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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/2213/2011 - EX[DB] WITH E/S/2902/2011-EX Date **21/03/2012**

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

To :
M/S DABUR INDIA LTD.
22, SSITE-IV, INDUSTRIAL AREA, SAHIBABAD
GHAZIABAD.

M/S DABUR INDIA LTD. Appellant

Vs

C.C.E. GHAZIABAD **STAY ORDER NO. 439/2012-EX** Respondent

I am directed to transmit herewith a certified copy of **Final order No. A/322/ 2012 EX|DB|** Dated 23-2-12

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. GHAZIABAD
C.G. O. COMPLEX-II, KAMLA
NEHRU NAGAR, GHAZIABAD
201302

2. Adv. / Consult
MR.V. LAXMIKUMARAN
B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

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

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. III

Excise Appeal No. 2213 of 2011
Excise Stay Application No. 2902 of 2011

[Arising out of Order-in-Appeal No. 116-CE/GZB/2011-12 dated 22.6.2011 passed by the Commissioner of Central Excise(Appeals), Ghaziabad]

For approval and signature:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Mathew John, Member (Technical)

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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? : No

2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes

3. Whether Their Lordships wish to see the fair copy of the Order? : Seen

4. Whether Order is to be circulated to the Departmental authorities? : Yes

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M/s. Dabur India Ltd. Appellants

Vs.

Commissioner of Central Excise Respondent
Ghaziabad

Appearance:

Shri B.L. Narasimhan, Advocate for the Appellants
Shri R.K. Verma & Shri Sumit Kumar, SDR for the Respondent

CORAM:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Mathew John, Member (Technical)

Date of Hearing/decision : 23.02.2012

STAY ORAL ORDER NO. 439/2012-EX(BR)
FINAL **ORAL ORDER NO** A/322/2012-EX(BR)

Per Archana Wadhwa (for the Bench):

After dispensing with the condition of pre-deposit of dues, we proceed to decide the appeal itself inasmuch as we find that the lower authorities, while passing the present impugned orders in de novo proceedings have not carried out the directions of the Tribunal's earlier decision vide which the matters were remanded.

2. For better appreciation of sequence of facts, we reproduce the facts as placed on record by the appellants :

"a) Appellant is a multi-product, multi-locational company, having a number of factories. The present proceedings are in respect of Sahibabad unit of the appellant, under the jurisdiction of CCE, Ghaziabad.

b) The issue in the present case is regarding admissibility of deduction from the assessable value on account of (i) Octroi, (ii) Additional Sales Tax, (iii) Freight & (iv) Additional Trade Discount, on equalized basis, for the financial years 1999-2000, 2000-2001 & 2001-2002.

c) In respect of the appellant's other unit at Baddi, under the jurisdiction of CCE, Chandigarh, the said benefit was allowed by the Ld. Commissioner (Appeals), Chandigarh, vide Order-in-Appeal No. 373&374/CE/CHD/06 dated 28.04.2006.

d) On appeal by the Department, the above order of Ld. Commissioner (Appeals) was upheld by the Hon'ble CESTAT vide its *order dated 30.04.2009 [reported in 2009 (247) ELT 335 (Tri.-Del.)], allowing deduction towards additional sales tax and octroi on equalized basis, following their judgment in the case of Apollo Tyres Ltd., 2005 (186) ELT 344 (Tri.-Bang.) and the matter was remanded to the original authority to segregate the said expenses exclusively in respect of excisable goods.*

d) However, in the present case, the said benefit was denied by the Ld. Assistant Commissioner, Central Excise, Division Ghaziabad, vide order dated 21.01.2008. The order of the Ld. Assistant Commissioner was upheld by the Ld. Commissioner (Appeals), vide order dated 16.12.2008.

