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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/2167/2011 - EX[DB]
E/S/2856/2011-EX

Date **17/04/2012**

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

To :
M/S DURGA INDUSTRIES PVT. LTD.
30-A, INDUSTRIAL AREA, BANMORE, DISTT.
MORENA (M.P.)

M/S DURGA INDUSTRIES PVT. LTD. Appellant

Vs

C.E. INDORE **STAY ORDER NO. 642/2012-EX** Respondent

I am directed to transmit herewith a certified copy of **Final order No.** A/437 **2012 EX|DB]** dated 10-4-12 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. INDORE
MANIK BAGH PALACE, POST
BOX NO. 10, INDORE 452001 (M.P.)

2. Adv. / Consult
MR.BHASIN SETHI & ASSICIATE
401,SATYAM CINEMA BUILDING,RANJEET NAGAR,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), 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

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing/decision: 10.4.2012

Stay Application No.2856 of 2011 of 2011 and
Central Excise Appeal No.2167 of 2011

Arising out of the order in appeal No.IND/CEX/000/APP/172 to 174/2011 (Denovo) passed by Commissioner (Appeals), Customs, Central Excise & Service Tax, Indore.

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 26 of the CESTAT (Procedure) Rules, 1982?	
2	Whether it should be released under Rule 26 of 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?	

Durga Industries Pvt. Ltd. .. Appellant

Vs.

C.C.E., Indore .. Respondent

None for the appellant

Present Ms. Renu Jagdev, A.R. for the Revenue

Coram: Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Mr. Rakesh Kumar, Technical Member
STAY order No. 642/2012-EX (BR)
FINAL Order No. A/437/2012-EX (BR)

Per Shri Rakesh Kumar:

The appellant filed this application in the registry on 9.4.2012 requesting to decide the stay application for granting waiver of differential duty amount till final disposal of the appeal.

2. The demand of Rs.16,966/- has been confirmed against the appellant with interest besides imposition of penalty of Rs.10,000/- on them under Rule 25 of the Central Excise (No.2) Rules, 2001.

3. Appellant is engaged in the manufacture of ACSR/AAA conductors. He has been charging freight including transit insurance on equalized basis of length of cable sold i.e. at per kilometer rate, irrespective of the distance factor . The invoices issued by the Appellant to his customers , mention the freight, but on equalized basis. The appellant while paying excise duty on the goods cleared claimed exclusion of the equalized freight from the assessable value and did not pay duty on the freight amount..

4. The Department was of the view that this has been in violation of Rule 5 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 read with Section 4(1)(b) as the freight & insurance shown in the invoices is not the actual freight but the equalized freight which is not deductible while determining the assessable value of the goods. Accordingly show cause notice was issued to the appellant which culminated into confirmation of demand of Rs.16,966/- . The adjudicating authority also directed the payment of interest in terms of Section 11AB of the Central Excise Act, 1944 and imposed penalty under Rule 25 of the Central Excise (No.2) Rules, 2001. The appellant's appeal against Assistant Commissioner's order was dismissed by Commissioner of Central Excise (Appeals) vide order in appeal dated 15.11.2011. Against this order of Commissioner of Central Excise (Appeals), this appeal along with stay application has been filed.

5. None appeared for the Appellant. However, there is a letter from the Appellant praying for decision of their stay application on merits.

6. Heard Shri Nagesh Pathak, the learned Authorised Representative (for the Department).Though this matter is listed today only for hearing of the stay application, after hearing the learned A.R. and going through the appeal memorandum, we are of the view that since only a short point is involved in this case and there is no point in keeping this appeal pending, with the consent of the learned A.R. the matter was heard for final disposal after waiving the requirement of pre-deposit.

7. The learned A.R. defended the impugned order by reiterating the finding of the Commissioner (Appeals) in it and emphasizing that since during the period of dispute, the Rule 5 of Central Excise Valuation Rules, 2000 provided for exclusion of actual cost of transportation from the place of removal upto the place of delivery and since the invoices do not show the actual freight, but the freight on equalized basis i.e. averaged freight charged at per kilometer rate, its exclusion from the assessable value has been rightly disallowed.

8. We have carefully considered the submissions of the learned A.R. and have gone through the memorandum of appeal. As mentioned in para 3 of the show cause notice, the appellant was showing the freight separately in the invoices on equalized basis charged on the basis of the length of the wire sold irrespective of the distance from the place of removal to the place of delivery. Rule 5 of the Central Excise Valuation Rules, 2000, during the period of dispute, were as under:

> ***"Where any excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of section 4 of the Act except the circumstances in which the excisable goods are sold for delivery at a place other than the place of removal, then the value of such excisable goods shall be deemed to be the transaction value, excluding the actual cost of transportation from the place of removal upto the***

place of delivery of such excisable goods, provided the cost of transportation is charged to the buyer in addition to the price for the goods and is shown separately on the invoices for such excisable goods."

The point of dispute is as to whether the freight though charged in addition to the price of the goods and shown separately in the invoices, but charged on equalized basis is excludible from the assessable value. According to the Department, only the actual freight can be excluded , not the equalized freight.

9. Hon'ble Supreme Court in para 50 of its judgment in the case of Union of India vs. Bombay Tyre International Ltd. reported in 1983 (14) ELT 1896 (SC) with regard to the provision of Section 4 of the Central Excise Act, 1944, as it stood during the period prior to 1.7.2000 and when sub-section (2) of Section 4 specifically provided for exclusion of - " the cost of transportation from the place of removal to the place of delivery" for determining the assessable value, held that freight charge from the place of removal to the place of delivery is deductible even if charged on equalized basis. Though the new Section in force w.e.f. 1.7.2000, does not have a provision specifically providing for exclusion of the cost of transportation from the place of removal to the place of delivery if the transaction value at the place of removal is not known, the cost of the transportation from the place of removal to the place of delivery has to be excluded as on per the provisions of Section 4(1)(a), the transaction value has be for delivery of the goods at the time and place of removal. In fact for this reason only Rule 5 of the Central Excise Valuation Rules, 2000 specifically provides for exclusion of the cost of freight from the place of removal the place of delivery when it is charged from the customer in addition to the price and is mentioned separately in the invoices. The provisions of Rule 5 of the

, then,
Valuation Rules, 2000 can be said to be analogous to the provisions of Sub-Section (2) of Section 4, as it stood during period prior to 1.7.2000. Therefore, the ratio of the Apex court's judgement in the case of UOI vs. Bombay Tyre International Ltd. (supra) is applicable to the new Section 4 also. We find that the Hon'ble Supreme Court in the case of VIP Industries Ltd. vs. C.C.E.., reported in 2003 (57) RLT 6 (SC) also has held that cost of transportation is not to be included when the sale price is inclusive of equalized freight and the same view has been taken by the Tribunal in case of Magestic Auto Ltd. vs. C.C.E. reported in 2003 (57) RLT 19 (T).

10. In view of the above discussion, the impugned order is not sustainable. The same is set aside. The appeal and the stay application are allowed.

(Order already pronounced in the court)

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Technical Member

scd/