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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/3864/2010-3865/2010 - EX[DB] WITH
E/S/3695-3696/2010-EX

Date **16/08/2011**

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

To :
M/S AVI PLAST
102, GROUND FLOOR, STATE BANK NAGAR, N
DELHI.-63

M/S AVI PLAST Appellant

Vs

C.C.E. DELHI I **STAY ORDER NO. 816-817/2011-EX** Respondent

I am directed to transmit herewith a certified copy of **Final order No.**729-730/ 2011 EX[DB] dated 12-8-11 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. DELHI I
C.R. BUILDING, I.P. ESTATE, NEW
DELHI 110002

2. Adv. / Consult
MR.NAVEEN MULLICK,ADV
B-388, MEERA BAGH, N.DELHI

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 (Haryana)
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. SH VIKAS SABHARWAL
102, GROUND FLOOR, STATE BANK NAGAR, N DELHI.-63

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Court No.II

Date of Hearing:13.5.2011

For Approval and signature:

Hon'ble Mr D.N. Panda, Judicial Member
Hon'ble Mr.Mathew John, Technical Member

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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 would 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 Department Authorities?

E/Stay 3695/2010 and E/Appeal No.3864/2010

(Arising out of order in original No.20/D-1/2010 dated 30.8.2010 passed by the Commissioner of Customs & Central Excise, New Delhi)

M/s AVI Plast Appellant

Vs

CCE, Delhi-I Respondent

E/Stay 3696/2010 and E/Appeal No.3865/2010

Vikas Sabharwal Appellant

Vs

CCE, Delhi-I Respondent

Appeared for the Appellant: Shri Naveen Mullick, Advocate
Appeared for the Respondent: Ms. Monika Oberoi , DR

Coram: **Hon'ble Shri D.N. Panda, Member Judicial**
Hon'ble Shri Mathew John, Member Technical

STAY order No. 816 & 817/2011-EX
FINAL ORDER No. 729&730/2011-EX

Per Mathew John:

The Appellants have entered into contracts with Indian Oil Corporation for installation of "Retail Visual Identity" (RVI for short) at various petrol pumps marketing their products. These are the boards, signage and other visual indicators which indicate to the customers that the products being retailed in the outlet are of the company concerned. A few of the RVI elements are Non-lit Canopy Fascia, Backlit Lettering Box having name of IOC, Building Fascia, Canopy Column Cladding, Building Cladding, Spreader, Facility Sign, Directional Sign, Monolith etc. Some of these items get attached to the canopy for the pumps or other parts of the building. Some of them are separately fixed to earth. The Appellant was not paying any excise duty on the fabricated items necessary for making such RVI.

2. The Revenue was of the view that these items are manufactured items classifiable under Tariff Item 94056090 of the Central Excise Tariff and the Appellant should have paid excise duty on the products fabricated by them. So the Revenue issued a show cause notice to the Appellant demanding duty on the value received by the Appellants from their customers during the years 2003-04 to 2007-08. This SCN was adjudicated by the impugned order demanding duty to the tune of Rs.2,47,76,069/- along with interest. Penalty for equal to the amount was imposed under section 11AC of the Act. A penalty of Rs.25,00,000/- was also imposed on one of the partners of the firm. Aggrieved by the order the Appellants have filed this appeal.

3. The main contentions of the Appellant are,-

(i) The case is made out on the basis of the statements given by officers of IOC. The Appellants were never given an opportunity to explain the processes during investigation. The Appellants asked for cross-examination of the persons whose statements were relied upon during the adjudication proceedings which was denied to them.

(ii) The impugned items came into existence as fixture on site as in the case of any immovable property constructed and the items are not goods and cannot be excisable. They rely on many decisions like that of the Tribunal in Ajni Interiors Vs. CCE -2005 (186) ELT 451

(iii) The items cleared from the factory were items like ACM (Aluminium Composite Material) Sheets mostly grooved, GI Sheet, MS Pipes, Aluminium Angles, Clamps, Structures made from MS Pipes, Poly Carbonate Sheet, Letters of Pet-G etc and these were not items like Monoliths, Canopy Fascia, Column Cladding etc as suggested in the SCN. The items listed in the SCN emerge at the site as fixtures attached to the building which cannot be excisable. Technically these items cannot be manufactured and removed in CKD condition.

(iv) The adjudicating authority has invoked Rule-2A of the General Rules of Interpretation which was not at invoked in the SCN and thus travelled beyond the scope of the SCN;

(v) The RVI elements at each site is dependent upon the specifications/dimensions of the site and nobody can venture to first construct the respective elements at the factory and then dismantle the same in CKD condition for assembly at site.