e) On appeal by the appellant against the order of Ld. Commissioner (Appeals) in the present case, vide Final Order No. 414/2009-Ex dated 15.06.2009, Hon'ble CESTAT allowed the deductions on equalized basis, following their decision vide order dated 30.04.2009 (supra), and remanded the matter to the original authority to allow deduction on the lines indicated in the order dated 30.04.2009. The issue, whether assessment was provisional or not was also directed to be decided afresh.

f) In a Rectification of Mistake application filed by the appellant, vide Misc. Order No. 62/2011-Ex dated 20.01.2011, the Hon'ble CESTAT modified the order dated 15.06.2009 (supra) to the extent of permitting the appellant to raise the issue of deduction of freight on equalized basis. The Hon'ble CESTAT however, declined to modify the order in respect of appellant's claim for additional trade discount on equalized basis.

g) On appeal by the appellant against the aforesaid order dated 20.01.2011, the Hon'ble High Court of Allahabad, vide order dated 05.04.2011 in Writ Tax Petition No. 425/2011 set aside the order of Hon'ble CESTAT to the extent it rejected the appellant's contention of additional trade discount, directing the authorities to *consider the issue of additional trade discount, on equalized and actual basis.*

h) Thus, in the remand proceedings the authorities were required to consider the appellant's claim for deduction on equalized basis in respect of all the four items. As per the order dated 15.06.2009 of the Hon'ble CESTAT, the issue on merits was decided in favour of the appellant and the matter was remanded only for the purpose of quantification of the demand, segregating the expenses exclusively in respect of the excisable goods cleared by the appellant. The issue, whether assessment was provisional or not was directed to be decided afresh.

i) However, vide the impugned orders, the Ld. Assistant Commissioner as well as the Ld. Commissioner (Appeals) have again gone into the question of admissibility of the deductions on equalized basis and disallowed the same, relying on the Board Circulars, ignoring the binding directions of the Hon'ble CESTAT and also of the Hon'ble High Court. The impugned orders are contrary to the binding directions of the Hon'ble CESTAT and also of the Hon'ble High Court and are beyond the scope of the order of remand.

j) Vide the impugned orders, the Ld. Assistant Commissioner as well as the Ld. Commissioner (Appeals) have also held the assessments to be provisional, contrary to the express provisions of the Central Excise Rules."

3. Learned advocate appearing for the appellant has drawn our attention to the Tribunal's decision vide which the matters were remanded. It is seen that vide Final Order No. 414/09-Ex dated 23.6.09, Tribunal took note of the earlier decision in the case of other unit of the same appellant and remanded the matter to the original authority to allow deduction in the lines indicated in the earlier order of the Tribunal.

4. However, it is seen that the Assistant Commissioner, while passing the present impugned order has again confirmed the demands by rejecting the assessees submission on the main legal issue of availability of discount on account of octroi and additional sales tax, average freight discount on equivalized basis. It would be worthwhile to reproduce the findings of the Assistant Commissioner, as recorded in the impugned order :

> "10(c) Now I examine whether the deductions of average taxes (Additional Trade Discount & the Octroi) can be allowed to the party for the period July, 2000 to March, 2002 as allowed to the party vide aforesaid Tribunal order. The order of the Tribunal in the instant case of the party has referred to the Tribunal Order 355-364/2009-Ex(PB) dated 30.4.2009 in the case of the party for its another unit situated in Baddi, Himachal Pradesh. Hon'ble Tribunal in this case has further relied upon the citation in case of CCE vs. Apollo Tyres reported in 2009 (247) ELT 335 (Tri-Del) and the Board's Circular No.20/90-CX.1 dated 30.8.90 for allowing such deductions to the party.
>
> I further find that in the case of the party's unit situated in Himachal Pradesh. The Hon'ble Tribunal has allowed the appeal by citing the CBEC circular No 20/90-CX.1 dated 30.8.90 ignoring the submissions made by the departmental representative relying on the CBEC Circulars. & C.B.E & C Circular F.No.354/81-2000-TRU, dated 30.6.2000 & Circular F.No. 643/34/2002-CX, dated 1.7.2002. I find that Board's Circular No. 20/90-CX.1 dated 30.8.90 provides for deductions on account of average taxes for the period covered in the Old Valuation Rules, CBEC vide circulars F.No. 354/81-2000-TRU dated 30.6.2000 & Circular F.No. 643/34/2002-CX, dated 1.7.2002 has denied the deductions on account of average taxes in the new Valuation Rules, 2000. Even

