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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/1421/2011 - EX[DB] Date **18/01/2012**

E/S/1829/2011-EX

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

To :
M/S MEHTA PLAST CORPORATION
18, DOONI HOUSE, FILM COLONY, JAIPUR(RAJ)K

M/S MEHTA PLAST CORPORATION Appellant

Vs

C.E.E. JAIPUR I **STAY ORDER NO. 76/2012-EX** Respondent

I am directed to transmit herewith a certified copy of **Final order No. A/25/ 2012 EX|DB|** dated 11-1-12 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. JAIPUR I
N.C.R.BUILDING, STATUE
CIRCLE, "C" SCHEME, JAIPUR
302005.

2. Adv. / Consult
MR.K K ANAND, ADVOCATE
A-103, DEFENCE COLONY, NEW DELHI-110024

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), 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.Jscon 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

Assistant Registrar
(Excise Appeal Branch)

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

Date of Hearing : 5.12.2011

Excise Stay No. 1829 of 2011 and Excise Appeal No. 1421 of 2011

[Arising out of Order-in-Original No. 30/2011 (CE) dated 10.3.2011 passed by the Commissioner, Central Excise, Jaipur)

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?	No
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?	NO

M/s Mehta Plast Corporation — Appellant

Vs.

CCE, Jaipur — Respondent

Appearance:

Appeared for Appellant : Shri K.K. Anand, Advocate
Appeared for Respondent : Shri S.R. Meena, DR

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

STAY order No 76/2012-EX(BR)
FINAL Order No A/95/2012-EX(BR)...dated...........

Per Mathew John :

Appellants are engaged in fabrication of Retail Visual Identity (RVI) elements for petrol pumps and installing the same at the pump premises. They have done such work for petrol pumps selling products of IOCL, BPCL, IBP etc. This work involves fabrication of various items and installing the same at the premises of the pumps.

2. The nature of the disputed items are more specifically called as Canopy Fascia, Building Fascia, Canopy Column Fascia, Building Cladding, Spreaders, Facility Signs, Direction Signs etc. The nature of each of the items is not adequately described in the impugned order or the appeal Memorandum. However we have reasonably good idea about the nature of the items because the dutiability of these items is contested in many other appeals before the Tribunal. For convenience, descriptions of some of the items as understood by us is given broadly 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 comprises of 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~~ covered 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 the Petrol Station. This comprises of 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 then piece by piece and as per the design of the building ACP sheets are fixed using screws. 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.

<u>Monolith :</u>

At first the foundation of Monolith is constructed at site with help of Cement, Rods and MS Bars. Then MS channels, after cutting and making holes, are taken on site and fixed. Then the Logo frame of IOCL is prepared and logo is fixed over frame and in the lower panel Aluminium angle of 25 mm X 25 mm is fitted and fixed in bottom of Logo frame. At last the foundation is covered with black Granite.

Column Cladding :
As per size of column, the frame is prepared at site with MS pipe and then this frame is welded with existing column by the nut bolt. Then the same is covered by ACM sheet after grooving the same.

Spreader / Facility :
As per required size, the frame of Spreader Facility is prepared by cutting Aluminium section and fixed with screws and angle cleat. Then after wiring, the Tube light and chowk are fixed in the Aluminium section of grooved ACP Sheet. Column cladding is fixed by nut and bolt and facility is fitted on the wall.

Directional Sign :
The foundation is prepared with Cement and Rods then Aluminium Section Frame is fixed over Top of Granite with nut and bolt and ACP sheet is fixed in the grooved Aluminium Frame and then tube light and chowk are fitted.

