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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/728 /2007 - EX[DB]   Date **19/04/2012**

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

To :
M/S KANDHARI BEVERAGES PVT LTD
177-F, INDUSTRIAL AREA-I, CHANDIGARH

M/S KANDHARI BEVERAGES PVT LTD Appellant
Vs
C.C.E CHANDIGARH Respondent

I am directed to transmit herewith a certified copy of **Final order No. A/452 2012 EX[DB]** dated 17-4-12 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 CHANDIGARH
C.R. BUILDING, PLOT NO 19,
SECTOR 17-C, CHANDIGARH

160019
2. Adv. / Consult
MR.J.P.KAUSHIK
A-14/3, SFS FLATS, SAKET, NEW DELHI-110017

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: 17.4.2012

Central Excise Appeal No.728 of 2007

Arising out of the order in original No.34/CE/CHD/2006 dated 13.11.2006 passed by Commissioner , Central Excise, Chandigarh.

Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Mr. Rakesh Kumar, Technical Member

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?	

Kandhari Beverages Pvt. Ltd. .. Appellants

Vs.

C.C.E.,Chandigarh .. Respondent

Present Shri J.P. Kaushik, Advocate for the appellants

Present Shri S.R. Meena, A.R. for Revenue

Coram: Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Mr. Rakesh Kumar, Technical Member

FINAL Order No. A/452/2012-EX(BR)

Per Justice Ajit Bharihoke (Oral):

This appeal is directed against the order in original of Commissioner, Chandigarh confirming demand of Rs.48,86,066/- against the appellant under Section 11A of the Central Excise Act,1944 along with interest payable besides penalty of equal amount imposed

2. Briefly stated relevant facts for the disposal of the appeal are that the appellants are manufacturers/bottlers of aerated water under brand names of M/s Coca Cola Company falling under Chapter heading 2202.20 of the First Schedule to the Central Excise Tariff Act, 1985 . The appellants are purchasing duty paid non-alcoholic beverage Bases (NABB) from M/s Britco Food Company Ltd., a wholly owned subsidiary of M/s Coca Cola Company. The aerated waters manufactured by the appellants are chargeable to central excise duty at ad valorem rates.

3. As per franchise agreement dated 18.11.1993 with M/s Coca Cola Company, the appellants were required to buy NABB from M/s Britco Food Company Ltd. and M/s Coca Cola Company had right to determine formulae for compensation of aerated water and to fix maximum price. The appellants were incurring expenditure on advertising, marketing and sale promotion of beverages. The appellants received a sum of Rs.1,24,77,265.45 from 6.8.94 to 31.5.95 and further Rs.21,80,935/- on 3.1.96 from Britco Food Company Ltd. to compensate for expenses incurred on advertising, marketing and sale promotion and also as price support incentive for financial year 1994-95 and 1995-96 (upto June, 1995).

4. The Department was of the view that above referred amount of Rs.1,46,48,199/- was received by the appellants against advertising, marketing and sale promotion and expenditure on price support incentive was required to be added to the assessable value of aerated water sold by the appellants to various independent dealers with effect from 6.8.1994 to 30.6.1995 as additional consideration under Rule 5 of Central Excise (Valuation) Rules, 1975. Thus, a show cause notice raising duty demand of Rs.73,29,100/- was served on the appellants invoking extended period of limitation under proviso to Section 11A(1)

of the Central Excise Act. Penalty under Section 11AC of the Central Excise Act was also proposed on the appellants.

5. The appellants contested the show cause notice. The adjudicating authority after giving due hearing to the appellants vide impugned order confirmed the demand of Rs.48,86,066/- against the appellants along with interest as per law and also imposed penalty of equal amount.

