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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 26/06/2012

Appeal No. E/4261/2004-4262/2004 - EX[DB]

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

To :
SHRI G.K. MITTAL
G-38, MASJITH MOTH, NEW DELHI
110048

Appellant

SHRI G.K. MITTAL

Vs

Respondent

C.E. NOIDA

I am directed to transmit herewith a certified copy of **Final order No. A/720-721** 2012 **EX[DB]** dated 25-6-12 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. NOIDA
C-56/42, SECTOR-62, NOIDA-
201307

201301

2. Adv. / Consult SH. R. SANTHANAM, ADV., C-3/210, JANAKPURI, N. DELHI-58
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. M/S MIRC ELECTRONICS LTD.
A-19, B-1 EXT., MOHAN INDL. ESTATE,
MATHURA ROAD, BADARPUR, 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.
Principal Bench, New Delhi

COURT NO. I

DATE OF HEARING : 17/05/2012.
DATE OF DECISION : 25/06/2012.

Excise Appeal No. 4261-4262 of 2004

[Arising out of the Order-in-Appeal No. 212-214/CE/APPL/NOIDA/ 2004 dated 23/07/2004 passed by The Commissioner (Appeals), Customs & Central Excise, Noida.]

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? :

Shri G.K. Mittal, Director of M/s Onida Saka Ltd.] Appellants
M/s MIRC Electronics Ltd.]

Versus

CCE, Noida Respondent

Appearance

Shri R. Santhanam, Advocate – for the Appellant.

Shri S.R. Meena, Authorized Representative (DR) – for the Respondent.

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

FINAL Order No. A/720-721/2012-Ex(BR)

Per. Shri Rakesh Kumar :-

M/s MIRC Electronics Ltd. (hereinafter referred to as MEL) are the owner of brand name 'ONIDA'. M/s Onida Saka Ltd. (hereinafter referred to as OSL) having their factory at Noida, manufacture 'ONIDA' brand colour TVs which are sold through the group company MEL. Shri G.K. Mittal is the Director of OSL. Since during the period of dispute, colour TV was notified under Section 4A of the Central Excise Act, duty was being paid by OSL on the CTVs being manufactured by them on the assessable value determined under Section 4A i.e. declared MRP minus abatement. A case of duty evasion was booked against OSL alleging that -

(a) duty of Rs. 1,54,575/- has been evaded on 141 CTVs found short at the time of officer's visit to the factory ; and

(b) duty of Rs. 15,50,813/- has been evaded in respect of CTV models No. 20 JX, 14 ON, TVES 14, 14 ZC and 14 ZD manufactured and cleared by OSL by mis-declaring their MRP in connivance with MEL, as CTVs of these models were sold to ultimate customers at MRPs higher than that declared to the Department.

1.1 Additional Commissioner, vide order-in-original No. 20/Addl. Commissioner/03 dated 30/7/03 confirmed the duty demand of Rs. 17,05,388/- against OSL alongwith interest under Section 11AB, and imposed penalty of equal amount on OSL under Section 11AC, besides confiscation of land, building, plant and machinery of M/s OSL under Rule 173Q (2) of the Central Excise Rules, 1944. Beside this, penalty under Rule 209A of Central Excise Rules, 1944 was imposed among other persons, on MEL (penalty of Rs. 10,00,000/-) and Shri G.K. Mittal, (penalty of Rs. 2,00,000/-.)

1.2 On appeals being filed by OSL, MEL and Shri G.K. Mittal before CCE (Appeals), the same were dismissed vide order-in-appeal No. 212,213 and 214/APPL/NOIDA/2004 dated 23/7/04.

1.3 Against the above order of CCE (Appeals), the three appellants filed appeals before the Tribunal. This order deals with the appeals filed by MEL and Shri G.K. Mittal. Earlier, the appeal filed by the main appellant - OSL No. E/4225/04 had been dismissed by final order No. 804/2010-EX dated 23/11/10 and ROM alongwith miscellaneous application filed in respect of the final order No. 804/2010-EX dated 23/11/10 was disposed of by miscellaneous order No. 548-549/2012-EX (DB) dated 15/5/12.

