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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/4461-4464/2004 & 4601-4604/2004 - EX[DB]   Date 24/01/2011

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

To :
HELLO MINERAL WATER (P) LTD.

D-18, SECTOR-3, NOIDA

201301

HELLO MINERAL WATER (P) LTD. Appellant

Vs

C.C.E. NOIDA Respondent

I am directed to transmit herewith a certified copy of **Final order No. 107-114/ 2011 EX[DB]** dated 13-4-10

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. NOIDA
C-56/42, SECTOR-62, NOIDA-> AND VICE- VERSA
201307

201301

2. Adv. / Consult
MR.V.LAKSHMI KUMARAN

B-6/10, SAFDARJUNG ENCLAVE,
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3. C.D.R
4. Bar association. CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications, M-93, Marg. 46. Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road. New Delhi - 110005
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10, Faridabad 121003 (Harvana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file
15. HON'BLE PRESIDENT.

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 : 13/04/2010.
DATE OF DECISION : 13/04/2010.

Appeal No.	Appellants	Respondent	Order-in-Appeal No.
E/4461/04	M/s Hello Mineral Water (P) Ltd.	CCE, Noida	179-182-CE/Appl/ Noida/04 dated 11.6.2004
E/4462/04	M/s Hello Mineral Water (P) Ltd.	CCE, Noida	179-182-CE/Appl/ Noida/04 dated 11.6.2004
E/4463/04	M/s Hello Mineral Water (P) Ltd.	CCE, Noida	179-182-CE/Appl/ Noida/04 dated 11.6.2004
E/4464/04	M/s Hello Mineral Water (P) Ltd.	CCE, Noida	179-182-CE/Appl/ Noida/04 dated 11.6.2004
E/4601/04	CCE, Noida	M/s Hello Mineral Water (P) Ltd.	179/CE/APPL/NOIDA/04 dated 11.6.2004
E/4602/04	CCE, Noida	M/s Hello Mineral Water (P) Ltd.	181/CE/APPL/NOIDA/04 dated 11.6.2004
E/4603/04	CCE, Noida	M/s Hello Mineral Water (P) Ltd.	180/CE/APPL/NOIDA/04 dated 11.6.2004
E/4604/04	CCE, Noida	M/s Hello Mineral Water (P) Ltd.	182/CE/APPL/NOIDA/04 dated 11.6.2004

Appearance

S/Shri A.R. Madhav Rao and R.K. Hasija, Advocates – for the Appellants.

Shri R.K. Verma, Authorized Representative (JDR) – for the Respondent.

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

FINAL Order No. 107-114/2011-CX Dated : ___________

Per. Rakesh Kumar :-

The facts giving rise to these appeals are, in brief, as under.

1.1 M/s Hello Mineral Water (P) Ltd., Noida (hereinafter referred to as the Appellant) are the manufacturer of branded packaged mineral water (Hello brand) chargeable to Central Excise duty under sub-heading 2201.90 of the Central Excise Tarif. The packaged mineral water was being manufactured and sold in 330 ml., 1 litre, 12 litres and 20/24 litre bottles. The 330 ml. and 1 litre bottles were being sold in cartoon of 12 bottles each. According to the Appellant, the packing of 12 litre and 24 litre bottles is of "durable and returnable nature".

1.2 The period of dispute in these appeals in from September 1996 to February 1999. During this period, the Appellant stock transferred a part of their goods to depots from where the same were being sold in retail. In respect of stock transferred goods, the duty was being paid on the assessable value at the factory gate determined by deducting from the depot sale price, the central excise duty and trade taxes, distribution charges, cost of durable packing, outward freight including freight from factory gate to depots and retailing expenses.

