Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

EXCISE Appeal No. 11297 of 2016- DB

[E/Misc/10356/2023]

(Arising out of OIO-SIL-EXCUS-000-COM-057-15-16 dated 28/03/2016 passed by Commissioner of Central Excise, Customs and Service Tax-SILVASA)

Transrail Lighting Limited **........Appellant**
Survey No. 178 To 182,
Amboli, Silvassa,
U T Of Dadra And Nagar Haveli

VERSUS

C.C.E & S.T.-Silvasa **......Respondent**
Commissioner Central Excise,
Customs & Service Tax, Silvassa, 4th floor,
Adarsh Dham Building, Vapi Daman Road Vapi
Opp. Old Town Police Station
Vapi, Gujarat

APPEARANCE:
Shri S J Vyas Advocate for the Appellant
Shri Rajesh R Kurup, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Misc. Order No. M/10010/2024

Final Order No. 10045/2024

DATE OF HEARING: 02.11.2023
DATE OF DECISION: 03.01.2024

RAMESH NAIR

This appeal is directed against the Order-in-Appeal No. SIL-EXCUS-000-COM-057-15-16 dated 28.03.2016 the appellant also filed miscellaneous application for change of name.

1.1 The issue involved in the present case is that whether the excess freight collected from the customer of the excisable goods as compared to the actual freight paid to the transporter in respect of the transport of excisable goods is includable in the assessable value of their excisable goods.

2. Shri S J Vyas Learned Counsel appearing on behalf of the appellant, as regard Miscellaneous application submits that the company’s name has

been changed from M/s Gammon India Limited to 'M/s Transrail Lighting Limited' in pursuance to the NCLT order dated 30th March, 2017. As regard appeal he submits that there was a clear understanding in the contract with the customers that a fixed rate of transport shall be charged in the sale invoices of excisable goods. Therefore, at times the actual freight is lesser than the fix rate of freight charged to the customer.

2.1 He further submits that this excess freight as compared to the actual one is not a consideration towards the sale of the goods but the same is profit on account of transportation only. Therefore, the same is not includable in the assessable value. He placed reliance on the following judgments:

- Baroda Electric Meter- 1997 7 TMI 126 SC
- Kashyap Sweetners-2023 7 TMI 1111
- Kashyap Sweetners-2023 10 TMI 224 TRI AHD
- Indo Amines Ltd 2018 11 TMI 489
- Mercedez- Benz India 2009 11 TMI 303 TRI MUM
- Mercedez- Benz India 2010 3 TMI 300 HGC BOM

2.2 He further submits that the Revenue has relied upon the judgment of Mercedes Benz India of the Hon'ble Bombay High Court. In this regard it is his submission that the matter was not finally concluded by the Hon'ble Bombay High Court. Therefore, no ruling was laid down hence the same cannot be relied upon.

3. Shri R R Kurup Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. On careful consideration of the submission made by both the sides and perusal of record, as regard miscellaneous application we find that

since the proposal of change of name in pursuance to NCLT order dated 30th March, 2017, the name of the appellant company is changed from M/s Gammon India Limited to 'M/s Transrail Lighting Limited'. Accordingly, the miscellaneous application is allowed. As regard the appeal, we find that the fact of the case is not under dispute that the appellant is charging freight to their customer at a fixed rate. Therefore, obviously the actual freight shall be different from the fixed rate of freight charged to the customer. This issue has been considered by the Hon'ble Supreme Court in the case of Baroda Electric Meter wherein it was held that the excess rate, if any collected as compared to the equalized freight charge to the customer, the same is not a part and parcel of the price of the goods but the same is profit on account of transportation. The relevant order of the Hon'ble Apex Court is reproduced below:

> *"The Tribunal accepted the position that equalised freight was charged by the appellant from everyone, but proceeded to say that even though freight cannot be a part of the assessable value that wherever freight actually paid was less than the amount collected by way of freight and transportation charges the difference was appropriated by the appellant and, therefore, the same would be a part of the assessable value. In our opinion, the Tribunal proceeded on an incorrect premise. It was clearly held in Indian Oxygen Ltd. v. Collector of Central Excise 1988 (36) E.LT. 723 (S.C.) 1988 (Supp.) SCC 658, that the duty of excise is a tax on the manufacturer and not a tax on the profits made by a dealer on transportation. In view of that decision, the view taken by the Tribunal cannot be sustained.*
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> *2. Consequently, the appeals are allowed and the impugned judgment of the Tribunal is set aside."*

4.1 The above decision of the Hon'ble Apex Court in Baroda Electric Meter was also followed in the case of Kasyap Sweeteners Ltd by this Tribunal wherein the following order was passed:

> *"4. We have carefully considered the submissions made by both sides and perused the record. We find that on the identical issue, in the same set of facts, in the appellant's own case, this Tribunal vide Final Order No. A/11559-11561/2023 dated*

24.07.2023 held that excess amount of freight collected from the customers is profit on account of transportation and not part and parcel of the value of the goods and thereby not included in the assessable value. The said decision is reproduced below:-

> *"The issue involved in the present case is that whether the excess amount collected from the customers over and above the actual freight is liable to be added in the assessable value/ transaction value for the purpose of charging excise duty or otherwise.*
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> *2. Shri Mehul Jiwani, learned Chartered Accountant appearing on behalf of the appellant submits that firstly, the freight as a whole in not includable in the transaction value from the place of removal to place of delivery. In support, he placed reliance on the following judgments:-*
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> *(a) M/S Ispat Industries Limited 2015 (324) E.L.T. 670 (S.C.)*
>
> *(b) GP Petroleums Limited 2019 (5) TMI 1018 CESTAT Ahmedabad*
>
> *(c) Emco Limited - 2016 (12) TMI 1385 - CESTAT Mumbai*
>
> *(d) Miraj Pipes & Fittings Pvt. Ltd. 2019 (7) TMI 1792 CESTAT New Delhi*
>
> *(e) Order No. A/10755/2022 Dated 30/06/2022 Passed By CESTAT Ahmedabad in case of Savita Oil Technologies Limited*
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> *2.1 without prejudice he further submits that even if freight is includable in the transaction value for the purpose of charging duty, excess freight collected over and above the actual freight paid to the transporter is nothing but on account of profit on transportation and the same is not part of the transaction value of the goods, therefore the same is not includable in the assessable value. He placed reliance on the following judgments:-*
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> *(a)Baroda Electric Meters - 1997 (94) E.LT 13 (SC)*
>
> *(b) Mercedes Benz India Pvt. Limited - 2010 (260) E.L.T. 149 (TRI. Mumbai)*
>
> *(c) Jost's Engineering Co. Limited. 2017 (8) TMI 213 CESTAT MUMBAI*
>
> *(d) Balkrishna Paper Mills Limited. - 2018 (5) TMI 300 CESTAT Mumbai*
>
> *(e) M/S. MarpolPvt Limited - 2017 (2) TMI 247 CESTAT Mumbai*
>
> *(f) Transformers and Rectifiers (India) Limited - 2021 (8) TMI 759 CESTAT*
>
> *(g) Indo Amines Limited - 2018 (11) TMI 489 CESTAT Mumbai*
>
> *(h) Indian Oil Corporation Limited - 2013 (291) ELT 449 (Tri. Ahmd.)*
>
> *(i) Indian Sugar & General Engg. Corpn. - 2016 (333) E.L.T. 109 (Tri. Del.)*
>
> *(j) PRS Rolling Mills Pvt. Limited - 2012 (281) E.L.T. 560 (Tri-Del)*
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> *2.2 He further submits that this issue has been decided in the appellant's own case for the other unit, in their favour and the said order has not been reviewed by the department and thus attained finality. Thus, department*

cannot be permitted to take contrary stand in the subsequent cases. In this support, he placed reliance on the following cases:-

(a) Surcoat Paints (P) Limited - 2008 (232) ELT. 4 (S.C.)

(b) Suntrack Electronics (P) Limited - 2003 (156) E.L.T. 163 (S.C.)

(c) Jayaswals Neco Limited - 2006 (195) E.LT. 142 (S.C.)

(d) Birla Corporation Limited - 2005 (186) E.L.T. 266 (S.C.)

2.3 Without prejudice he further submits that there is not only cases of excess recovery of freight but there are cases where the appellant have paid excess freight and collected from the customer the lesser amount of freight as compared to the actual. He submitted a chart which is reproduced below:-

Year	*Freight Excess payment to appellant considered in SCN.*	*Freight short payment to appellant by the customers*	*Net Excess/ short recovery of freight*
April 2011 to October 2011	*43,06,483/-*	*-35,64,561/-*	*7,41,922/-*
November 2011 to March 2012	*33,97,141/-*	***-30,13,955/-***	*3,83,186/-*
Total	*77,03,624/-*	***-65,78,516/-***	*11,25,108/-*

He submits that despite the clear figures given above, the Adjudicating Authority has not considered the transactions where the lesser freight was collected from the customers. It is his submission that overall the demand should be on the net difference of excess freight and lesser freight collected from the customers.

3. Shri Rajesh Nathan, learned Assistant Commissioner, (AR) appearing for the Revenue reiterates the findings of the impugned order.

4. We have carefully considered the submissions made by both the sides and perused the record. We find that limited issue to be addressed is whether the excess paid freight as compared to the actual should be included in the transaction value for the purpose of charging excise duty. This issue is no longer res-integra as held by the Hon'ble Supreme Court in the case of Baroda Electric Meters (supra) which is reproduced below:-

> ***"[Order]***. *- The Tribunal accepted the position that equalised freight was charged by the appellant from everyone, but proceeded to say that even though freight cannot be a part of the assessable value that wherever freight actually paid was less than the amount collected by way of freight and transportation charges the difference was appropriated by the appellant and, therefore, the same would be a part of the assessable value. In our opinion, the Tribunal proceeded on an incorrect premise. It was clearly held in Indian Oxygen Ltd. v. Collector of Central Excise - 1988 (36) E.L.T. 723 (S.C.) = 1988 (Supp.) SCC 658, that the duty of excise is a tax on the manufacturer and not a tax on the profits made by a dealer on transportation. In view of that decision, the view taken by the Tribunal cannot be sustained.*

2. Consequently, the appeals are allowed and the impugned judgment of the Tribunal is set aside."

5. As held in the above judgment by the apex court that excess amount of freight from the customer is profit on account of transportation and not part and parcel of the value of the goods therefore, same cannot be included in the assessable value. We observe that this judgment was given with reference to un-amended Section 4 and Rules made thereunder prior to 01.07.2000. However, in the identical case for the period post 01.07.2000, in various judgments a view was taken that the Baroda Electric Meters (supra) prevails even after amended Section 4 and Rules made thereunder after 01.07.2000.

6. Accordingly, In view of the various judgments cited by learned Chartered Accountant, excess freight collected by the appellant from the customers shall not be included in the transaction value for charging excise duty. Since we have decided the matter on the merits of the case, we are not going to address various alternate submissions made by learned Chartered Accountant. Accordingly, the impugned orders are set-aside and the appeals are allowed."

5. In view of the above decision in the appellant's own case only for the different period, there being identical issue involved in the present case, the issue is no longer res-integra accordingly, the demand and penalties are not sustainable. The impugned order is set-aside and the appeals are allowed."

4.2 Similar issue was considered by CESTAT Mumbai in the case of Indo Amines Ltd (Supra) wherein even after considering Mercedes Benz decision passed the following order:

"4. *We find that the decision of the Hon'ble Supreme Court in re Baroda Electric Meters Ltd has laid down the principle that 'freight' has nothing to do with the activity of manufacturing which is the object of taxation under Central Excise Act, 1944. This decision has been followed by the Tribunal in IComm Tele Ltd v. Commissioner of Central Excise, Hyderabad [2010 (251) ELT 103 (Tri-Bang)], Commissioner of Central Excise, Vadodara v. Amod Industries [2008 (229) ELT 713 (Tri-Ahmd)], and Commissioner of Central Excise, Salem v. WS Industries [2007 (213) ELT 413 (Tri-Chennai)] all pertaining to the period after amendment of section 4 of Central Excise Act, 1944.*

5. In re JCT Ltd, the addition approved by the Tribunal was that of 'travel insurance', in re Mercedes Benz (I) Ltd and in re Saraswati Air Products Ltd approval was accorded to adding of excess recovery of 'road delivery charges' while in re AB Mauri India Pvt Ltd approval was accorded to addition of freight on the return of goods to appellant. None of these apply to the facts of the present case *and any referral therein to the decision in re Baroda Electric Meters Ltd were for distinguishing the facts in those disputes from that in the decision of the Hon'ble Supreme Court.*

6. In the light of the above, the impugned order is set aside and appeal allowed."

4.3 As regard the judgment of Hon'ble Bombay High Court in case of Mercedes Benz (supra), we find that the matter was not finally decided by the Hon'ble High Court. In the said judgment, the Hon'ble Court is of the view the matter may be decided by the larger bench, however, as of now no larger bench decision is available. Therefore, in our considered view, the judgment of Hon'ble Supreme Court in the case of Baroda Electric is in force. Particularly, when there is no substantial difference between the old Section 4 and new Section 4. This has been expressed by the Hon'ble Supreme Court in the case of Commissioner of Central Excise, Indore Vs. Grasim Industries Ltd.- 2018 (360) ELT 769 (S.C)

4.4 In view of the above Supreme Court judgment, which held that there is no substantial change between the provision of Section 4 pre and post amendment in year 2000 and valuation Rules made there under. The law laid down by the Hon'ble Supreme Court in the case Baroda Electrics shall prevail.

5. Accordingly, we are of the considered view that the excess freight collected by the appellant as compared to the freight paid to the transporter is not includable in the assessable value of the excisable goods. Consequently, the demand on this count shall not sustain. In the result, impugned order is set aside, appeal is allowed with consequential relief.

(Pronounced in the open court on 03.01.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha