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Email : delhi@cestat.gov.in

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

Appeal No. E/781 /2011-783 /2011 - EX[DB] WITH E/S/947-949/2011-EX   Date 05/01/2012

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

To :
M/S PIONEER CORPORATION
3344, PUSA GATE, SOUTH PATEL NAGAR, NEW DELHI.

M/S PIONEER CORPORATION Appellant

Vs

C.C.E. DELHI I Respondent

STAY ORDER NO. 3-5/2012-EX.

I am directed to transmit herewith a certified copy of **Final order No. A/1-3/ 2012 EX[DB]** dated 30-12-11 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.R.P. JINDAL, CONSULTANT (N)
C-110, BASEMENT, SHIVALIK MALVIYA NAGAR, NEW 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-3
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithiyaram 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. PRABHAT KUMAR, ADV., B-51, SARVODAYA ENCLAVE, NEAR MOTHER INTERNATIONAL SCHOOL, N. DELHI-17

Assistant Registrar
(Excise Appeal Branch)

P.T.O.-2,

15. MR. PANKAJ ARORA, DIRECTOR OF
M/S SAMARTH DESIGNS (P) LTD. , 6/12, D&E,
KIRTI NAGAR INDL. AREA, NEW DELHI.

16. M/S SAMARTH DESIGNS (P) LTD.
6/12, D&E, KIRTI NAGAR INDL. AREA, NEW DELHI.

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

Date of Hearing : 13.12.2011

Coram:
Hon'ble Shri S.S. Kang, Vice President
Hon'ble Shri Mathew John, Member (Technical)

1.	Whether Press Reporter 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?	Yes
3.	Whether their 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

Excise Stay No. 949 of 2011 and Excise Appeal No. 783 of 2011

M/s Pioneer Corporation — Appellant

Vs.

CCE, New Delhi — Respondent

Excise Stay No. 947 of 2011 and Excise Appeal No. 781 of 2011

M/s Samarth Designs (P) Ltd. — Appellant

Vs.

CCE, New Delhi — Respondent

Excise Stay No. 948 of 2011 and Excise Appeal No. 782 of 2011

[All Appeals Arising out of common Order-in-Original No. 26-27/D-I/2010 dated 23.12.2010 passed by the Commissioner of Central Excise, New Delhi)

Shri Pankaj Chopra Appellant

Vs.

CCE, New Delhi Respondent

Appearance:

Appeared for Appellant : Shri Prabhat Kumar & Sh. R.P. Jindal, Advocates

Appeared for Respondent : Shri B.K. Singh, Jt. CDR

CORAM: Hon'ble Shri S.S. Kang, Vice President
Hon'ble Shri Mathew John, Member (Technical)

STAY order No. 03-05/2012-EX(BR)
FINAL Order No. A/1-3/2012-EX.(BR) dated............

Per Mathew John :

Three stay petitions filed in three appeals are being considered in this proceeding. All the three arise from the same impugned order. The First Appellant, M/s Pioneer Corporation is a proprietorship concern of Shri. Pankaj Chopra. The Second Appellant, M/s Samarth Designs (P) Ltd is a private Ltd Company having Shri. Pankaj Chopra as one of the Directors, and the Third Appellant is Shri. Pankaj Chopra himself, in both his capacities as stated above.

2. Appellants are engaged in fabrication of Retail Visual Identity (RVI) elements mainly for petrol pumps and installing the same at pump premises. They have done such work for petrol pumps selling products of IOCL, BPCL, IBP etc. This work involves fabrication of various items at their factory and installing the same at the premises of the pumps. The Contracts were awarded to M/s Pioneer Corporation and certain work under the contracts were sub-contracted to M/s Samarth Designs (P) Ltd.

3. The nature of the disputed items as explained by the Appellants is as under:

1. **Canopy Fascia** : Canopy fascia is the cladding work done on existing canopies (roof structure made of concrete/structural steel erected on steel columns where petrol/diesel dispensers are installed) as per desired colour scheme on the four sides of the face of the canopy. It is ACM cladding of desired colour, the front side have one panel bearing the Indian Oil Logo. The complete four sided structure on four faces of Canopy is called Canopy Fascia. Canopies have slants to facilitate the drainage of water. Canopy Fascia has two types of structures.

a. Non – Lit

This is made mostly welding/sometimes bolting-steel tubular structures to the front and side faces of the canopy. Once these tubular structures are fixed in water line and level so as to facilitate drainage as per the particular site, additional aluminium and steel pipes/extrusions are fixed in place and then one by one individually ACM sheets are hand routed and fixed to the welded frames on top of the canopy to give a Non-Lit Canopy Fascia.

b. Backlit Fascia (4 Meter Box)

A Four Meter Box is fabricated and welded onto the left hand side of the front side face of the canopy where electricals are provided. This box is sealed on all sides except the front, which is sealed with ACM and PET-G Letters to enable light to come out from the letters.

2. Building Fascia

Building Fascia is the ACM Cladding done on the top of Sales/Administration building of the Petrol Pump. The Building Fascia is the element provided on the front and side faces of the existing Sales/Store Building at a Petrol Station. This is done by bolting steel tubular structures to the front and side faces of the top of the building. Once these tubular structures are fixed in water line and level so as to facilitate drainage as per the particular site, additional aluminium and steel pipes/extrusions are fixed in place and then one by one individually ACM sheets are hand routed and fixed to the welded frames on top of the canopy to give a Building Fascia. Building Fascia is completely non-lit.

3. **Canopy Colum Cladding**

The Existing Columns of Steel/Concrete supporting the Canopy of the Petrol Pump are provided with MS Tubular Sections, which are fixed by welding/bolting on which the raw aluminium sections are bolted and then ACP is mounted and fixed using screws to give Canopy column Cladding.

4 **Building Cladding**

The existing building/store is provided with first Horizontal MS Tubular Sections which are bolted onto the walls and then Raw Aluminium Sections are bolted onto the fixed tubular sections and on which (ACP sheets are fixed using screws) piece by piece and as per the design of the building. All the while taking into account the particular nuances of the building like windows, doors, ventilators, electrical points including switch boards, tube light fittings, Water Dispensers, Credit Card Machines etc. The ACP is mounted and fixed sheet by sheet, taking into account the above factors.

4. The Appellants were initially not paying any excise duty on any goods fabricated for executing their contracts. After an initial investigation done in Aug 2008 by the Anti-Evasion wing of Central Excise Commissionerate, Delhi-I, the Appellants paid excise duty on the value of products stated to be manufactured and cleared from the factory and also took Central Excise registration from 01-04-2007 and started paying excise duty as per their understanding of excise liability. However the officers of Directorate General of Anti-Evasion New Delhi later probed extensively into the matter with reference to activities of many manufacturers manufacturing such items and they came to the conclusion that the appellants had not paid appropriate excise duty for the period 2006-07 to 2008-09 and issued a Show Cause Notice dated 01-02-08 demanding excise duty short paid. This Notice was adjudicated confirming a duty demand of Rs. 3,29,63,547/-/- along with interest and penalty under section 11AC for equal amount from M/s Pioneer Corporation and Rs. 4,92,95,034/- along with interest

and penalty under section 11AC for equal amount from M/s Samarth Designs (Pvt) Ltd and also imposed a penalty of Rs. 50,00,000/- on Shri. Pankaj Chopra. Aggrieved by this order the appellants have filed ~~this~~ these appeals along with a stay petitions for waiver of pre-deposit arising from the impugned order for hearing of appeals.

5. After hearing both sides for some time we find that this matter involves issues like,-

- (i) whether principles of natural justice have been complied with,
- (ii) identification of excisable products manufactured as a part of a contract for fabrication and installation, and classification of the excisable manufactured products,
- (iii) valuation of excisable manufactured products,
- (iv) examining duty liability on goods claimed to have been got manufactured on job-work basis, and
- (v) the issue of time bar.

6. The adjudication order does not deal with the above issues in a manner which would have enabled us to decide the issues in appeal. So we came to the conclusion that the adjudication order cannot be sustained in the present form. So we decided to waive the requirement of pre-deposit and we proceeded to dispose of the appeal itself laying down some guidelines for a de-novo adjudication in this matter.

7. While we clarify that the matter is being remanded to the adjudicating authority keeping all issues, so far raised and that may be raised by the appellants in de-novo proceedings, open, we would like to specify some guidelines in the matter of issues so far raised. This is being done in the following paragraphs.

8. In the matter of Natural Justice.

8.1 The appellants had requested for the cross examination of the following persons whose statements have been relied upon:

i) Anil Ganeshmal Chopra, machine operator and product of the noticee.

(ii) Shri Kunal Katyal, Manager Production of the Noticee.

(iii) Shri S.K. Jain, Chief Engineering Manager, IOCL.

(iv) Shri S.S. Pandita, Sr. Manager Engg. IOCL.

(v) Shri Ashit Gupta, Field Inspector, M/s Bureau, Vertas.

(vi) Shri Ajay Thakur, Field Inspector, M/s SGS India.

8.2 In the case of witnesses 1 and 2 the adjudicating authority has observed that they are the employees of the appellant and they had "confessed" the matter and confession or admission before a Central Excise officer is admissible as evidence.

8.3 The Appellants raise the issue that The statements of these persons are only in the context of Monoliths, Spreader, Direction Sign, Facility Sign and Signage Cladding on which they are already paying excise duty. The Appellants contest that the statements are not in relation to Building Fascia, Canopy Fascia, Building Cladding and Column Cladding which are the items in dispute. They contest that these items come into existence at the site as immovable property only. They point out that this clarity can be brought out only in cross-examination of the persons.

8.4 The adjudicating authority has taken the view that the remaining four witnesses were independent and authentic witnesses and they have not retracted from their statements. So it is not necessary to allow cross examination.

8.5 The Appellants wants cross-examination for the reasons that some of the standard conditions of the contract are practically impossible to comply with. For example the dimensions of some of items specified are too big to be transported from factory which would imply that such goods were fabricated at site. In the case of statements of Quality Inspectors they wanted to confront them with the fact that they had issued inspection reports at the assembly site rather than at the factory which implies that the goods they inspected came into existence only at the site.

8.6 It is too elementary to state that there cannot be a confession or an admission about a legal position, least of all by a Machine Operator or a Production Manager who are not experts in excise laws. The statements of any witness can be only to prove facts. Questions of law cannot be proved through statements. The issues like whether a particular item is excisable or what is its assessable value cannot be proved through statements. We note that the adjudicating authority has not taken the statements as proof of legal position.

8.7 But still there are other issues. Even though the witnesses are authentic they may not have stated all the relevant facts because questions relating to those facts might not have been put to them or investigating officers might have chosen not to record the whole facts. Further the person concerned might have given statements thinking certain facts are relevant and others are not. To avoid such pitfalls it is eminently advisable to allow cross-examination. We note that there are many cases ~~of this type~~ on this issue booked and it may not be practicable to call the officers of IOCL et al for cross examination for the purpose of each case at the convenience of advocates of each party. It is for the adjudicating authority to work out methods convenient to both the parties. For example the Revenue can ask for early decisions on all the pending cases on this issue before the Tribunal so that, if there is a need, necessary proceedings in all such cases can be taken up together. If there is any serious difficulty in producing any witness it is open to Revenue to proceed on the basis of what the documents reveal or based on the statements of witnesses whose statements are tested through cross-examination. Further, the evidence given by Shri. S. K. Jain, Chief Engineering Manager in reply to letter dated 09-09-2008 (para 11 of impugned order) is in the nature of an affidavit which can be re-butted through a counter affidavit by the appellant~~s~~. The adjudicating authority can reduce the points of difference between the two and decide on how to arrive at the correct position. One method to resolve such difference can be cross-examination. Further affidavits on the points of difference can be another method. A visit by adjudicating authority to the factory and the ~~installed items~~ sites of installation and detailed recording of his observations with reference to the persisting disputes can also be useful.

9. In the matter of excisability and classification

9.1. The excisability of products manufactured for erection at site has received the attention of CBEC long time back and CBEC had issued guidelines in the mater 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. The adjudicating authority can take help from these circulars.