1.2.1 Some of the goods manufactured were sold to M/s Drinkwell India Pvt. Ltd. (hereinafter referred to as DIPL) and M/s

Hello Marketing Pvt. Ltd. (hereinafter referred to as HMPL) who sold the goods in retail at much higher price than their purchase price from the Appellant, but the Appellant paid duty on their sale price to DIPL and HMPL, while according to Departments both DIPL and HMPL are related with the Appellant within the meaning of this term as defined in Section 4 (4) (c) of Central Excise Act, 1944 (hereinafter referred to as the Excise Act) and duty should have been paid on the price at which the goods were sold by DIPL and HMPL.

1.2.2 During period from 13/4/98, some of the goods manufactured by the Appellant were sold to 15 appointed dealers. Whereas the Appellant discharged duty in respect of 24 litre and 12 litre bottles at assessable value of Rs. 15.60 and Rs. 8.50 per bottle respectively, the appointed dealers sold the same at prices of Rs. 50/- per bottle and Rs. 30/- per bottle respectively. According to Department, since the Appellant exercise complete control over the sale and distribution of their products by the appointed dealers, the duty should have been paid on the price at which the appointed dealers sold the goods.

1.2.3 It is on this basis that from orders-in-Original No. 10-20/N-II/02 dated 16/4/02, NO. 31-33/N-II/02 dated 30/4/02, No. 34-38/N-II/02 dated 30/4/02 and No. Nil dated 26/6/03 were passed by the Deputy Commissioner, Central Excise, Noida confirming duty demands of Rs. 1,22,71,575/-, Rs. 7,81,354/-, Rs. 6,76,572/- and Rs. 5,01,733/- against the appellant.

1.3 On appeal against the above-mentioned orders-in-original, the Commissioner (Appeals) vide order-in-appeal No. 179-182/CE/APPL/NOIDA/04 dated 11/6/04, held that –

(a) the Appellant and HMPL are related persons and in respect of sales to HMPL, the duty should be charged on the price charged by HMPL for the goods (retail sale price) minus delivery charges and sales tax ;

(b) in respect of sales to DIPL, the duty is to be charged on the price charged by DIPL (retail sale price) minus delivery charges and sales tax ; and

(c) in respect of sales through Depot, the assessable value should be determined by deducting delivery charges and sales tax from the depot sale price (retail price).

1.4 The Department has filed Appeals No. E/4601-4604/04-EX against the above-mentioned order-in-appeal, challenging the deduction of "delivery charges" on the grounds that -

(a) the "delivery charges" whose deduction has been allowed by the Commissioner (Appeals) also include distribution charges, freight charges incurred on transportation of goods from factory to Depot and inward freight incurred on the transportation of empty bottles ; and

(b) deduction on account of packing in respect of 12 litres and 24 litre bottles cannot be considered as admissible as empty plastic bottles get damaged after 40 cycle of refilling and notional cost of packing, claimed as deduction from the depot sale price is includible in the assessable value.

1.4.1 The appellant have filed appeals No. E/4461,4462 & 4463/04-EX against the Commissioner (Appeals)'s order treating Appellant and HMPL, DIPL and appointed dealers as related persons, and ordering determination of assessable value on the basis of sale price of HMPL, DIPL and appointed dealers, who were selling in retail.

2. Heard both the sides.

2.1 Shri A.R. Madhav Rao, Advocate, the learned Counsel for the Appellant made the following submissions.

(1) The dispute in this case is about assessable value of the branded bottled water packed in 330 ml., 1 litre, 20/24 litre and 12 litre bottles. Sales by the Appellant from depot are made in retail and similarly the sales by DIPL and HMPL and by the authorised dealers are in retail. During the period of dispute, the law provided for assessment of excise duty on the wholesale price and since the depot price or the sale price of DIPL/HMPL/authorised dealer is retail price, for arising at the wholesale price, the margin between the wholesale price and retail price has to be abated from the retail price. The Department wants to charge duty on the MRP price which is not correct. As held by the Tribunal, in cases of **Swaraj Mazda Ltd. vs. CCE, Chandigarh** reported in **2001 (137) E.L.T. 547** retail sale price is to be adopted by the Central Excise authorities only after suitable adjustments to make it correspond to wholesale price.

