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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/2094/2011-2096/2011 - EX[DB] Date **21/03/2012**
E/S/2748-2750/2011-EX

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

To :
M/S KIRLOSKAR BROTHERS LTD.
OPP. RAILWAY STATION, UJJAIN ROAD, DEWAS
(M.P.)
455001

M/S KIRLOSKAR BROTHERS LTD. Appellant
Vs
C.C.E. INDORE **STAY ORDER NO. 449-451/2012-EX** Respondent

I am directed to transmit herewith a certified copy of **Final order No.324-326/ 2012 EX[DB]** dated 02-2-12 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. INDORE
MANIK BAGH PALACE, POST
BOX NO. 10, INDORE 452001 (M.P.)

2. Adv. / Consult
MR.SUNIL G.KHANDELWAL,CA
"SHYAM CHANDRA VILLA" 53, ANOOP NAGAR, NEAR UCO BANK, INDORE-452001 (MP)

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 & SERVICE TAX APPELLATE TRIBUNAL

Date of Hearing:02.02.2012
Date of Decision:02.02.2012

Excise Stay Applications Nos.2748-2750 of 2011 in Appeals Nos.2094-2096 of 2011

M/s. Kirloskar Brothers Ltd. Appellant

Versus

CCE, Indore Respondent

[Arising out of Order-in-Appeal No.IND/CEX/000/APP/208 to 210/11 dated 26.05.2011 passed by the Commissioner of Central Excise (Appeals), Indore]

For approval and signature:

Hon'ble Smt. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Rakesh Kumar, Member (Technical)

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1. Whether Press Reporters may be allowed to see CESTAT (Procedure) Rules, 1982.

2. Whether it should be released under Rule 27 of the 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?

Appearance: Rep. by Shri Sunil Khandelwal, C.A. for the appellants.
Rep. by Shri S.K. Panda, Jt. CDR for the respondent.

CORAM : **Hon'ble Smt. Archana Wadhwa, Member (Judicial)**
Hon'ble Shri Rakesh Kumar, Technical Member

STAY Order No. 449-451/2012-EX(BR)
FINAL Order No. A/324-326/2012-EX(BR) Dated : 02.02.2012

Per Rakesh Kumar:

The facts giving rise to these appeals and stay applications are, in brief, as under:-

1.1 The appellants are manufacturer of Hydrolic Mobile Crane, Loaders and Cranes falling under Chapter chargeable to central excise duty. They clear the goods from their factory to their different branches/depots on payment of duty and from the branches and depots, the goods are sold to dealers. According to the appellant, they give cash discounts, quantity discounts and quarterly incentive and discount which based on the quarterly turn-over in respect of a dealer. Since at the time of clearance from the factory, the exact quantum of discount in respect of the sales from the depot/branches is not known, the appellant used to deduct the discount on average basis and pay duty on that basis on the goods at the time of clearance of the goods from their factory. Since the clearances were being made on provisional basis, subsequently, when the exact quantum of discounts was known at the end of the particular quarter, the assessment was being finalized. The period of dispute in this case is from January, 2010 to March, 2010 and April, 2010 to June, 2010 and July, 2010 to September, 2010. For these periods, the jurisdictional Asstt. Commissioner disallowed the discounts on the ground that the same could not be allowed in terms of provisions of Rule 7 of the Central Excise Valuation Rules. On this basis, the duty demands of Rs.17,07,692/-, 14,32,573/- and 14,74,705/- were confirmed for the above mentioned three quarters along with interest.

1.2 On appeal to the Commissioner (Appeals), the Commissioner (Appeals) vide Order-in-Appeal dated 26.5.2011 upheld the orders of the Asstt. Commissioner and dismissed the appeals. Against this order of the Commissioner (Appeals), these three appeals have been filed.

2. Heard both the sides. Though these matters were listed for hearing of the stay applications only, after hearing the appellants for sometime, we are of the view that the appeals themselves can be taken up for final disposal. Accordingly, with the consent of both the sides and after waiving the requirement of pre-deposit, the matters are heard for final disposal.

3. Shri Sunil Khandelwal, Advocate, ld. Counsel for the appellants pleaded that discounts, in question, whose deductions have been allowed are known well in advance, that since the quantity discounts depend upon the

quantity purchased by a dealer and the quarterly incentive/discount given to a dealer, is dependent upon the total quantity purchased by him during a quarter and cash discount is dependent upon the payment terms, whether made in cash or on credit, these discounts by their very nature are not known at the time of clearance from the factory and hence, the same are deducted on an average basis for the purpose of payment of duty, that the appellant were actually passing on these discounts and subsequently, when the exact quantum of discounts was known at the end of the quarter, the assessment was being finalized, that just because the quantum of discount is not known at the time of clearance, the discount cannot be disallowed when the nature of the discount is known very well ~~interms~~ in form of price circulars, price list, etc. that just because the quantum of discount is not known at the time of clearance of the goods, the same cannot be disallowed, that identical issue with regard to the period from 1.4.2003 to 31.3.2004 was involved in the case of **Commissioner of Central Excise, Chandigarh Vs. Goetze (India) Ltd. reported in 2011 (263) ELT 477 (Tribunal-Delhi)** wherein the Tribunal has held that the deduction of trade discount known and understood at the time of removal of the goods is permissible even if the same are quantified subsequently and that in view of settled legal position on this issue, the impugned order is not correct.

