

SUPR EME COUR T OF I ND I A  
RECORD OF PROCEEDINGS

CIVIL APPEAL NO(s). 7143 OF 2004

COMMNR. OF CENTRAL EXCISE, CHENNAI III

Appellant (s)

VERSUS

M/S ULTRA MARINE & PIGMENTS LTD.  
(With office report)

Respondent(s)

WITH

Civil Appeal NO. 2261 of 2006  
(With appln.for con.of delay in filing appeal and office report)

Civil Appeal NO. 2246-2247 of 2008  
(With appln.for stay and office report)

Civil Appeal NO. 3528 of 2008  
(With appln.for con.of delay in filing appeal and office report)

Civil Appeal NO. 5689 of 2008  
(With appln.for stay and with office report)

Civil Appeal NO. 2934-2935 of 2008  
(With appln.for c/delay in filing appeal and office report)

Civil Appeal NO. 2982-2985 of 2005  
(With appln.for exemption from filing OT and office report)

Date: 28/07/2009 These Appeals were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE D.K. JAIN  
HON'BLE MR. JUSTICE ASOK KUMAR GANGULY

For Appellant(s) Mr. K. Radhakrishnan, Sr. Adv.  
Mr.S.W.A. Qadri, Adv.  
Ms.Rashmi Malhotra, Adv.  
Mr.Arijit Prasad, Adv.  
Mrs Anil Katiyar, Adv.  
Mr. Shreekant N. Terdal, Adv.  
Mr. B.V. Balaram Das, Adv.

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C.A. 7143/2005 Etc...contd...(It.101(PH),Ct.9,Dt.28/7/2009)

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For Respondents:

C.A.Nos.7143/2005, Mr. S Nanda Kumar, Adv.  
3528/2008 Mr. G Ananda Selvam, Adv.  
Mr.Satish Kumar, Adv.  
Mr. V.N. Raghupathy, Adv.

CA.No.2246-47/2008 Mr. S.K. Bagaria, Sr.Adv.  
CA.No.2982-2985/05 Mr. S Sukumaran, Adv.  
& CA.No.5689/2008 Mr. Anand Sukumar, Adv.  
Mr. Rajesh Khaware, Adv.

Ms. Meera Mathur, Adv.  
Mr. K Rajeev, Adv.

C.A. Nos.2934-35/08      Mr. Ravinder Narain, Adv.  
                                 Ms. Sonu Bhatnagar, Adv.  
                                 Mr. Ajay Aggarwal, Adv.  
                                 Ms. Kanika Gomber, Adv.  
Mr. Rajan Narain, Adv.

UPON hearing counsel the Court made the following  
ORDER

Mr. K.Radhakrishnan, learned senior counsel resumed his submissions in CA.Nos.2934-2935 of 2008 at 11.00 a.m. and concluded at 12.05 p.m. Thereafter, Mr. Ravinder Narain replied about five minutes. Hearing concluded. The Court reserved its verdict.

Civil Appeal No.5689 of 2008 is dismissed with no order as to costs.

Thereafter Mr. S.K. Bagaria learned senior counsel started his submissions in CA.Nos.2982-2985 of 2005 at 12.35 p.m. and was on his legs till 4.00 p.m. leaving the matter part heard.

Rest of the matters remained part-heard.

[Usha Bhardwaj]      [Charanjeet Kaur]      [Vijay Dhawan]  
Court Master      Court Master      Court Master

Signed order in CA.No.5689/2008 is placed on the file.  
IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.5689 OF 2008

COMMISSIONER OF CENTRAL EXCISE      ...  
APPELLANTS

JAMSHEDPUR

VERSUS

M/S BOC (INDIA) LTD.      ....RESPONDENTS

ORDER

This appeal by the Revenue under Section 130-B of the Central Excise Act, 1944 (for short 'the Act') is directed against order dated 31st January, 2008 passed by the Customs Excise & Service Tax Appellate Tribunal, East Zonal Bench, Kolkata hereinafter referred to as 'the Tribunal', in Central Excise Appeal No.EDM-126 of 2005.

By the impugned order the Tribunal has held that the facility charges collected by the respondent-assessee from its customers over and above the sale price of gases manufactured by them are not includible in the

assessable value of the gases under Section 4 of the Act.

Since, in our opinion, the question of law formulated by the Revenue in the present appeal for our adjudication stands concluded by the decision of this Court in Collector of Central Excise, Madras vs. M/s Indian Oxygen Ltd. (1998) 4 SCC 139, it is unnecessary to state the facts in great detail. It would suffice to note that the assessee is a manufacturer of industrial gases, such as nitrogen and oxygen etc. It supplies gases to its customers through various modes, viz. Vacuum Insulated Transport Tanks (VIT) or pipelines network, connecting its plant with the buyer's factory. Some customers buy the gases at assessee's premises. The assessee charges, on monthly basis, facility charges from these customers who are provided with the facility of pipeline or VIT irrespective of the fact whether any gases are purchased by the customers during the month concerned and irrespective of the quantum of the purchases. The facility charges are billed separately. However, facility charges are not included for the purpose of computing the assessable value of the gases for levy of excise duty.

For the period May 1996 to November 1999, subject matter of the appeal, the Excise Authorities issued notices to the assessee to show cause as to why the said facility charges be not included in the assessable value under Section 4 of the Act. Rejecting assessee's stand, the Adjudicating

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Authority came to the conclusion that the said charges realised by the assessee were in the nature of an additional consideration for sale of the excisable goods

and therefore includible in the assessable value for the purpose of levy of duty of Excise under Section 3 of the Act. Accordingly, he confirmed the demand indicated in the show cause notice. Penalty under Rule 173-Q for contravening the provisions of the Act was also levied.

Aggrieved, the assessee carried the matter in appeal to the Commissioner(Appeals). Relying on the decision of this Court in Indian Oxygen Ltd. (supra) and the orders of the Tribunal in the case of Hindustan Polymers as also in case of the assessee itself in appeal No.A-768-771/KOL/2004, dated 8th November, 2004, the Commissioner came to the conclusion that the facility charges/fixed charges were not includible in the assessable value of the gases supplied by the assessee to its customers. Accordingly, the additional demands created on account of duty as well as penalty were deleted.

Being aggrieved, the Revenue preferred appeal to the Tribunal. Relying on the decision of this Court in the M/s Indian Oxygen Ltd. (Supra) and its order in the case of Grasim Industries vs.

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Commissioner of Central Excise the Tribunal has upheld the decision of the Commissioner (Appeals). It is against this order that the Revenue is before us in this appeal.

We have heard learned counsel for the Revenue and assessee. Learned counsel for the parties are ad-idem that the present appeal pertains to the period prior to the substitution of amended Section 4 in the Act with effect from 1st July, 2000, though we find that in the impugned order, the Tribunal has referred to its earlier order, which pertained to the period after the amendment in Section 4. Be that as it may, since learned counsel for the

parties are agreed that this appeal pertains to the period prior to the said amendment we are of opinion that the Tribunal was correct in law in relying on the decision of this Court in M/s Indian Oxygen Ltd. (Supra). In the said decision it has been held that rental charges on returnable cylinders realised by the assessee from its customers on supply of gases were not includible in the assessable value under Section 4 of the Act as these amounts were for ancillary or allied and not for incidental services rendered by the assessee.

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In that view of the matter, there is no merit in this appeal which is dismissed accordingly but with no order as to costs.

.....J.  
(D.K. JAIN)

.....J.  
(ASOK KUMAR GANGULY)

NEW DELHI,  
JULY 28, 2009.