6. Shri J.P. Kaushik, learned Advocate appearing for the appellants has assailed the impugned order on the ground that the demand has been confirmed in violation of Section 4(1)(a) of the Central Excise Act, 1944 which provides that the transaction value in relation to non-excisable goods is a function of price and the value derived from normal price at the factory gate charged to un-related person on wholesale basis at the time and place of removal. Expanding on argument, learned Counsel for the appellants submits that admittedly, the appellants have paid excise duty at the time of removal of goods on wholesale value which was common for all the customers as determined by the principal manufacturer M/s Coca Cola Company. It is not the case of the Department that the customers of the appellants were related party. Thus, the value in relation to excisable goods, according to learned Counsel for the appellants has been rightly assessed under Section 4(1)(a) of the Central Excise Act, 1944. Learned Counsel further submits that otherwise also the issue is no more *res integra* and it has been decided by the Supreme Court in the matter of C.C.E., Meerut I vs. Bisleri International Pvt. Ltd. - 2005 (186) ELT 257 (SC). Learned Counsel contends that the impugned order is not sustainable under law and liable to be set aside as it is in conflict with the law laid down by the Supreme Court.

7. On the contrary, Shri S.R. Meena, Authorised Representative for the Department supporting the impugned order has submitted that the

assessee had reduced their wholesale price on instruction from M/s Coca Cola Company in order to lower the incidence of duty and this reduction in price in aerated water was compensated by issuance of credit notes by M/s Britco Food Company Ltd.(subsidiary of M/s Coca Cola Company) by devising price support incentive which, in turn, depressed the price of aerated water. Learned A.R. submitted that the entire arrangement was entered into between M/s Coca Cola Company, Britco Food Company Ltd. and the assessee in order to lower the incidence of duty, as such, the adjudicating authority was right in taking into account a sum of Rs.1,46,58,199/- paid by Britco Food Company Ltd. to the assessee for confirming the demand of excise duty.

8. We have considered the rival contentions and perused the records. The short question which arises for determination in the present case – whether the Department has been able to establish that intrinsic price of aerated water charged by the appellants from the wholeseller was more than the price actually charged to the buyers?

9. Similar question came up before the Supreme Court in the case of C.C.E., Meerut I vs. Bislery International Pvt. Ltd. (supra) wherein the Supreme Court decided against the Department with the following inter alia, observing thus : -

> ***11. At the outset, it may be mentioned that under Section 4(1)(a), "value" in relation to any excisable goods is a function of the price. In other words, "value" is derived from the normal price at the factory gate charged to an unrelated person on wholesale basis and at the time and place of removal.***
>
> ***12. It is for the department to examine the entire evidence on record in order to determine whether the transaction is one prompted by extra-commercial considerations. It is well settled that under Section 4 of the said Act, as it stood at the material time, price is adopted as a measure or a yardstick for assessing the tax.***

The said measure or yardstick is not conclusive of the nature of the tax. Under Section 4, price and sale are related concepts. The "value" of the excisable article has to be computed with reference to the price charged by the manufacturer, the computation being made in accordance with Section 4. In every case, it will be for the revenue to determine on evidence - whether the transaction is one where extra-commercial considerations have entered and, if so, what should be the price to be taken into account as the value of the excisable article for the purpose of excise duty. These principles have been laid down in the judgment of this Court in the case of Union of India & Others v. Bombay Tyre International Ltd. etc. reported in AIR 1984 SC 420.

13. The short question which arises for determination in the present case is - whether the department has been able to show that the intrinsic price of aerated water was more than the price actually charged to the buyer? According to the department, the actual price was lower on account of incentives given by M/s. Britco, the supplier of concentrates to the assessee. As found by the adjudicating authority as well as by the Tribunal, the prices had to be reduced by the assessee on account of competition in the market. Further, the prices stood reduced on account of concession given by M/s. Britco, supplier of concentrates (raw material), to the assessee. There is no evidence of flow back of any additional consideration from the buyers of aerated water (beverage) to the assessee. On account of cut throat competition from Pepsi, M/s. Britco had to provide incentive to the assessee. But for the incentive from the supplier of concentrates (raw material), the assessee was not in a position to face acute competition from Pepsi. On the other hand, the evidence on record indicates that price uniformity was maintained. No favour for extra commercial reasons were shown to any of the buyers of aerated water. There is no evidence of any concession to any of the buyers. There is no evidence of existence of any favoured buyers. In the circumstances, Rule 5 is not applicable.

10. The aforesaid judgment of the Supreme Court squarely applies to the facts and circumstances of this case. Going by the ratio of the above judgment, we find it difficult to sustain the order in original confirming duty demand with interest and also imposing penalty of equal amount. The appeal is ,therefore, accepted and the order in original is set aside.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Technical Member

scd/