REGISTERED / AD

FAX : 011-26108426

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
EXCISE APPEAL BRANCH

Dated: **13/12/2012**

To

Appellant as per address in table below

Respondent as per address in table below

<u>Final Order No. **A/1359/2012-EX[DB]** dated **11/12/2012**</u>

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section **35-C(1) of the Central Excise and Salt Act, 1944.**

Asstt. Registrar(EXCISE Appeal Branch)

Application	Appeal	Name and Address of Appellant
1	E/802/2006	**HINDUSTAN LEVER LTD** NSD Bar Plant, 5/6 KM Store, Narsinghpur Road, Lahgadua, Chhindwara
		Name and Address of Respondent
2		**C.C.E Bhopal** Hoshangabad Road, 48, Administrative Area, Area Hills, Bhopal (M.P.) 462011

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Copy To
3<u>Advocate(s) / Consultant(s)</u>:

M. H. Patil
Post Office building, 2nd Floor,
JB Nagar, Andheri East,
Mumbai

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4 Bar Association, CESTAT, Delhi

5 Director Publications, Customs, Excise, I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, 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, Satellite Road, Ahmedabad-15

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

13 C.D.R. **14** Office Copy **15** Guard File

Asstt. Registrar(EXCISE Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I
DATE OF HEARING : 03/12/2012.
DATE OF DECISION : 11/12/2012.

Excise Appeal No. 802 of 2006

[Arising out of the Order-in-Original No. 28/Commr/Cex/2005 dated 28/11/2005 passed by The Commissioner of Central Excise, Bhopal.]

Hon'ble Shri Justice Ajit Bharihoke, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? :

2. Whether it would 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 Department Authorities? :

M/s Hindustan Lever Ltd. Appellant

Versus

CCE, Bhopal Respondent

Appearance

Shri M.H. Patil, Advocate- for the appellant.

Shri Davender Singh, Authorized Representative (Jt. CDR) - for the Respondent.

CORAM : **Hon'ble Shri Justice Ajit Bharihoke, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

FINAL Order No. A/1359/2012-EX (BR) Dated : __________

Per. Rakesh Kumar :-

The facts leading to filing of this appeal are, in brief, as under.

1.1 The appellant, a unit of M/s Hindustan Lever Ltd., at Chindwara manufacture detergent bars, detergent cakes and detergent powder chargeable to Central Excise duty under sub-heading 3401.2 and also sulphonic acid falling under sub-heading 3402.90 of the Tariff. They clear detergent bar, detergent cake and detergent powder packed for retail sale on payment of duty on value determined under Section 4A. Beside this, they also clear detergent powder and sulphonic acid in bulk for captive consumption by their sister concerns and in respect of these clearances, the duty is paid by them on 110% / 115% on the cost of production in terms of the provisions of Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (hereinafter referred to as Valuation Rules, 2000). The period of dispute in this case is from July 2000 to December 2002. While according to the appellant, during this period they were clearing the bulk detergent powder and sulphonic acid to their sister concerns for their captive consumption on payment of duty on the value determined under Rule 8 of the Valuation Rules, 2000 and in this regard from time to time they had declared the value adopted for such clearances based on the Chartered Accountant's Certificate, according to the department, the cost of the production of the goods was not correctly declared by them during the period of dispute and that the correct assessable value of the goods is that based on the Chartered Accountant's Certificates dated 7/9/02 i.e. Rs. 52,000/- per M.T. for Surf Excel bulk powder and Rs. 62,000/- per M.T. for sulphonic acid. According to the Department, during the period from July 2000 to December 2002, the appellant should have paid duty in respect of clearances of Surf Excel powder in bulk and sulphonic acid by taking their cost of production as Rs. 52,000/- per M.T. and Rs. 62,000/- per M.T. respectively, while they had paid duty on much lower value determined on the basis of much lower cost. On this basis, the department has alleged that during this period, the appellant have short paid the duty to the tune of Rs. 6,00,52,995/-. Accordingly, a show cause notice dated 2/8/05 issued to the appellant invoking proviso to Section 11A (1) of Central Excise Act, 1944 for recovery of the above-mentioned duty alleged to have been short paid during the period from July 2000 to December 2002 alongwith interest thereon under Section 11AB of the Central Excise Act and also for imposition of penalty on the appellant under Section 11AC ibid.