2. Heard both the sides.

3. Shri R. Santhanam, Advocate, the learned Counsel for the appellants, pleaded that allegation of duty evasion against OSL is without any basis, that he has challenged the Tribunal's final order No. 804/2010-EX dated 23/11/10 before Hon'ble Supreme Court, that there is no justification for penalty on Shri G.K. Mittal, Director, OSL, as OSL, as manufacturer had no control over the price at which the CTVs were sold by the dealers to the retail customers and, therefore, neither any duty can be demanded

from OSL on the basis of higher MRP nor any penalty can be imposed on OSL and its Director, that in this regard, he relies upon judgment of the Apex Court in case of **ITC Ltd. vs. Union of India,** that MEL have not dealt with any excisable goods which he knew or had reason to believe were liable for confiscation, that there is no evidence to show that the MRP of CTVs cleared by OSL was deliberately under declared in connivance with MEL and that in view of this, the impugned order upholding penalty on MEL and Shri G.K. Mittal, Director, OSL is not sustainable.

4. Shri S.R. Meena, the learned Senior Departmental Representative, defended the impugned order by reiterating the findings of CCE (Appeals) in it and emphasised that –

(a) while the CTVs of the 'ONIDA' brand were being manufactured by OSL, it is MEL, a group company who owned the 'ONIDA' brand and marketed the CTVs and entire production of CTVs of OSL was being cleared to MEL;

(b) OSL was charging from MEL only the cost of raw material, manufacturing charges and duties leviable and for calculation of assessable value, MRP was being communicated by MEL to OSL ;

(c) MEL was circulating price lists to various dealers mentioning the maximum retail prices at which the CTVs of various models were to be sold ; and

(d) in view of the above, Shri G.K. Mittal, Director, OSL cannot be unaware of the actual MRP at which certain models of the CTVs were being sold.

He, therefore, pleaded that there is no infirmity in the impugned order with regard to imposition of penalty on MEL and Shri G.K. Mittal.

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

6. The issue of imposition of penalty on Shri G.K. Mittal, Director OSL and MEL under Rule 209A of Central Excise Rules, 1944 is linked with the question of duty demand against OSL and imposition of penalty on OSL on the basis of allegation of clandestine removal of CTVs without payment of duty and short payment of duty on certain models of CTVs by mis-declaring their MRP. The duty demand against OSL has been upheld vide final order No. 804/2011-EX dated 23/11/10. In view of this, Shri G.K. Mittal, would also stand accused of knowingly dealing with the goods which he knew were liable for confiscation and as such the penalty of Rs. 2,00,000/- imposed on him under Rule 209A has to be upheld.

7. As regards MEL, it is seen that it is MEL who was controlling the marketing of the CTVs of ONIDA brand manufactured by OSL and it is MEL who were communicating the MRP to OSL for being declared to Central Excise Department and on the basis of which assessable value was to be determined and was also circulating the price lists to various dealers containing the retail prices at which various models were to be sold. In view of this, MEL cannot be unaware of the fact that in respect of certain models of CTVs,

the MRP declared for the purpose of Section 4A and the MRP at which the CTVs were actually being sold were different. Thus, MEL have also dealt with the goods in respect of which they knew that full duty liability has not been discharged and for this reason, the same are liable for confiscation. Therefore penalty on MEL has also been correctly imposed under Rule 209A.

8. In view of the above discussion, we do not find any merit in these appeals. The same are dismissed.

(Pronounced in the open court on 25/06/2012.)

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

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CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. 3

Excise ROM / 3698, 3712 -3713 / 2012 in
Appeal No. Excise / 4225, 4261 - 4262 / 2004

Date of Hearing /decision: 19.10.2012

M/s. ONIDA Saka Ltd. Applicant
Shri G.K. Mittal
Mirc Electronics Ltd.

