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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

Date **11/07/2011**

Appeal No. E/1701/2005 - EX[DB]

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

To :
M/S VISHAL BEVERAGES PVT. LTD.
16-B, NEW INDL. AREA, NATIONAL HIGH WAY NO.-
12, MANDIDEEP, BHOPAL
462046

M/S VISHAL BEVERAGES PVT. LTD. Appellant

Vs

C.C.E BHOPAL Respondent

I am directed to transmit herewith a certified copy of **Final order No.589/ 2011 EX|DB|** dated 05-7-11 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 BHOPAL
HOSHANGABAD ROAD, 48,
ADMINISTRATIVE AREA, AREA
HILLS, BHOPAL (M.P.) 462011

2. Adv. / Consult SH. AMIT JAIN, ADV., c/o
MR.V. LAXMIKUMARAN
B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

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. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Harvana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file
14. HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi.

Date of hearing/decision 05.07.2011

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri M. Veeraiyan, 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. 1701 of 2005

[Arising out of order in appeal No. 16-CE/BPL/2005 dated 22.2.2005 passed by the Commissioner (Appeals-II) Customs & Central Excise, Bhopal]

M/s Vishal Beverages Pvt. Limited — Appellants

Vs.

CCE, Bhopal — Respondent

Appearance:

Rep. by Sh. Amit Jain, Advocate for the appellants.
Rep. by Sh. Sunil Kumar, DR for the respondent.

Coram: **Hon'ble Sh. Justice R.M.S. Khandeparkar, President**
Hon'ble Sh. M. Veeraiyan, Member (Technical)

FINAL ORAL ORDER NO. 589/2011-EX

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

Heard the ld. Advocate for the appellants and the DR for the respondent.

2. This appeal arises from order dated 22.02.2005 passed by the Commissioner (Appeals), Bhopal. By the impugned order, the appeal filed by the appellants against the order of the adjudicating authority dated 12.08.1996 has been dismissed.

3. The appellants are engaged in manufacture of aerated water containing added sugar or other sweetening materials classifiable under chapter heading No. 22.02 of the Schedule to the Central Excise Tariff Act, 1985. They were also availing modvat credit as provided under Rule 57A of the Central Excise Rules, 1944.

4. Consequent to the scrutiny of the monthly returns filed by the appellants for the month of May and June 1995 the department found that the modvat credit amounting to Rs. 154787/- on packaging materials namely empty glass bottles was availed by the appellants. However, the cost of such packaging materials i.e. the glass containers was not included in the assessable value of the final product as was required to be included in terms of Section 4 of the Central Excise Act, 1944 in order to avail the benefit of modvat credit on the inputs utilized in the final product, bearing in mind the provision of Rule 57A of the said Rules. Consequently, the said aspect was brought to the notice of the assessee and query in that regard was made. The appellants under their letter dated 25.07.1995 informed the department that the glass containers used by the appellants were returnable and the value of

such containers was included in the cost of the finished product only to the extent of breakages of the same during the production of the finished product. Taking into consideration this aspect and the disclosure made by the appellants in their letter dated 25.07.1995 the proceedings were initiated for denying the said modvat credit to the tune of Rs. 154787/- availed by the appellants during the month of May and June 1995. The show cause notice in that regard was issued on 30.10.1995. The appellants did not file any reply to the show cause notice. Consequently, the matter was fixed for hearing and after the commencement of hearing, the appellants filed their reply on 25.04.1996, the reply being dated 27.04.1996. The adjudicating authority rejected the claim of the appellants and held that the modvat credit was wrongly availed in relation to the said two months to the tune of Rs.154787/- and ordered recovery thereof besides imposing penalty of Rs.15,000/-. The matter was carried in appeal by the appellants which came to be dismissed by order dated 12.09.1997 by the Commissioner (Appeals), Bhopal. Being aggrieved, the appellants preferred appeal to this Tribunal which was disposed of by order dated 10.12.1998. The order of the Tribunal dt. 10.12.1998 read thus:-

> "The short point involved in this appeal is the eligibility of glass bottles as inputs when used in the manufacture of aerated waters. The Commissioner (Appeals) in the impugned order observed that for such admissibility, the cost of such bottles had to be included in the assessable value of the final product. He made the categorically claim that the assessee has not disputed that the cost of the bottles was not included in the assessable value of the final product. Shri Devnath, ld. Advocate showed that in the submissions made before the learned Commissioner a categorical claim had been made that the cost is

included on prorate basis. A copy of the memorandum of appeal dt. 28.10.96 is on record. What is apparent is that the Commissioner had not appreciated this submission. On this count his orders are set aside, and the proceedings are remanded back to him. In the de novo proceedings, he would satisfy himself that the cost of the bottles is included in the assessable value of the product and if, he is so satisfied he would permit the extension of MODVAT in terms of the Tribunal's judgements reproduced in 1997 (22) RLT 37 and 1997 (22) RLT 697".

