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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 13/03/2012

Appeal No. E/1980/2011-1981/2011 - EX[DB]
E/S/2616-2617/2011-EX

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

To :
M/S FIBERFILL ENGINEERS
C-9/9574, VASANT KUNJ, NEW DELHI.
110070

M/S FIBERFILL ENGINEERS Appellant
Vs
C.C.E. DELHI II Respondent

STAY ORDER NO. 393-394/2012-EX

I am directed to transmit herewith a certified copy of **Final order No.** A/255-256/ **2012 EX[DB]** dated 29-2-12 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. DELHI II
C.R. BUILDING, I.P. ESTATE, NEW DELHI 110002

2. Adv. / Consult
MR.AMIT GUPTA (ADVOCATE)
21, LAWYERS CHAMBER SUPREME COURT OF INDIA NEW DELHI-110001

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
14. SHRI RISHABH KISHORE, PARTNER OF M/S FIBERFILL ENGINEERS, C-9/9574, VASANT KUNJ, NEW DELHI.

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 : 11.1.2012

Excise Stay No. 2616-2617 of 2011 and Excise Appeal No. 1980-1981 of 2011

[Arising out of Order-in-Original No. 3/2011 dated 6.5.2011 passed by the Commissioner, Central Excise, New Delhi]

Coram:
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
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 Fiberfill Engineers
Shri Rishabh Kishore, Partner — Appellants

Vs.

CCE, Delhi-II — Respondent

Appearance:

Appeared for Appellant : Shri Amit Gupta, Advocate
Appeared for Respondent : Shri N. Pathak, Sh. Sumit Kumar, A.Rs

CORAM: Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Mathew John, Member (Technical)

STAY order No. 393-394/2012-Ex(BR)
FINAL Order No. A/255-256/2012-Ex(BR) dated............

Per Mathew John:

The appellants were awarded contracts by Petroleum companies like M/s Indian Oil Corporation, M/s Bharat Petroleum

Corporation, M/s IBP Co. Ltd for manufacture and installation of Retail Visual Identity Elements (RVI for short) at the petrol pumps of those different companies. Broadly RVI are those signs which display the name of each company the unique look, common to all pumps dispensing products of each company, by which a person going to the pump clearly identifies the pump that dispenses the products of that particular company. There were other elements indicating the facilities at the pump and directions signs to help the vehicles using the pump covered by this expression. More specifically RVIs consist of Spreaders, Facility Signs, Direction Signs, Monoliths, Wall cladding etc. The process of making of these elements are recorded in para 3.12 to 3.19 of the impugned order (sequence of these numbering cannot be easily understood) on pages 28 to 30 of the impugned order. These are reproduced below.

"3.12 **Cladding:** (i.e., covering of any surface such as walls, floors, building, column etc. by any foreign material on the pre-existing structure), was carried out mainly with aluminum composite sheets on the pre existing surfaces of walls, columns, canopies and buildings. In the process, (a) exact sizes were measured, (b) the sheets were cut as per the site specifications, (c) surface was leveled with M.S. pipes which were welded to the existing surface to even out different levels of variations (i.e., to cover the defects in civil construction), (d) aluminum extrusion was fixed piece by piece of required lengths cutting out the various opening like doors, windows, ventilators, ACs, coolers, water dispensers, power points and lighting fixtures etc., (e) ACM sheet was cut as per the Aluminum extrusion that was secured to the MS or building through bolts. The ACM was installed in equal lengths/panels and depended upon the individual site plans.

3.13 **Monoliths:** Monolith is a complete sign which is manufactured at the site of oil company (i.e., petrol pump) using steel, ACM, Ploy carbonate sheets & aluminum tubes. Exact cut to size pipes were received/procured and given to a job worker to fabricate the components of monolith as per design of the oil company. The steel was then directly dispatched from the job worker to site of the Oil company. Other items like ACM and polycarbonate were purchased as per the design of the Oil company. These panel were then cladded on the cut to size as per format, POC Foam boards were packed and dispatched to site, where they are all assembled and installed on the specially constructed foundation built by Oil Company for the same. At the site the components of monoliths were assembled piece by piece and the structure was erected and panels were cladded.

3.14 **Building Fascia:** Building Fascia is the ACM cladding done on top of sales Building of a Petrol Pump. Aluminum Composite Panels (ACM) sheets and Aluminum ACM sheets and Aluminum Angle/Extrusion length were dispatched on as it is basis. They were cut to size on the site as per requirements of that particular site/petrol pumps. They were installed on the existing sites Building Top of the petrol pumps. It was not possible/feasible to assemble building fascia at factory or even at ground level on the site. The material was always sent in loose condition.