Vs

C.C.E. NOIDA Respondent

Appearance:
Shri R. Santhanam, Advocate for the Appellants
Shri R.K. Verma, DR for the Respondent

CORAM:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Rakesh Kumar, Member (Technical)

MISC. **ORDER NO.** 1142-1144/2012-EX(BR)

Per Archana Wadhwa (for the Bench):

Learned Advocate, Shri Santhanam appearing in support of ROM application draws our attention to Misc. order No. 548-549/2012-EX(DB) dated 15.5.2012 vide which his ROM application was allowed. The said ROM which was disposed of vide the said Order related to the issue of non-consideration of one of the points in the appeal relatable to confiscation of land, plant and building in terms of Rule 173Q. By accepting the said mistake, the Tribunal dealt with the issue of confiscation of building and plant and machinery and added one paragraph in the order. The Tribunal by observing that inasmuch as the applicant had evaded duty by mis-declaring the MRP in respect of imported goods, confiscation of plant and machinery in terms of provision of Rule 173 Q(2) was justified. Tribunal also observed that redemption fine of Rs.5 lakh is also not much on the higher side. Accordingly, the confiscation of plant and machinery with option to redeem the same on payment of redemption fine of Rs.5 lakh was upheld.

2. The present Misc. application, in the nature of ROM, again stand filed by the applicant. The contention of the learned advocate that the goods had declared correct MRP at the time of import and clearance from New Delhi and as such, the MRP was tempered with by the dealers, the provisions of Section 4A cannot be said to have been contravened by him so as to invoke the provisions of Rule 173Q. He also draws our attention to sub section 4 A (4) which was introduced with effect from 14.5.03 which empowers the Revenue to confiscate the goods if the MRP declared on the goods is found to be wrong or tempered with.

3. After hearing learned DR, we first of all, note that the present ROM application stands filed in respect of Misc. order which was passed in the ROM application filed by the applicant earlier. There is no provision for rectifying the mistake in respect of order already passed on ROM application. The provisions of Section 35C(2) relates to rectification of mistake in Final order passed by the Tribunal and do not relate to order passed on ROM.

4. However, keeping in view that the issue which was not considered in the earlier order and as such was considered afresh in the subsequent order passed on ROM application, we proceed to decide the present ROM application independently.

5. Learned advocate reference to the provisions of Section 4A(4) is not appropriate inasmuch as it is the same relates to confiscation of goods and does not relate to confiscation of plant and machinery. Further, the confiscation of plant and machinery ordered by the lower authorities and upheld by the Tribunal are not in terms of provisions of section 4A(4) but are only in terms of provision of Rule 173Q(2). Admittedly, the said Rule allows confiscation of plant and machinery in case of contravention of various provisions of law referred to in the said Rule. Learned Advocate fairly agrees that in the Final Order, Tribunal has not accepted to appellants contention of declaration of correct MRP and has upheld the confirmation of duty and imposition of penalty. If that be so, the provisions of Rule 173 Q(2) stands rightly invoked by the Tribunal. We cannot rehear the appeals on the point of upholding of demand and imposition of penalty, while deciding the issue of invokation of provisions of Rule 173 Q (2).

6. As such, at this state, we are informed by the learned advocate that the earlier Final Order of the Tribunal already stand challenged before the Supreme Court and notice stand issued to the standing counsel for the Revenue. If that be so, the subsequent order passed on ROM application, being a part of the earlier Final Order of the Tribunal,

is automatically become the subject matter of appeal before the Hon'ble Supreme Court and as such, being sub-judice before the Supreme Court. No further orders are required to be passed in relation to confiscation of plant and machinery in the present ROM application.

7. In view of the above, we reject the ROM application.

(Pronounced in the open court)

(Archana Wadhwa)
Member(Judicial)

(Rakesh Kumar)
Member(Technical)

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