1.2 The above show cause notice was adjudicated by the Commissioner vide order-in-original No. 28/Commr/Cex/2005 dated 30th November 2005 by which the Commissioner upheld the allegation made against the appellant in the show cause notice and confirmed the above-mentioned duty demand alongwith interest and beside this, also imposed penalty of equal amount on the appellant company under Section 11AB of the Central Excise Act. In this order, the Commissioner held that during the period of dispute, the appellant had not determined the cost of production and, hence, the assessable value, correctly with intent to evade the payment of duty and that the certificates of Chartered Accountant produced by the appellant subsequently on 26/3/03 certifying lower cost of production of detergent powder and sulphonic acid during July 2000 to December 2002 are not acceptable. Against this order of the Commissioner, this appeal has been filed.

2. Heard both the sides.

3. Shri M.H. Patil, Advocate, the learned Counsel for the appellant, pleaded that the higher cost of production shown in the Chartered Accountant's certificate dated 7/9/02 was on account of inclusion of expenses of the head office and selling and distribution expenses in the cost of production which are not required to be included in the cost of production in terms of costing standard CAS-4, that this had been done on the insistence of the department, that the cost of production determined of the Surf Excel powder and sulphonic acid during the period of dispute when determined on the basis of CAS-4 is much less and on that basis, the appellant have paid excess duty, that in terms of the Board's Circular No. 692/8/2003-CX dated 13/2/03, the cost of production for determining the assessable value under Rule 8 of the Valuation Rules, 2000 is to be

determined on the basis of CAS-4 standard, that in terms of the Apex Court's judgment in the case of **CCE, Pune vs. Cadbury India Ltd.** reported in **2006 (200) E.L.T. 353 (S.C.)**, even in respect of the period prior to 13/2/03, the cost of production for the purpose of Rule 8 of the Valuation Rules, 2000 must be determined in terms of CAS-4, that same view have been taken by the Apex Court in the case of **CCE, Aurangabad vs. Raymonds Ltd.** reported in **2006 (204) E.L.T. 3 (S.C.)**, that in terms of the CAS-4 standard, for determining the cost of production, the marketing and distribution expenses and head office expenses are not required to be added and administrative over-heads in relation to activities other than manufacturing activities like marketing, corporate office expenses etc. are to be excluded from the cost of production, that Commissioner's observation in the impugned order that costing had not been determined in terms of CAS-4 is factually incorrect, that in any case, the duty demand is totally time barred, as throughout during the period of dispute, the cost of production and the assessable value adopted by the appellant for payment of duty in respect of clearances to their sister unit for captive consumption had been communicated to the department alongwith the Chartered Accountant's certificate and, hence, the appellant cannot be accused of suppressing any relevant information, that in any case, the entire duty paid by the appellant unit was available as Cenvat credit to their sister concern and, hence, there could not be any intention on the part of the appellant unit to evade the payment of duty and for this reason also, longer limitation period is not invokable, that in this regard the reliance is placed on the judgment of Larger Bench of the Tribunal in the case of **Jay Yuhshin Ltd. vs. CCE, New Delhi** reported in **2000 (119) E.L.T. 718 (Tribunal - LB)**, that when the longer limitation period under proviso to Section 11AB is not invokable there is no question of imposition of penalty on the appellant company under Section 11AC and that in view of the above submissions, the impugned order is not sustainable.

4. Shri Davinder Singh, the learned Jt. CDR, defended the impugned order by reiterating the findings of the Commissioner in it and pleaded that during the period of dispute, the appellant have not determined the cost of production in terms of CAS-4 standard and, thus, have short paid the duty, that the appellant have suppressed the relevant information from the department and that in view of this, longer limitation period under proviso to Section 11A (1) has been correctly invoked and penalty on them under Section 11AC has been correctly invoked. He also pleaded that the ratio of the Tribunal's judgment in the case of **Jay Yuhshin Ltd. vs. CCE, New Delhi** (supra) is not applicable to the facts of this case. He, therefore, pleaded that there is no infirmity in the impugned order.

