

**2014 (1) ECS (167) (Tri - Kol.)**

**Customs, Excise & Service Tax Appellate Tribunal  
East Zonal Bench: Kolkata**

**Date of Decision: 08.01.2014**

**M/s BURN STANDARD & COMPANY LIMITED**

**Vs.**

**COMMISSIONER OF CENTRAL EXCISE, KOLKATA-II**

Stay Petition No. E/S/160/2012

Service Tax Appeal No. E/A/84/2012

(Arising out of O-I-O No.04/COMMR/CE/KOL-II/ADJN/2011 DATED 09.12.2011 passed by Commissioner of Central Excise, Kolkata-IV)

Appearance:

Shri N.K. Chowdhury

For the Appellant

Shri S.Misra, A.R.(Addl. Commr.)

For the Respondent

**CORAM:**

**Dr. D.M.Misra, Hon'ble Judicial Member**

**DR. I.P.Lal, Hon'ble Technical Member**

*( ORDER NO. SO/75035/2014)*

**"We are not able to accept the contention of the applicant on the facts of the case, at this stage, that they harboured a bona-fide belief for non-inclusion of the value of free issue materials in the Transaction Value regime, even though a specific judgment was against them and that too, was also upheld by the Hon'ble Supreme Court, way back in 1991. In the result, we are of the opinion that the applicant could not able to make out a prima-facie case for total waiver of pre-deposit of the dues adjudged."**  
**(Para 4.1)**

**Per Dr. D.M.Misra**

This is an Application seeking waiver of pre-deposit of duty of Rs.4.34 crore and equal amount of penalty imposed under Section 11AC of the Central Excise Act, 1944.

2. Ld. Advocate for the Applicant, at the outset, submits that the applicant had received the free issue materials from their customer, M/s. Indian Railways for manufacture of the goods namely, BOXNHS wagons/ BCNAHS wagons. Even though way back in the year, 1991, it was held by the Hon'ble Supreme Court in their own case, reported as Burn Standard Ltd. vs. Union of India, [1992 (60)ELT 671(SC)], that the

value of the free issue materials is includible in the value of the manufactured wagons, the Applicant did not include the value of the free issue materials for the relevant period i.e. from March 2006 to October, 2006, on a bona-fide belief that in the Transaction Value regime, the value of free issue materials is not includible in the value of wagons. The Id. Advocate also submits that the present demand is barred by limitation, as no fact was suppressed from the knowledge of the Department and the duty was discharged by them on the transaction value, as shown in the respective invoices. He also submits that if the value of the free issue materials is to be included in the assessable value of wagons, then they should be allowed to take credit on the input invoices that were raised by the input suppliers, M/s. SAIL and M/s. TISCO in favour of M/s. Indian Railways. He has referred to the judgment of the Hon'ble Supreme Court in the case of CCE vs. Chemphar Drugs & Liniments, [1989 (40) ELT 276(SC)] and Padmini Products vs. CCE, [1989 (43) ELT 195 (SC)]. The Id. Advocate submitted that the Applicant Company has been referred to BIFR and recently, taken over by M/s. Indian Railways.

3. Per contra, Id. AR for the Revenue has submitted that on the very same issue, the Hon'ble Supreme Court in the Applicant's own case in the year, 1991, had held that free supply items were includible in the assessable of the manufactured wagons. He also submitted that in spite of the said judgments in their own case pertaining to the period, when there is no specific provision to include the value of free issue materials in the assessable value of goods under old Section 4, the Applicant had failed to include the value of free issue materials and discharge the duty on the total assessable value of wagons for the period, March, 2006 to October, 2006, when a specific provision viz. Rule 6 of Central Excise Valuation, 2000 governs such situation. He disputed the contention of the Id. Advocate for the Applicant that under the bona-fide belief, they could not discharge the appropriate duty on the assessable value of the wagons.
4. Heard both sides and perused the records. We find from the submissions of the Id. Advocate that even though he has accepted the principle of law on the includibility of the value of free issue materials in the assessable value of the wagons, for determination of the appropriate duty, he vehemently argued that the demand was barred by limitation, as the facts had not been suppressed from the knowledge of the Department. We do not find any substance or merit in the contention of the Id. Advocate. Admittedly, in the present case, the law was well settled by the Hon'ble Supreme Court way back in the year, 1991, when there was no specific provision in the Statue about includibility of the value of the free issue materials

in the assessable value of the manufactured goods. But under the present set of Central Excise Valuation Rules, under the Transaction Value regime introduced w.e.f.01.07.2000, the value of free issue materials is required to be added to the value of the manufactured goods, as prescribed under Rule 6 of the Central Excise Valuation Rules,2000, which read as follows:-

"RULE 6. Where the excisable goods are sold in the circumstances specified in clause (a) of sub section (1) of section 4 of the Act except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee.

[Explanation 1] - For removal of doubts, It is hereby clarified that the value, apportioned as appropriate, of the following goods and services, whether supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale of such goods, to the extent that such value has not been included in the price actually paid or payable, shall be treated to be the amount of money value of additional consideration flowing directly or indirectly from the buyer to the assessee in relation to sale of the goods being valued and aggregated accordingly, namely:

- (i) value of materials, components, parts and similar items relatable to such goods;
- (ii) value of tools, dies, moulds, drawings, blue prints, technical maps and charts and similar items used in the production of such goods;
- (iii) value of material consumed, including packaging materials, in the production of such goods;
- (iv) value of engineering, development, art work, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of such goods."

4.1. It is difficult to appreciate that M/s. Burn Standard Company, who are engaged in the manufacture of railway wagons, could not appreciate the new provisions prescribed under Section 4 of the CEA, 1944 and the Rules made thereunder, introduced from 01.07.2000. On a query from the Bench, whether the Applicant had approached the Department for any clarification regarding the includibility of the value of free issue materials in the assessable value of wagons, after introduction of the Transaction Value regime, the Id. Advocate

expressed his inability to answer the same, as nothing is borne out from the record available with him. There is no room to disagree with the principles of law laid down in various judgments cited by the Id. Advocate on the issue of suppression of facts, but we are not able to accept the contention of the Applicant on the facts of the case, at this stage, that they harboured a bona-fide belief for non-inclusion of the value of free issue materials in the Transaction Value regime, even though a specific judgment was against them and that too, was also upheld by the Hon'ble Supreme Court, way back in 1991. In the result, we are of the opinion that the Applicant could not able to make out a prima-facie case for total waiver of predeposit of the dues adjudged. Accordingly, keeping in view the interest of revenue, the financial hardship of the Applicant and the principle of law settled by the Hon'ble Supreme Court and High Courts in disposal of stay applications, we direct the Applicant to deposit 50% of the duty amount of Rs.4,34,54,450/- within a period of eight weeks from today and report compliance on 17.03.2014. On deposit, the balance dues adjudged would stand waived and its recovery stayed during pendency of the Appeal. Failure to deposit the said amount would result into dismissal of the Appeal without further notice.

(Operative part of the Order pronounced in the court)