3.15 **Canopy Fascia:** It is cladding work on existing canopies of the Oil Companies as per their colour scheme and designs provided by the oil companies for aesthetic looks. For installation of canopy fascia MS Pipe (Coated) Aluminum extension, ACM sheets, GI sheets were supplied directly to the site. At the site, measurement of canopy with regards to size, string level/straightness, water level was taken and a mean level was worked out so that water does not stop on the canopy. Subsequently, MS Pipes of 900 mm were installed on the canopy piece by piece, single by single on the desired line levels, as worked out earlier (vertically) Aluminum Extrusion was then put/installed on the MS Pipes horizontally again piece by piece i.e., as per the standard lengths available then the ACM sheet which measures 900 x 4000 mm 1mm required colours was cladded on the MS/Aluminum with the help of screws/rivets. GI sheet was fixed on the top of ACM sheet to avoid water seepage.

3.16 Moreover at the respective sites, existing canopies were present, some of which were very old in construction and not designed for ACM work. The faces of the canopy (that was the front façade) was in most cases not in blue and more certainly not water level as rain water had to flow out somewhere. In order to maintain these levels it became necessary to do the installation/cladding works at site only.

3.17 **Direction Sign** : The Direction Sign is entry/exit sign displaying road directions. The aluminum frame was made by the job worker and ACM was slided into it after punching & routing, poly carbonate sheet was fixed in the routing and punching area, CFL lamps was used for illumination. At site, excavation was done and RCC foundation was made. The direction sign was then fixed on RCC foundation, which was then cladded with black granite tiles.

3.18 **Facility Sign** : Aluminum, Poly Carbonate and ACM Aluminum Frames were fabricated by job workers, ACM polycarbonate was cut, punched to size assembled and then dispatched to the site by the job worker.

3.19 **Spreaders** : They were fixed on canopy column and facilities on the compound walls, Aluminum, Poly Carbonate and ACM Aluminum frames were fabricated through a job worker and ACM and ACM polycarbonate are cut, punched to size as per oil company's designs, assembled and then dispatched to the site by the job worker."

2. Revenue was of the view that fabrication and installation of the RVI involve manufacture as defined in Section 2(f) of Central Excise Act, 1944 and the Appellants should have paid excise duty on goods so manufactured. Since the appellants did not register with the excise authorities and did not pay excise duty the Department took the amounts realised from the oil companies as reflected in the balance sheets of the appellants and demanded excise duty to the tune of Rs.12,41,92,955/- by a notice dated 30-11-09 for such realization for the financial years 2004-05 to 2007-08 and Rs. 1,95,58,263 by a Notice dated 31.3.2010 for the

financial year 2008-09. In adjudication proceedings the said duty amounts were confirmed against the appellants along with appropriate interest. Further penalties equal to the duty amounts are imposed on the appellant firm under section 11AC of the Act and a penalty of Rs. 50,00,000/- is imposed on Shri. Rishab Kishore, partner of the appellant firm. Aggrieved by the adjudication order the appellants have filed these appeals before the Tribunal.

3. The contention of the appellants are the following:

3.1. The appellants did not have any manufacturing facility till September 2009.In September 09 a manufacturing facility was set up in Sitarganj which is a place where area based exemption from excise duty is available. The Show cause Notices do not state where the manufacturing activity took place. Without specifying the place of manufacture the adjudicating authority does not get jurisdiction to adjudicate the case. They contest that they got the goods fabricated on job work basis from others and excise duty liability if any had to be discharged by the actual manufacturer. They vide their letter dated 12-11-2008 submitted copies of TDS certificates issued to their contractors and job-workers to prove that fabrication work was done by others. Since fabrication work was not done by them till Sep. 2009 no excise liability would arise against them.

3.02. The appellants contest that adjudication order is not a speaking order countering the submissions given by the appellant.

(i) that the entire case of the department is based on statements of certain IOC officials and third parties who were engaged for ensuring the quality of the work by misinterpreting their statements; that appellants have not been given a chance to cross-examine the persons whose statements have been relied upon and hence the order is passed in violation of principles of natural justice.

(ii) that the finding that even without a place of manufacture, excise duty liability will arise is not correct;

(iii) that the finding that the principal manufacturer will be liable for duty liability of job workers is not correct.

(iv) that the extended period of time cannot invoked because the processes of calling for contract and award of the contract were in public domain and it also came to the knowledge of the department when department booked a case against M/s Samarth Designs which was also awarded contract by the petroleum companies concerned; that there is difference between the case of the appellants and the case of M/s Samarth Designs since the latter had its own manufacturing facility where as the appellants had no facility for manufacture.

(v) that the appellants were in fact only doing the service of Works Contract and they got registered with the department for payment of service tax under the category of Works Contract Services since the year 2007 when the service became taxable. The works contract cannot be vivisected to levy service tax and also to levy excise duty; that the works contract awarded by the oil companies were for works contracts which brought into existence immovable structures at site which are not liable to excise duty; that the Oil companies claimed depreciation on RVI elements under Section 32 of Income Tax Act treating it as immovable structures; that the facts that nuts and bolts are used to fix some of these elements cannot lead to the conclusion that before fixing the goods using nuts and bolts the items were excisable goods; that RVIs came into existence only as immovable property and there cannot be any excise duty liability on immovable property; that the issue has not been examined in the light of Board's order No. 58/1/2002-CX dated 15-01-2002.