4. Shri S.K. Panda, learned Joint CDR defended the impugned order by reiterating the finding of the Commissioner (Appeals) in the impugned order and emphasized that in terms of Rule 7 of the Central Excise Valuation Rules, 2000, when the goods are first cleared from the factory to the depot from where the same are sold to the dealers, the assessable value of the goods would be the price of the goods at the depot at the time of removal and in view of this, the discount given at a later stage, would not be admissible.

5. We have carefully considered the submission from both the sides and perused the records. We find that identical issue was involved in the case of **CCE, Chandigarh Vs. Goetz (India) Ltd. (supra),** wherein in para 3.1 of the judgement, the Tribunal relying upon the judgement of the Apex Court in case of **Union of India Vs. Madras Rubber Factory Ltd. reported in 1995 (77) ELT 433 (SC)** has held as under:-

> 3.1 The period of dispute in both the appeals is from 1-4-03 to 31-3-04. The respondents while paying duty on the goods at the depot price at the time of their removal from the factory, pay duty after claiming deduction of turnover discounts on an average basis. The turnover discount available to the customer is decided only at the end of the year. The point of dispute is as to whether when the turnover discount is not given at the time of sale but is determined at a later date, its deduction is permissible. Hon'ble Supreme Court in the case of *Union of India* v. *Madras Rubber Factory Ltd. and others* reported in 1995 (77) E.L.T. 433 (S.C.) while interpreting the provisions of Section 4 of Central Excise Act, as it stood during the period prior to 1-7-2000 and in which there was a specific provision for deduction of trade discount from the assessable value, has held that the deduction of

trade discounts known and understood at the time of removal of goods is permissible even if the same are quantified later and in para 58 and 60 of the judgment with regard to "turnover discount" given on half yearly basis depending upon the volume of purchases made by the dealers, held that its deductions is permissible, as it is known and understood at the time of removal of the goods, though it is quantified later. Though the present Section 4 w.e.f. 1-7-2000 in which the assessable value is the transaction value of the goods, does not has a specific provision for deduction of trade discounts, the concept of transaction value, by its very nature would include the deduction of trade discount and, therefore, the judgment of Hon'ble Supreme Court in case of *Union of India* v. *Madras Ruber Factory* (supra) is also applicable to Section 4, as it stood w.e.f. 1-7-2000. Moreover in these cases, it is not the contention of the department that the deduction of trade discount is not permissible at all. The only contention of the department is that since the turnover discount is not given at the time of sale and is quantified much later its deduction is not permissible. This plea, in our view, is not correct, in view of the clear judgment of Hon'ble Supreme Court on this issue in the case of *Union of India* v. *Madras Rubber Factory Ltd.* (supra), wherein Hon'ble Supreme Court with regard to turnover discount held in clear terms that its deduction would be permissible even though it is quantified on half yearly basis, depending upon the volume purchases made by the dealers. We also find that in the respondent's own case reported in 2005 (186) E.L.T. 229 (Tri. - Del.) the Tribunal has held that the deduction of turnover discount cannot be disallowed as there is no legal provision for imposing the condition that for permitting the deduction of trade discount, the same has to be passed on to the buyers at the time of sale. However, we agree with the contention of the learned Department Representative, that as held by tribunal in the case of *VIP Industries* v. *CCE, Nasik* and *Electrolux Kelvinator Ltd.* v. *CCE, Jaipur-I* (supra), the deduction of trade discounts for determining the assessable value is permissible only to the extent such discounts have actually been passed to the buyers. We find that the extent to which the turnover discounts were actually passed on to the buyers has neither been discussed in the order-in-original nor in the impugned order-in-appeal. In view of this, the impugned order is set aside and the matter is remanded to the original Adjudicating Authority for *de novo* adjudication of this matter, keeping in view our observations in this order. The Adjudicating Authority has to allow the deduction of turnover discount, but only to the extent the same had actually been passed on to the buyers and in this regard, the respondents have to produce the evidence.

3. Thus, for permitting deduction of a trade discount, what has to be seen is as to whether the discount is known and understood at the time of removal and if so, the same is to be allowed being allowed irrespective of the fact as to whether the discount can be quantified at the time of removal or can be quantified later on. The impugned order is, therefore, set aside and the matter is remanded to the Commissioner of Central Excise (Appeals) for de novo adjudication after ascertaining as to whether the discounts were on the basis of the price circulars, price lists or discount policy of the appellant and thus the discounts, in question, were known and understood at the time of clearance and if so, the discounts would have to be allowed. The appeals and stay applications stand disposed of as above.

[operative part of the order already pronounced in open court]

(Archana Wadhwa)
Member (Judicial)

(Rakesh Kumar)
Member (Technical)

Ckp.