5. Pursuant to the remand, the Commissioner (Appeals) heard the matter afresh and disposed the same by order dated 22.02.2005. The Commissioner (Appeals) rejected the claim of the appellants. Hence the present appeal.

6. While assailing the impugned order, ld. Advocate for the appellants submitted that the matter was taken up by the Commissioner (Appeals) for hearing nearly after five to six years from the order passed by the Tribunal and there was no sufficient time granted to the appellants after fixing the appeal for hearing to produce necessary evidence in support of the appellants claim in the matter. In any case, the appellants did produce the certificate from Chartered Accountant in support of their claim which clearly revealed that the cost of the bottles was included in the assessable value of the final product for the relevant period. This is also apparent, according to the learned Advocate from the balance sheet copy of which was also produced before the Commissioner (Appeals). According to the learned Advocate therefore, the Commissioner (Appeals) erred in holding that the appellants failed to adduce relevant evidence in support of their claim. Placing reliance in the decision of the Bombay High Court in the matter of **Advani**

Oerlikon Ltd. vs. **Union of India** reported in 1991 (55) ELT 486 (Bom.) the learned Advocate submitted that it is not that only preliminary evidence should be insisted in each and every case and if the party produces secondary evidence cannot be discarded merely on that ground. It was necessary for the Commissioner (Appeals) to analyse the certificate issued by the Chartered Accountant and the balance sheet before rejecting the claim of the appellants.

7. On the other hand, the DR submitted that taking into consideration the facts and circumstances of the case, no fault can be found with the impugned order, and, therefore, appeal be rejected.

8. Perusal of Tribunal's order dated 10.12.1998 quoted above, clearly discloses that the matter was remanded to enable the appellants to satisfy the Commissioner (Appeals) that the cost of bottles was included in the assessable value of the product so as to justify their claim for availment of modvat credit for the period of May and June 1995. The order passed by the Tribunal nowhere discloses any liberty having been given to the appellants to produce any additional evidence as such. Obviously, therefore, the Commissioner (Appeals) had to decide the matter on the basis of materials available on record. It cannot be forgotten that the enquiry before the Commissioner (Appeals) was pursuant to the remand order by the Tribunal. Evidently, therefore, the jurisdiction of the Commissioner (Appeals) was confined to the scope of remand order, and the remand order nowhere discloses any liberty to either of the parties to produce any evidence nor any liberty to the Commissioner (Appeals) to allow to place on record further

evidence. Obviously, it meant that the Commissioner (Appeals) was required to analyse the materials on record and to hear the parties and thereupon to decide the matter afresh and that exactly has been done by the Commissioner (Appeals). In fact, the Commissioner has clearly stated that there was no relevant evidence produced by the appellants before him to sustain the claim of the appellants.

9. Even otherwise, the evidence which is sought to be produced by the appellants admittedly was confined to the certificate of the Chartered Accountant and the copies of balance sheet.

10. The certificate issued by the Chartered Accountant reads thus:-

"TO WHOM SO EVER IT MAY CONCERN

We have verified books of accounts of M/s Vishal Beverages Pvt. Ltd. 16-B, New Industrial Area, N.H.12, Mandideep (Bhopal) for the year 1995-96 and clarify that in the cost of aerated water manufactured and sold by them: following components of cost are included and as appear in the books of accounts of the said company and debited in Profit and Loss A/c for the year.

(i) Breakages of Bottles & Crates Rs. 6,93,720/-
(ii) Depreciation of Bottles & Crates Rs. 15,24,892/-
(iii) Repairs & Maintenance of Crates Rs. 2,15,035/-"

11. The above quoted certificate merely states that for the year 1995-96 the cost of aerated water manufactured and sold by the appellants included the cost of breakages of bottles and crates, depreciation of bottles and crates and repairs & maintenance of crates. At the outset, it is to be noted that the appellants themselves under their letter dated 27.07.1995 had informed the department that the glass bottles were returnable and the value of the bottles

was included in the cost of the finished product only to the extent of breakages of the same during the production of the finished product. It is also pertinent to note that the said clarification and disclosure was made by the appellants immediately after query in that regard relating to the months of May and June 1995. The query was not in relation to the entire year 1995-96. The query was specific relating to the two months of May and June 1995. There was specific reply in that regard by the appellants themselves under letter dated 25.07.1995. The Chartered Accountant who claims to have verified the records nowhere refers to the said letter nor explains the discrepancy between the contents of the said letter, which admittedly relates to the months of May and June 1995, and the certificate which he has issued in relation to the entire year 1995-96. There has been no attempt even by the appellants to explain the discrepancy between the said letter and the said certificate at any point of time. In the background of these facts, one fails to understand as to what credibility can be given to such certificate issued by the Chartered Accountant which is apparently contrary to the statement by the appellants themselves in their letter dated 25.07.1995.