(2) During the period from September 1996 to April 1997 and May 1997 to July 1997, the Appellant were showing the assessable value and paying duty thereon without including the trade tax/sales tax and distribution expenses incurred

by the delivery agents which has been allowed by the Commissioner (Appeals).

(3) HMPL and DIPL are not related person of the appellant. Just on the basis of the appellant's selling price to HMPL and DIPL and the price at which HMPL and DIPL sold the water bottles, which was retail sale price, it cannot be concluded that the HMPL/DIPL are related to the Appellant within the meaning of this term, as defined in Section 4 (4) (c) of the Excise Act. In this regard, reliance is placed on Hon'ble Supreme Court's judgment in case of **CCE Chandigarh vs. Bharti Telecom Ltd.** reported in **2008 (226) E.L.T. – 3 (S.C.)**.

(4) Since during the period of dispute, the law provided that for durable and returnable containers, their value cannot be included in the value of the goods, in respect of sale of 12 litre and 20/24 litre bottles of water, the value of empty bottles cannot be included in the assessable value of water as the empty bottles were being returned and were being used repeatedly. Just because the bottles can be used upto 40 cycles after which the same have to be discarded, the same cannot be treated as non-durable.

(5) The cost of transportation of empty bottles to the factory is not includible in the assessable value. In this regard, reliance is placed on Tribunal's judgments in cases of -

(a) **Pure Drinks (ND) Ltd. vs. CCE** reported in **1991 (56) E.L.T. 619 (Trib.)** ; and

(b) **Herbertsons Ltd. vs. CCE, Mumbai** reported in **1997 (89) E.L.T. 553**.

(6) During period w.e.f. 13/4/98, the Appellant were selling bottled water to independent wholesale dealers. In order to ensure that the water bottles are handled properly

and the water does not get contaminated, as per the Appellant's agreement with dealer, delivery agents were being appointed by them. Just because of this, the Appellant's sale price to Dealers cannot be rejected and the transaction between the Appellant and those wholesale dealers do not cease to be at arm's length.

2.2 Shri R.K. Verma, the learned DR, made the following submissions.

(1) The "delivery charge", whose deduction has been allowed by the Commissioner (Appeals), are nothing but Depot maintain charges including transport charges of the goods from the factory gate to Depots. When during the period of dispute, in case of sale of the goods from depot, the depot was to be treated as the "place of removal" and in this case, there is no dispute that the goods were sold from Depot, in respect of goods sold from depot, the deduction of transport expenses from factory gate to depot could not be allowed.

(2) Deduction on account of packing in respect of 12 litre and 20/24 litre bottles is not admissible and has been wrongly allowed by CCE (Appeals) as the bottles have certain life spam and have to be discarded after about 40 cycles of use.

(3) During the period from 13/4/98, the sales were through appointed dealers. But since the Appellant had compete control over the distribution and sale of the goods as they were appointing the delivery agents, the transactions between the Appellant and their authorised dealers cannot be said to be at arm's length. Therefore, the price charged by the dealers from the customers would be the correct assessable value and from this price, the

deduction of delivery charges is not permissible which has been wrongly allowed by CCE (Appeals).

2.3 In rejoinder Shri A.R. Madhav Rao pointed out that the transport cost of the goods from the factory gate to depot is already included in the assessable value of goods and, therefore, there is no question of adding the same again to the assessable value.

3. We have carefully considered the submissions from both the sides and perused the records. The appellant manufactured branded packaged mineral water chargeable to Central Excise Duty under sub-heading 2201.90 of the Central Excise Tariff and the same is manufactured in 330 ml., 1 litre, 12 litre, 20 litre and 24 litre packs. The 330 ml. and 1 litre bottles are further packed in cartoons. The 12 litre, 20 litre and 24 litre water bottles are claimed by the Appellant to be of durable and returnable nature. There is no dispute about the fact that during the period of dispute, part of the goods were stock transferred to Depots, from where the same were sold, and a part of the goods were sold to -

(i) HMPL,
(ii) DIPL and
(iii) Appointed dealers.