9.2. The adjudicating authority has classified all the elements under Tariff Item 94056090. This heading is for "Illuminated signs, illuminated name-plates and the like". The key arguments of appellants is that Retail Visual Identity comes into existence only as an immovable property and the manufactured items have to be classified in the form in which it is removed from the place of manufacture. It is necessary to examine the issue whether items like building fascia, canopy fascia, building cladding and column cladding will fall in this heading. A likely argument that wherever the goods are classifiable duty is payable is not appropriate firstly considering the scheme of excise levy, secondly considering the argument that these are items which come into existence only as immovable property. So the adjudicating authority has to record the nature of goods as it is removed from place of manufacture, whether it is excisable and if so its classification and then proceed. We would like to make it clear that interpretative Rule 2 (a) of the General Rules of Interpretation of the First Schedule to Central Excise Tariff (relied upon in para 12 of discussion and finding in the impugned order) cannot be of help in taxing anything which comes into existence only as an immovable property or in concluding that the value of ~~excise~~ excisable goods removed will be the contract value inclusive of activities for installing and erecting the goods to make it an immovable property.

10. In the matter of Valuation

The core of the dispute is actually valuation. Revenue has taken the sales figures from the balance sheets of the appellants and treated that as the assessable value of excisable goods manufactured when part of the money realized from the customers was in relation to installation of the fabricated items. It would appear that the insistence of cross examination is also for establishing what are the activities done in the factory and what are the activities in the nature of installation and construction. The Appellants have also raised the issue that cost of transportation of goods from their factory to the sites of installation will not form part ~~as~~ of assessable value. Since the contract is a composite one, the adjudicating authority should decide which of the Valuation Rules will apply and proceed in the matter. We find that the most serious defect with the impugned order is in this respect. This has to be remedied.

11. In the matter of claim regarding processes done on job-work basis

11.1 M/s Poineer Corporation submits that for work sub-contracted to M/s Samarth Designs (P) Ltd and carried out by them, excise duty has been demanded from both the appellants. This prima facie appears to be a serious defect. In the de-novo adjudication the value of excisable goods manufactured by each of the appellants should be quantified separately and duty demanded from the actual manufacturer and there should not be any case of demanding on the same goods twice.

11.2 The statement of Shri. Pankaj Chopra, Director, M/s Samarth Design (P) Ltd recorded on 28-08-2008 as discussed in para 7 of the impugned order states that states that items like Spreaders, Direction Signs and Facility signs were got manufactured by them through sub-contractors. The issue as to why excise duty is demanded from the Appellants on such goods is not clearly dealt with in the impugned order. This issue may be specifically examined and finding recorded in de-novo proceedings.

12. Issue of time bar

The Appellants contest that the entire matter was studied by the Central Excise Officers of Delhi-I Commissionerate by scrutinizing the records and after doing site inspection and appropriate excise duty has been demanded. After this process if a demand is to be issued for the same period it will be necessary to record what ere the documents and information suppressed during such process which is the reason for the present Notice. We have gone through para 20.1 of Findings of the impugned order. This para does not clearly state which vital facts have been suppressed by the appellants and which could not be noticed during the previous investigation conducted by the department. The adjudicating authority has to give facts and findings on this issue specifically. We are not giving any finding on the issue whether a second notice invoking extended period can be invoked in such a case.

13. We are of the view that the appellants also need to give full co-operation in the matter. Primarily this will consist of furnishing information for arriving at the value of goods cleared from the place of manufacture. Firstly the appellants will give the copies of the Balance Sheets, Profit and Loss statements and related schedules and allow access to the ledger if need arises. Further if the department communicates its tentative findings as to what are the excisable goods that has escaped the excise levy, it will be incumbent on the appellants to give information about its assessable value explaining the method adopted.

14. Since the findings against the main appellants are being set aside for de-novo consideration the penalty imposed on Shri. Pankaj Chopra also has to be re-adjudicated.

15. Thus the stay petitions are allowed and appeals are allowed by setting aside the impugned order and remitting the matter for de-novo adjudication.

(Operative part pronounced in Court on 13-12-11)

(S.S. Kang)
Vice President

(Mathew John)
Member (Technical)

RM