after the judgement of the Apollo Tyres supra the instructions of the Board on the issue of deductions of average taxes are unchanged / not withdrawn i.e. no deductions are allowable on this account. The Hon'ble Supreme Court in the catena of judgements has directed the assessing officers to follow the Board circulars even if they are contrary to the Apex Court judgements."

5. After observing as above, the adjudicating authority took note of decision of the Hon'ble Supreme Court laying down that the circulars issued by the Board are binding on the Revenue authorities, he observed as under:

> "In view of the above mentioned Apex Court judgements, I am is of the considered opinion that the CBEC circulars F.No. 354/81-2000-TRU, dated 30.6.2000 & Circular F.No. 643/34/2002-CX, dated 1.7.2002, allowing the deductions only on the actual basis and denying the deductions on the averaged basis are binding upon me for finalisation of the provisional assessment of the impugned period."

6. As is seen from the above, the adjudicating authority has not carried out the directions of the Tribunal but has virtually sit in appeal over the Tribunal's judgement. The observations made by the adjudicating authority that the arguments made by the departmental representative were ignored by the Tribunal, are not only bad in taste but amounts to contempt. If the Revenue was not in agreement with the Tribunal's decision, it was open to them to challenge the same before the higher appellate forum. The Revenue having not done so, is deemed to have accepted the order of the Tribunal and the original

adjudicating authority was bound to implement the same and to carry out the instructions / directions given by the Tribunal. It was not open to the adjudicating authority to again decide the matter on the legal principle of availability of deductions on account of equalised basis and to prefer Circulars over the Tribunal's decision.

7. It may not be out of place to mention here the decision of the Supreme Court in the case of CCE vs. Usha Martin Industries [1997 (94) ELT 460 (SC) as also in the case of Ranadey Micronutrients vs. CCE, [1996 (87) ELT 19 (SC)], relied upon by the adjudicating authority are not applicable to the facts of the instant case inasmuch as in those cases it stands held that Circulars issued in favour of the assessee are binding on the Departmental officers who cannot argue the same. In any case, there was no Tribunal's order in those case which was referred to and in which the Hon'ble Supreme Court observed that circulars have to be given preference over Tribunal's order. The order passed by the Tribunal are judicial orders and are required to be followed by the authorities below, unless the same are set aside by the higher appellate forum. It was not open to the adjudicating authority to adjudge the correctness of otherwise of the said order of the Tribunal and to decide the matter, on the legal issue, against the assessee by ignoring some finding and declaration of law given by the Tribunal.

8. It also stands brought to our notice that the earlier decision of the Tribunal in the case of appellants factory in Himachal Pradesh stands implemented by the jurisdictional Central Excise authority in favour of

the assessee and those orders have not been challenged by the Revenue. We really feel at pain at the observations of the present adjudicating authority commenting upon the correctness of the Tribunal's order and preferring to adopt the departmental Circulars. Even Commissioner (Appeals) who is the first appellate authority has chosen to uphold the impugned order of the original adjudicating authority.

9. Without further commenting upon the observations made by the lower appellate authority in the impugned orders, we set aside the same and remand the matter to original adjudicating authority to segregate the expenses exclusively in respect of excisable goods as directed by the Tribunal in the earlier remand matter and to decide it afresh.

10. Appeal is allowed by way of remand. Stay petition also gets disposed of.

(Pronounced in the open Court)

(Archana Wadhwa)
Member(Judicial)

(Mathew John)
Member(Technical)

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