According to the Department while in respect of the goods stock transferred to Depots, the duty, as per the provisions of Section 4 during this period should be charged on the price at which the goods were sold from depot and so far as the sales to

HMPL, DIPL and dealers are concerned, the Appellant's transactions with HMPL, DIPL and dealers are not at arm's length and on this basis the Department, in respect of the Appellant's sales to HMPL, DIPL and Dealers seeks to charge duty on the price at which the goods were sold by them. The Appellant's contention is that the HMPL, DIPL and Dealers are not their related persons and in any case, since the sale of bottled water through Depot, and by HMPL, DIPL and Dealers is in retail, and since duty can be charged only on the wholesale price at the time and place of removal, the sale price at Depot or of HMPL, DIPL and Dealers cannot be adopted without making adjustments for the margin between the wholesale price and retail price. Thus the main points of dispute to be decided are as under –

(1) Whether the duty on the goods stock transferred to depot, is to be charged on the depot sales price and if so whether from the depot price, deduction of distribution charges; inward freight expenses incurred in transportation of empty bottles, transportation of the goods from the factory to the depots, and cost of packing in respect of 12 litre, 20 litre and 24 litre bottles is to be allowed.

(2) Whether the Appellant's sales to HMPL, DIPL and appointed dealers are at arm's length and if so what should be the assessable value of the goods sold to HMPL, DIPL and appointed dealers ?

(3) Are the sales from Depots and by HMPL, DIPL and appointed dealers only in retail, as claimed by the Appellant and if so whether such retail prices are be adopted as the assessable value.

4. During the period of dispute, the Section 4 of the Central Excise Act, 1944 read as under.

SECTION 4 (Valuation of excisable goods for purposes of charging of duty of excise – (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value, shall, subject to the other provisions of this section, be deemed to be –

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale :

Provided that –

(i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers ;

[(ia) where the price at which such goods are ordinarily sold by the assessee is different for different places of removal, each such price shall, subject to the existence of other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such place of removal ;]

(ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof ;

(iii) where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons), who sell such goods in retail ;

(c) where the normal price of such goods is not ascertainable for the reason, that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.

(2) Where, in relation to any excisable goods the price thereof for delivery at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of

removal to the place of delivery shall be excluded from such price.

(3) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of Section 3.

(4) For the purposes of this section, -

(a) "assessee" means for person who is liable to pay the duty of excise under this Act and includes his agent;

(b) "place of removal" means –

(i) a factory or any other place or premises of production or manufacture of the excisable goods;

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;

[(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory and,]

from where such goods are removed;

[(ba) "time of removal", in respect of goods removed from the place of removal referred to in sub-clause (iii) of clause (b), shall be deemed to be the time at which such goods are cleared from the factory;]

(c) "related person" means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee, and any sub-distributor of such distributor.

Explanation – In this clause "holding company", "subsidiary company" and "relative" have the same meanings as in the Companies Act, 1956 (1 of 1956) ;

(d) "value", in relation to any excisable goods, -

(i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee.

Explanation – In this sub-clause, "packing" means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound;

(ii) does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale.

[*Explanation* – For the purposes of this sub-clause, the amount of the duty of excise payable on any excisable goods shall be the sum total of –

(a) the effective duty of excise payable on such goods under this Act ; and

(b) the aggregate of the effective duties of excise payable under other Central Acts, if any, providing for the levy of duties of excise on such goods,

and the, effective duty of excise on such goods under each Act referred to in clause (a) or clause (b) shall be, -

(i) in a case where a notification or order providing for any exemption (not being an exemption for giving credit with respect to, [or reduction of duty of excise under such Act on such goods equal to, any duty of excise under such Act, or the additional duty under section 3 of the Customs Tariff Act, 1975 (51 of 1975), already paid] on the raw material or component parts used in the production or manufacture of such goods) from the duty of excise under such Act is for the time being in force, the duty of excise computed with reference to the rate specified in such Act, in respect of such goods as reduced so as to give full and complete effect to such exemption; and

(ii) in any other case, the duty of excise computed with reference to the rate specified in such Act in respect of such goods.]

