confiscation of land, plant and building in terms of Rule 173Q. By accepting the said mistake, the Tribunal dealt with the issue of confiscation of building and plant and machinery and added one paragraph in the order. The Tribunal by observing that inasmuch as the applicant had evaded duty by mis-declaring the MRP in respect of imported goods, confiscation of plant and machinery in terms of provision of Rule 173 Q(2) was justified. Tribunal also observed that redemption fine of Rs.5 lakh is also not much on the higher side. Accordingly, the confiscation of plant and machinery with option to redeem the same on payment of redemption fine of Rs.5 lakh was upheld.

2. The present Misc. application, in the nature of ROM, again stand filed by the applicant. The contention of the learned advocate that the goods had declared correct MRP at the time of import and clearance from New Delhi and as such, the MRP was tempered with by the dealers, the provisions of Section 4A cannot be said to have been contravened by him so as to invoke the provisions of Rule 173Q. He also draws our attention to sub section 4 A (4) which was introduced with effect from 14.5.03 which empowers the Revenue to confiscate the goods if the MRP declared on the goods is found to be wrong or tempered with.

3. After hearing learned DR, we first of all, note that the present ROM application stands filed in respect of Misc. order which was passed in the ROM application filed by the applicant earlier. There is no provision for rectifying the mistake in respect of order already passed on ROM application. The provisions of Section 35C(2) relates to rectification of mistake in Final order passed by the Tribunal and do not relate to order passed on ROM.

4. However, keeping in view that the issue which was not considered in the earlier order and as such was considered afresh in the subsequent order passed on ROM application, we proceed to decide the present ROM application independently.

5. Learned advocate reference to the provisions of Section 4A(4) is not appropriate inasmuch as it is the same relates to confiscation of goods and does not relate to confiscation of plant and machinery. Further, the confiscation of plant and machinery ordered by the lower authorities and upheld by the Tribunal are not in terms of provisions of section 4A(4) but are only in terms of provision of Rule 173Q(2). Admittedly, the said Rule allows confiscation of plant and machinery in case of contravention of various provisions of law referred to in the said Rule. Learned Advocate fairly agrees that in the Final Order, Tribunal has not accepted to appellants contention of declaration of correct MRP and has upheld the confirmation of duty and imposition of penalty. If that be so, the provisions of Rule 173 Q(2) stands rightly invoked by the Tribunal. We cannot rehear the appeals on the point of upholding of demand and imposition of penalty, while deciding the issue of invokation of provisions of Rule 173 Q (2).

6. As such, at this state, we are informed by the learned advocate that the earlier Final Order of the Tribunal already stand challenged before the Supreme Court and notice stand issued to the standing counsel for the Revenue. If that be so, the subsequent order passed on ROM application, being a part of the earlier Final Order of the Tribunal,

is automatically become the subject matter of appeal before the Hon'ble Supreme Court and as such, being sub-judice before the Supreme Court. No further orders are required to be passed in relation to confiscation of plant and machinery in the present ROM application.

7. In view of the above, we reject the ROM application.

(Pronounced in the open court)

(Archana Wadhwa)
Member(Judicial)

(Rakesh Kumar)
Member(Technical)

ss