12. In the copies of the balance sheet, attention was drawn to the entry whereby it refers to "crates and bottles" value of which was disclosed as on 01.04.1995 to be Rs. 13877074.86, additions as Rs. 9230784.58, deductions to be Rs. 693720.00 and the balance number of crates and bottles as on 31.03.1996 to be Rs.22414139.44. This information in the balance sheet neither discloses whether in the month of May and June 1995 the appellants had included the cost of the bottles in the assessable value or not.

13. The fact that the dispute related to the need for inclusion of cost of packaging materials of the aerated water in the assessable value of the final product in order to avail modvat credit under Rule 57A of the said Rules was in relation to the month of May and June 1995 was clearly brought out in the show cause notice and was known to the appellants all throughout and the same is apparent from the contents of the memo of appeal filed before us. Being so, it was to the knowledge of the appellants that they were required to satisfy the Commissioner (Appeals) that in the month of May and June 1995 they had included the cost of packaging materials in the assessable value of the final product manufactured by the appellants. They having failed to establish the same,as rightly pointed out by DR, we do not find any fault with the impugned order.

14. As regards the decision of Bombay High Court, attention was sought to be drawn to the following passage from para 4 of the said decision. It reads thus:-

> "he Learned Counsel invited our attention to circular dated December 3,1983 issued by Government of India, Ministry of Finance, Department of Revenue addressed to all the Collectors of Central Excise in respect of Valuation proposed to be carried out in pursuance of the Supreme Court judgment in *Bombay Tyre International.* The circular, *inter alia*, recites that in respect of deductions like equalized freight/average freight, taxes, etc. claimed by the manufacturers for the past periods, it would be very difficult to verify the same with reference to each and every voucher/bill issued by the carrier to the manufacturers in transporting the goods. The circular advises the Collectors to request the manufacturers to give a consolidated statement explaining the expenses incurred towards freight, taxes, etc. duly verified and certified by the Chartered Accountants. The circular advises that such statements may be accepted without going into much details with regard to the verification of the individual/voucher etc. Shri Desai submits that in accordance with the instructions issued in circular dated December 3, 1983, the Company had produced a consolidated statement duly verified and certified by the Chartered

> Accountant and, therefore, it is not correct for the Assistant Collector to turn down the claim only on the ground that each and every voucher and freight bill issued by the Company between the period October 21, 1979 and October 30,1980 was not produced. In our judgment, the submission is correct and deserves acceptance. The provisions of Indian Evidence Act make it clear that a thing can be proved by various modes and when the original documents are not available, the parties relying upon the same can certainly produce secondary evidence. The Assistant Collector could not have denied the relief to the Company only on the ground that the freight bills were not produced when the issuance of the freight bills and the existence thereof could be easily gathered by perusal of trial balance-sheets and consignor notes. It was not incumbent upon the Assistant Collector to examine each and every voucher or the freight bill and in accordance with the instructions issued by the Government of India, the Assistant Collector would have been justified to rely upon the certificate issued by the Chartered Accountants. It is undoubtedly true that it is within the domain of the Assistant Collector to determine whether the documentary evidence produced by the Company is genuine or otherwise and whether the same is sufficient to grant the claim for deduction, but it is not permissible for the Assistant Collector to turn down the claim solely on the ground that the freight bills as demanded by the Assistant Collector were not produced. In our judgment, the Assistant Collector was bound to examine the documentary evidence produced by the Company and reach the conclusion".

15. Plain reading of the above quoted decision of the Bombay High Court, it would disclose that the said decision was delivered in the set of facts where the authority had refused to give any credence to the secondary evidence. Whether in a given case, secondary evidence can be produced as a matter of right or not was not the issue before the Bombay High Court in the said decision. It is settled law that party has to produce best evidence. Question of production of secondary evidence can arise only when the party is able to satisfy the authority that it is impossible for the party to produce primary evidence. Only thereafter it becomes obligatory for the authority to consider the secondary evidence. Production of secondary evidence is not a matter of right of any party to any litigation. Secondly, in the decision before the Bombay High Court, there was relevant evidence available on

record, may be in the form of secondary evidence. That is not the case in the matter in hand. We have already analysed the so-called evidence which was sought to be produced by the appellants and same apparently disclose that no fault can be found with the lower authority for having rejected the said evidence.

16. For the reasons stated above, we find no case having been made out for interference in the impugned order. Hence, the appeal fails and is hereby dismissed.

[Justice R.M.S. Khandeparkar]
President

[M. Veeraiyan]
Member [Technical]

Pant