(e) "wholesale trade" means sales to dealers, industrial consumers, Government, local authorities and other buyers, who or which purchase their requirements otherwise than in retail.]

5. From a plain reading of sub-section (1) of Section 4 it is clear that the assessable value of the goods attracting duty at ad. Valorem rates was the "normal price" which should satisfy the following conditions -

(a) It is the price at which the goods are sold in course of wholesale trade i.e. it should be the wholesale price ;

(b) It should be the price for delivery at the time and place of removal ;

(c) The transaction between the assessee and the buyer is at arm's length i.e. they are not "related person" within the meaning of this term, as defined in Section 4 (3) (c).

(d) The transaction is such that price is the sole consideration for sale and the same has not been influenced by any other consideration.

5.1 As per Section 4 (4) (e) of the Act, "wholesale trade" means sales to dealers, industrial consumers, Government, local authorities and other buyers who or which purchase their requirement otherwise than in retail. Thus, Section 4 itself makes a distinction between "wholesale price" and "retail price" and it is only the price of the goods in wholesale trade i.e. the wholesale price, which can be adopted as the assessable value. If at the time and place of removal, the sales are in retail only, from the retail price, the margin between wholesale price and retail price will have to be removed for arriving at the assessable value. Same view has been taken by the Tribunal in case of Swaraj Mazda Ltd. vs. CCE, Chandigarh (supra). In this case, the CCE (Appeals) while rightly holding that in respect of the goods sold from depots, it is the depot sale price which will be the assessable value, has not considered the Appellant's plea that from the depots, the goods were sold only in retail and the depot price is the retail price and has determined the assessable value after permitting deduction of "delivery charge" and taxes from the depot sale price. From the CCE (Appeals)'s observations in para 6 of the order-in-appeal dated 11/6/04, - "The assessable value, therefore, should be derived by deducting the delivery charges from the retail sale price", it is clear that he has accepted that the depot price is retail sale price but he still adopted the same as such for determining the assessable value, without deducting from it the margin between the wholesale and retail price. From his observations in para 7,8 and 9 it is seen that in respect of Appellant's sales to HMPL, DIPL and appointed dealers, also, he has accepted that HMPL, DIPL and appointed dealers are selling only in retail and the price charged by them from their customers is retail sale price, but he still did not deduct from the retail sale price, the margin between the wholesale and retail price. The impugned order is, therefore, not correct on this count as -

(i) it accepts without any discussion that the sales from depot and by HMPL, DIPL and Appointed dealers are only in retail and

(ii) having accepted the sales from depot and by HMPL, DIPL and appointed dealers as in retail, the margin between the wholesale price and retail price has not been deducted to convert the retail sale price into wholesale price. Therefore, for correct determination of the assessable value the matter has to be remanded for denovo decision.

6. There is no dispute that HMPL, DIPL and appointed dealers of Appellant are not a holding company, a subsidiary company, a