5. We have considered the submissions from both the sides and perused the records.

6. In this case there is no dispute that in respect of clearances of the bulk Surf Excel powder and clearances of sulphonic acid by the appellant unit to its sister concern, duty is required to be on the value determined under Rule 8 of the Valuation Rules, 2000 i.e. on 115% / 110% on the cost of production. The dispute is only over determination of the cost of production. Central Board of Excise and Customs vide Circular No. 692/8/2003-CX dated 13/2/2003 had directed to determine the cost of production for the purpose of Rule 8 of the Valuation Rules, 2000 by adopting CAS-4 standard developed by ICWAI. In this case there is no dispute that the cost of production of the products, in question, is to be determined under CAS-4. However, while according to the appellant, during the period of dispute, the costing has been determined as per the CAS-4, according to the department this has not been done so. The department alleges that for the period of dispute i.e. from July 2000 to December 2002, cost of production as certified in the Chartered Accountant certificate dated 7/9/02 i.e. Rs. 52,000/- per M.T. for Surf Excel, the detergent powder and Rs. 62,000/- per M.T. for sulphonic acid should have been adopted, while according to the appellant this costing had been wrongly done on the insistence of the department by including the head office expenses and marketing and distribution expenses which are not required to be included in the costing in terms of CAS-4.

7. On going through the various certificates of Chartered Accountant regarding cost of production of the products, in

question, we find that the same are not in the CAS-4 format and accordingly it cannot be said as to whether the costing had been done in terms of CAS-4 costing standard or not. The Commissioner also, except for stating that the costing has not been done properly, has not been pointed the exact objection of the department in respect of the same. In our view, therefore, the matter has to be remanded for denovo adjudication after determining the cost of production of both the products during each financial year during the period of dispute strictly in terms of CAS-4 standard and in that format by a Cost Accountant appointed by the department and in the light of the Cost Accountant's certificate regarding the cost of production of the products, in question, during each financial year, the matter must be re-adjudicated.

8. As regards, the question of limitation, while the appellant pleads that through out during the period from April 2000 to March 2003 they had submitted price lists declaring the price of the Surf Excel bulk detergent (bulk) as well as of sulphonic acid accompanied by the Chartered Accountant's certificates, according to the Commissioner as observed by him in para 17 of the impugned order, the appellant submitted the Chartered Accountant certificate for the period from 1/7/2000 to December 2002 only on 27/3/03 and that while after 1/7/2000 on the introduction of new Valuation Rules, the appellant were supposed to submit costing certificate from 1/7/2000 immediately, they in spite of repeated requests made by the Range Officer submitted

the same only on 27/3/03 claiming a much lower cost of production, than that certified in the certificates dated 7/9/02. On this basis, the Commissioner has alleged that the appellant have suppressed the relevant information from the department. Since the Commissioner's order is silent on the appellant's claim that they had informed the department from time to time during the period of dispute regarding the assessable value of sulphonic acid done Surf Excel bulk detergent alongwith the Chartered Accountant's certificate, for correct determination of the question of limitation and the linked question of imposition of penalty under Section 11AC, the matter has to be remanded for denovo adjudication. If the appellant's claim that throughout during the period of dispute, they had filed the price declarations alongwith the Chartered Accountant's/Cost Accountant's certificate declaring the assessable value of the sulphonic acid and Surf Excel bulk detergent powder to sister concern for their captive consumption, the longer limitation period under proviso to Section 11A (1) would not be invokable and penalty under Section 11AC would not be imposable. Beside this, the Commissioner should also examine as to whether the ratio of Larger Bench judgment of the Tribunal in the case of **Jay Yuhshin Ltd. vs. CCE, New Delhi** (supra) is applicable to the facts of this case.

9. In view of the above discussion, the impugned order is set aside and the matter is remanded to the Commissioner for

denovo adjudication, keeping in view our observations and directions in this order.

(Order pronounced in open court on 11/12/2012.)

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

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