(vi) RVI elements constructed at site on pre-constructed buildings, columns, and construction of items like monolith made on a concrete foundation and thus attached to earth cannot be considered as excisable goods.

(vii) Delhi Commissionerate has no jurisdiction to issue Show Cause Notice and adjudicate on activity of construction done outside its jurisdiction;

(viii) If attempt is made to remove the RVI elements from the place where it is constructed, the ACM Sheet, Poly Carbonate Sheet etc will get damaged hence these items are not goods

(ix) Revenue has classified the goods under heading 94056090. Under this heading only illuminated name plates and the like having permanently fixed light source and parts thereof can be classified. Most of the impugned items have no light source as part of it and so the goods cannot be classified under this heading. Outside light used to illuminate these signs will not make it an item having its own light source.

(x) If the goods are excisable goods they should be given the benefit of Cenvat credit on the duty paid on inputs.

(xi) The benefit of cum-duty price should have been granted as decided by the Supreme Court in the case of Maruti Udyog Ltd- 2002 (141) ELT 3 SC.

(xii) Benefit of Notification 8/2003-CE for small scale units should have been given.

(xiii) There is no ground to invoke extended period because they had a bonafide belief that the items constructed at site were not excisable.

(xiv) The work-contract tax paid by them should have been deducted from their realization.

4. The Learned DR submits that the items manufactured and cleared from their factory as well as excisable goods fabricated at site were excisable goods before it is attached to earth or building. He fairly concedes in the adjudication proceedings the values of such goods have been taken as the total receipts in their balance

sheet which may not be correct. This happened because the Appellants did not furnish any information that will help in arriving at the value of excisable goods and to segregate the value of construction at site. It is his submission that unless the Appellant is put to some terms of pre-deposit the Appellant will not co-operate in a proper adjudication proceedings and no purpose will be served by sending the case back for denovo consideration.

5. After hearing both sides we are of the prima facie view that the adjudication order in its present form cannot be sustained because of the many issues like reliability of statements which were not tested by a cross examination, demanding of excise duty for construction activity, inadequate justification for classification adopted etc. need to be looked into. But at the same time prima facie it appears that some excisable goods were manufactured and cleared.

6. We also note that the Appellant has not co-operated during the adjudication proceedings by furnishing information that will help in arriving at the value of excisable goods manufactured.

7. So we are of the view that the Appellant need to make ~~terms regarding~~ pre-deposit and the case should be sent back for a denovo consideration. At this stage the Counsel for the Appellant suggests that an order for pre-deposit of an amount of 40 lakhs will be reasonable and Appellants are willing to pre-deposit this amount. So we order accordingly.

8. In view of above, it would be proper to lay down guidelines to be followed in the de-novo adjudication proceedings. These are,-

(i) Excise duty should be demanded only on the goods manufactured and cleared and not on construction activity. The classification of the goods being cleared should be decided first. Excise duty should be demanded on the value of the goods as it is cleared and not the full value including construction work that may be needed for its installation. The adjudicating authority shall keep in mind the circular issued by CBEC vide circular Order No. 58/1/2002-CX, dated 15-1-2002, and Circular No. 643/34/2002-CX. (S. No. 10), dated 1-7-2002 in this regard and the various decisions of the Tribunal and higher Courts in the matter and the submissions as may be made by the Appellant.

(ii) The Appellant should first submit the details of goods manufactured, its classification and its value and the exemptions claimed.

(iii) If the statements of any persons are to be relied upon, opportunity for cross-examining the person giving statement should be allowed.

(iv) After taking into account the submissions made by Appellant the adjudicating authority shall communicate his opinion on classification, eligibility for exemptions, the legal provision under which goods are proposed to be valued and a worksheet based on which revised duty liability will be finally determined. The further submissions made by Appellant should be taken on record and finding on each submission should be given in the final order determining all relevant issues. A reasoned and speaking order in this regard should be passed.

9. In view of the above discussions the appellant is directed to deposit an amount of Rs. 40 lakhs (Rupees forty lakhs) only in addition to the amount already deposited and produce evidence of such deposit before the adjudicating authority within 4 weeks for fixing date of hearing during August, 2011 along with their initial submissions on classification and valuation.

10. Subject to the above, the impugned order is set aside and the matter is remitted to the adjudicating authority keeping all issues open. We make it clear that we have not expressed any opinion on classification or valuation.

11. The two stay petitions and the two appeals are disposed of in the above terms.

(Reasons of decision and the decision were pronounced in the open Court on the date of decision).

(D. N. Panda)
Member Judicial

Mathew John
Member Technical