(vi) that the activity of cladding is not a manufacturing activity but a construction activity.

(vii) that all the elements cannot be classified under Tariff Entry No. 94056090.

(viii) that the Appellants are entitled to SSI exemption under Notification 8/2003-CE dated 01-03-2003

(ix) that excise duty cannot be imposed on the entire money received because it is a composite contract for supply of bought out items and for construction at site.

4. We note that this can be considered as second round of litigation, because the Appellants had approached the Honorable Delhi High Court after the first O-in-O No. 08/2010 dated 20-01-2011 was passed. The Court had given certain directions. We have scrutinized the order with reference to the directions given by the Delhi High Court and we find that the directions have not been complied with in as much as the issue as to why the goods are manufactured goods is not reasoned out. Further a wrong argument is given that for work undertaken by job-workers, the principal manufacturer is liable to pay excise duty as a matter of general rule.

5. We also note that a few other appeals by other parties regarding the excisability of RVI elements came before this Tribunal and those cases have been remanded to the adjudicating authorities with detailed instruction as to how to proceed in the de-novo adjudication. We propose to follow the same course of action in this case also.

6. We consider that the impugned order before us also suffers from basic infirmities and cannot be sustained in the present form. So we have considered it proper to waive the pre-deposit of dues for hearing the appeal and we proceeded to dispose of the appeal

itself with certain directions. The adjudicating authority may note that this matter is to be adjudicated in a third round and at least during this time a better job is done rather than applying the excise duty rate on figures entered in the balance sheets of the appellants for each of the financial year and confirming the demand for amount so worked out.

7.1 We are prima facie not in agreement with the contentions that excise duty liability will arise only if the appellants had a factory. The definition of manufacture does not stipulate that manufacturing activity has to take place in a factory.

7.2 We prima facie do not agree with the argument that since the contracts were awarded through a public process or because the department had booked offence case against some other manufacturer for the same offence the matter of manufacturing activity if any done by the appellant was in the knowledge of the Department and hence extended period cannot be invoked for demanding the duty.

8. The main contentions to be dealt with are the following:-

(a) The appellants contest that they did not do any manufacturing activity but got the goods manufactured on job-work basis. The fact that the appellants have been awarded a contract and they executed a contract can result in a burden on the appellants to demonstrate that the goods were not manufactured by them. When they produced evidence of payment of charges to the job-workers it was totally inappropriate to ignore such evidence and give a ruling that the excise duty liability was on the appellants ignoring all the ruling given by Tribunal and Courts in the matter. This is the most important matter to be dealt with in de-novo adjudication.

(b) The contention that RVIs did not come into existence as anything other than immovable property has to be examined more carefully and reasons recorded why the adjudicating officer considers otherwise. The guidelines given by the order No. 58/1/2002-CX dated 15-01-2002 issued by CBEC in exercise of powers under section 37B of Central Excise Act along with various decisions of the Tribunal and the Courts should be kept in mind while deciding the issue.

(c) If the adjudicating authority proposes to rely on the statements of the four persons, disputed by the appellants opportunity for cross-examination should be given. The argument that the deponents have not retracted from the statement is not a good reason to deny such cross- examination. The Tribunal has recorded the reason why such cross examination is required while dealing with the appeal filed by M/s Samarth Designs. This is re-produced for the benefit of the adjudicating authority.

> "*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 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. 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 and detailed recording of his observations with reference to the persisting disputes can also be useful."

(d) The next issue to be decided is the valuation of excisable goods. Though we prima facie do not agree with the argument that a composite contract for supply of goods and erection at site cannot be vivisected. But we are clearly of the view that the money realized for the work as a whole cannot be considered to be value of excisable products for demanding excise duty. The adjudicating authority has to identify the excisable goods manufactured, its classification. Then its value will have to be arrived at following Central Excise Valuation Rules after stating which rule is followed and why. If necessary the appellants will allow access to the journals maintained by the appellants for preparing their balance sheets to arrive at cost of materials. The appellants claim for SSI exemption also needs to be examined. Needless to say that it cannot be denied for the reason that the Receipts in the balance sheets for the concerned years are above the value limits prescribed in the notification. The criterion has to be applied with reference to assessable excisable products manufactured by the appellants in each financial year.

9. We make it clear that our observations on legal issues are only prima facie views because the arguments on the issues were not listened to at length. Therefore we keep all issues and contentions open to be considered in de-novo proceedings.

10. Thus the stay petitions ~~is~~ are allowed. The Appeals also are allowed by setting aside the impugned order and remitting the matter to the adjudicating authority for a fresh adjudication.

(Operative portion pronounced in open Court)

(Archana Wadhwa)
Member (Judicial)

(Mathew John)
Member (Technical)

RM