3. The Appellants were not paying any excise duty or service tax for the activity. The Central Excise Authorities initially asked the appellants to pay service tax on their activity under the head of "Erection, Commissioning and Installation" and they paid service tax of Rs. 2,70,035/- and interest of Rs. 35,105/- as seen para 2.10 of the impugned order. However later revenue took a view that they had not paid excise duty payable on goods manufactured and cleared for the period 2004-05 to 2008-09 and issued a Show Cause Notice dated 25-11-09 demanding excise duty short paid. This Notice was adjudicated confirming a duty demand of Rs. 25,74,350/- along with interest and penalty under section 11AC for equal amount from the appellants. Aggrieved by this order the appellants have filed this appeal along with a stay petition for waiver of pre-deposit arising from the impugned order for hearing of appeal.

4. 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 its classification,

(iii) valuation of excisable manufactured products,

(iv) the issue of time bar.

5. 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.

6. 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. But we would like to specify some guidelines in the matter of issues, so far raised. This is being done in the following paragraphs.

7. In the matter of Natural Justice.

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

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

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

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

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

7.2 The Adjudicating officer has not specifically explained why cross examination was not allowed but pointed out the fact that the statements are in conformity with the contract and work order.

7.3. Though we see some merit in the reasoning given by the adjudicating authority there may be some issues which need further clarifications if the statements are to be relied upon. The witnesses 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 relating to such goods booked against different parties in different Commissionerates. It may not be practicable to call the same witnesses for cross examination in each case at the convenience of advocates of each party. It is for the adjudicating authority to work out methods convenient to ~~both~~ Revenue and the various appellants and the witnesses. 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 for de-novo proceedings, 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, of IOCL vide letter dated 18-09-2008 (para 1.8 of impugned order) is in the nature of an affidavit which can be re-butted through a counter affidavit by the appellant. 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.

Inspection of site and detailed recordings of facts as seen can also be resorted to. Further, affidavits on specific points can also help.

8. In the matter of excisability and classification

8.1. The excisability of products manufactured to be erected at site has received the attention of CBEC long time back and CBEC had issued guidelines in the matter 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 may take note of these circulars and various decisions of the Tribunal and the Courts in the matter while doing the de-novo adjudication.

8.2. The adjudicating authority has classified some elements in heading 9405 and some elements in heading 8310. 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 are "goods". A likely argument that whenever the goods are classifiable duty is payable is not a proper argument 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 7 of the impugned order) cannot be of help in levying excise duty on 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 consideration for activities for installing and erecting the goods making it an immovable property.

9. In the matter of Valuation

The core of the dispute is actually valuation. It would appear that Revenue has taken the sales figures from the annual financial statements 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. Though adjudicating authority has allowed deduction of value of service on which service tax is paid, the authority has not specified the rule under the Central Excise Valuation Rules that is adopted and reasons for adopting the same. The issue whether the value can be arrived at on the basis of cost construction method is also not examined. Further the adjudicating authority has not allowed the benefit of cum-duty realization. We feel that these issues need to be looked into again. If value is to be arrived at based on figures in Annual Financial statements are being adopted, then it will be appropriate to consider it as cum-duty price.

10. Issue of time bar

The Appellants contest that the entire matter was disclosed to the department while demanding service tax from them which they paid. The adjudicating authority is of the view that the initial stand of the Appellant that the goods were fabricated at site was found to be false as seen from statements of the IOC officials. Here also there is reliance placed on the statements of the IOC officials without allowing cross-examination. The Revenue may have a case only if the contracts were not disclosed when the matter was being probed for collecting service tax. We are not giving any firm view on this because the matter is being remanded to bring on record what were the facts disclosed, when and what was the suppression and whether any SCN was issued for levy of service tax and whether the payment was made without detailed scrutiny of the full facts by the department.

11. 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. If some value is attributed to service component such value has to be specified with supporting evidence, if a need arises in the proceeding.

12. Thus the stay petition is allowed and appeal is allowed by setting aside the impugned order and remitting the matter for de-novo adjudication.

(Operative part pronounced in Court on 05-12-11)

(S.S. Kang)
Vice President

(Mathew John)
Member (Technical)

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