relative and a distributor and a sub-distributor of such distributor. Therefore as per the provisions of Section 4 (4) (c), the Appellant and HMPL/DIPL/ appointed dealers can be "related person" within the meaning of this term as defined in Section 4 (4) (c) only if they are so associated that they have interest, direct or indirect in the business of each other i.e. there is mutuality of interest in each other's business. But when the Department makes an allegation that the Appellant and DMPL/DIPL/appointed dealers of appellant have mutual interest in each other's business, the burden of proving this would be on the Department. But in this regard, other than the difference between the Appellant's price to DMPL/DIPL/appointed dealers and the price changed by DMPL/DIPL/appointed dealers from their customers, no other evidence has been discussed. As held by Hon'ble Supreme Court in case of CCE, Chandigarh vs. Bharti Telecom Ltd. (supra), just because of large difference between the price at which Appellant sell their goods to HMPL/DIPL/appointed dealers and the price at which HMPL/DIPL/appointed dealers sell the goods to their customs, it cannot be concluded that the Appellant and HMPL/DIPL/appointed dealers of appellant are related persons – more so when the CCE (Appeals) has accepted that the HMPL/DIPL/appointed dealers of Appellant are selling the goods in retail and the price charged by them is retail sale price. Therefore, CCE (Appeals)'s order holding that the Appellant and HMPL/DIPL/appointed dealers of appellant are related persons is a non-speaking order and the same has to be set aside and the matter has to be remanded for de-novo decision in accordance with the law.

7. As regards the deduction of freight expenses incurred on return of empty bottles, as held by the Tribunal in case of Herbatsons Ltd. vs. CCE, Mumbai (supra) and Pure Drinks (ND) Ltd. vs. CCE (supra) are not includible in the assessable value of the goods.

8. As regards the exclusion of cost of packing – i.e. the cost of 12 litre, 20 litre and 24 litre bottles, since it is an admitted fact that the same were being returned for re-use, the same will have to be treated as of durable and returnable nature and just because the bottles have to be discarded after 40 cycles of use, the same would not cease to be of durable and returnable nature. Since during the period of dispute, in Section 4 (4) (d) (i) there was a specific provision for exclusion of the cost of the packing of "durable nature and returnable by the buyer to the assessee" and since the 12 litre, 20 litre and 24 litre bottles were of durable and returnable nature and the same were being actually returned, their cost would not be includible in the assessable value.

9. As regards the freight expenses for transportation of the goods from factory to Depot the same would have to be included in the assessable value of the goods, sold from the depot, as in such a case, it is the depot which has to be treated as the place of removal.

10. As regards the deduction of "delivery charge/distribute charges" for determining the assessable value, CCE (Appeals)'s order, while permitting their deduction does not discuss the nature of these charges. Then deduction would be permissible only if the same are purely the transport expenses for transport of the goods from the place of removal to the customer's premises. But if these expenses are in the nature of "marketing and selling organisation expenses" in view of Hon'ble Supreme Court's judgments in cases of **Union of India and others vs. Bombay Tyre International** reported in **1983 (14) E.L.T. 1896 (S.C.)** and **Union of India vs. Madras Rubber Factory Ltd.** reported in **1995 (77) E.L.T. 433 (S.C.)** their deduction will not be permissible. Since the impugned order does not discuss the nature of "Delivery charges", the matter has to be remanded for denovo decision on this issue in accordance with the law.

11. In view of our above discussion, the impugned order is set aside and the appeals are remanded to CCE (Appeals), for denovo decision in accordance with our observations in this order. The Commissioner (Appeals), in particular, should decide the following points in accordance with our observations in this order -

(a) Are the Appellant and HMPL/DIPL/appointed dealers of appellant, "related person" within the meaning of this term, as defined in Section 4 (4) (c) of the Central Excise Act, 1944 ? This question with regard to the 'Appointed

Dealers' is to be examined on the basis of the Appellant's agreements with them.

(b) Are the Appellant's sales of stock transferred goods to Depots in retail and similarly are the sales of HMPL/DIPL/ appointed dealers of Appellant to their customers in retail and if so, what is the margin between wholesale price and retail price, which must be deducted from retail sale price to convert the same into wholesale price ?

(c) What is the actual nature of "Distribution/Delivery charge" and whether the same are includible in the assessable value in accordance with Hon'ble Supreme Court's judgment in cases of UOI vs. Bombay Tyre International (supra) and UOI vs. Madras Rubber Factory Ltd. (supra).

(Operative part of the order pronounced in the open court.)

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK