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

REGIONAL BENCH-COURT NO. 3

Excise Appeal No. 10949 of 2015 - DB

(Arising out of OIO-DMN-EXCUS-000-COM-0055-14-15 dated 26/03/2015 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN)

Jaksons Limited ....**Appellant**
Survey No. 196,
Panchal Industrial Estate, Bhimpore,
DAMAN,
U T OF DAMAN

VERSUS

Commissioner of C.E. & S.T.-Daman ......**Respondent**
3RD FLOOR...ADARSH DHAM BUILDING, VAPI-DAMAN ROAD, VAPI
OPP.VAPI TOWN POLICE STATION,
VAPI, GUJARAT-396191

APPEARANCE:
Shri Keyur Kamdar, Chartered Accountant appeared for the Appellant
Shri Anoop Kumar Mudvel, Superintendent (AR) appeared for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR

Final Order No.12907/2024

DATE OF HEARING: 09.08.2024
DATE OF DECISION: 29.11.2024

RAMESH NAIR

The brief facts of the case are that the appellant is the manufacturer of DG Sets and sold DG Sets to M/s. Jay Prakash Associates Ltd at nil rate of excise duty under exemption notification no. 03/2004-CE dated 08.01.2024 and also reversed the Cenvat credit of Rs. 66.74 Lakhs under Rule 6 (3) (1) of Cenvat Credit Rules, 2004 at the rate of 10.3%. Due to non- availability of credit to the customers, the debit note was issued for recovery of amount of Rs. 66.74 Lakhs recovered from the buyer stating that such amount is not eligible for credit. The buyer has provided declaration that they have not availed any Cenvat credit . Thereafter during CERA Audit observations, a show cause notice was issued and such amount of 10.3% reversed by the appellant was sought to be recovered from the appellant applying Section 11D of Central Excise Act, 1944 and accordingly, the demand was confirmed through impugned order. Therefore, the present appeal filed by the appellant.

2. Shri Keyur Kamdar, Learned Chartered Accountant appearing on behalf of the appellant submits that the amount of Rs. 66.74 Lakhs for which the debit note has been issued to the customers was reversed by the appellant, therefore, as per the CBEC Circular No.870/08/2008-CX dated 16.05.2008 which clarifies that the amount of 10% is paid under Rule 6 of Cenvat Credit Rules, 2004, provision of Section 11D is not applicable even if such amount is recovered from the buyer. He also take support in the case of Jindal Tubular (India) Ltd vs. Principal Commissioner, CGST & CE , Ujjain- 2023 (4) CENTAX 3 – Tri Delhi. He submits that in view of above , the impugned order is liable to be quashed.

3. Shri Anoop Kumar Mudvel, Ld. Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both sides and perused the records. We find that as per the facts of the present case the amount of 10.3% which was reversed by the appellant in terms of Rule 6(3) of Cenvat Credit Rules, 2004 and the same was recovered from the customer, the revenue sought to recover the same under Section 11D of Central Excise Act, 1944.For the ease of reference Section 11D is reproduced below:-

> ***"[1][11D. Duties of excise collected from the buyer to be deposited with the Central Government.--***
>
> *(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, [2][every person who is liable to pay duty under this Act or the rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.*

[3][(1A) Every person, who has collected any amount in excess of the duty assessed or determined and paid on any excisable goods or has collected any amount as representing duty of excise on any excisable goods which are wholly exempt or are chargeable to nil rate of duty from any person in any manner, shall forthwith pay the amount so collected to the credit of the Central Government.

[4][(2) Where any amount is required to be paid to the credit of the Central Government under [5][subsection (1) or sub-section (1-A), as the case may be,] and which has not been so paid, the Central Excise Officer may serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.

(3) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (2), determine the amount due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(4) The amount paid to the credit of the Central Government under [6][sub-section (1) or sub-section (1A) or sub-section (3), as the case may be, shall be adjusted against the duty of excise payable by the person on finalisation of assessment or any other proceeding for determination of the duty of excise relating to the excisable goods referred to in [7][sub-section (1) and sub-section (1A)].

(5) Where any surplus is left after the adjustment under sub-section (4), the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of Section 11B and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Assistant [8][Principal Commissioner of Central Excise or Commissioner of Central Excise for the refund of such surplus amount.]"

4.1 From the plain reading of Section 11D, it is found that firstly the recovery under Section 11D can be made only when an asseesee recovers any amount in the name of excise duty and does not deposit to the government exchequer. In the present case the amount so recovered, firstly not a duty of excise and secondly, the same amount has been reversed by the appellant. Therefore, on both the counts Section 11D cannot be invoked. This very issue has been clarified by the CBEC Circular No.870/08/2008-CX dated 16.05.2008 which is reproduced below:-

"The undersigned is directed to refer to circular No. 599/36/2001-CX dated November, 2001, wherein the issue of the applicability of the provision of section 11D of the Central Excise Act, 1944 in cases of payments made under erstwhile rule 57CC (1) of the Central Excise Rules, 1944 was examined. It has been brought to the notice of the Board that there are some decisions of

the Tribunal contrary to the said circular. Further, rule 6 of the CENVAT Credit Rules, 2004, has been amended w.e.f. 01.04.2008, necessitating re-examination of the circular of the circular in the light of these developments.

2. It is seen that the Larger Bench of the Tribunal in the case of Unison Metals Ltd. Versus Commissioner of Central Excise, Ahmedabad-I [2006(2004) E.L.T. 323 (Tri.-LB)] has held that section 11D provides that any amount which has been collected as excise duty and not paid to the credit of the Central Government shall be liable to be recovered. The scheme of the Law is that manufacturers shall not collect amounts falsely representing them as Central Excise duty and retain them, thus, unjustly benefiting themselves. However, in case of payments made under erstwhile rule 57CC(1), section 11D of the Act is not applicable since the amount of 8% or 10% has already been paid to the revenue and no amount is retained by the assessee. The said order of the Tribunal has been accepted by the Department.

3. The matter has been examined. Sub-rule (3) of rule 6 of the CENVAT Credit Rules, 2004 has been amended w.e.f. 01.04.2008 to provide for payment of an amount equal to 10% of ***value*** *of the exempted goods, instead of 10% of the* ***price*** *of the exempted goods as provided earlier. The value is to be determined as per section 4 or 4A of the Central Excise Act, 1944 read with rules made thereunder.*

4.In the light of what is sated above, it is clarified that as long as the amount of 8% or 10% is paid to the Government in terms of erstwhile rule 57CC of the Central Excise Rules, 1944 or rule 6 of the CENVAT Credit Rules, the provisions of section 11D shall not apply even if the amount is recovered from the buyers. However, it may be noted that the CENVAT credit of the said amount of 8% or 10% cannot be taken by the buyer since such payment is not a payment of duty in terms of rule 3(1) of the CENVAT Credit Rules, 2004. Therefore, the said 10% amount should be shown in the invoice as "10% amount paid under Rule 6 of the CENVAT Credit Rules, 2004".

5. Board's circular No. 599/36/2001-CX dated November, 2001 stands withdrawn.

6. The field formations as well as trade and industry may be suitably informed.

7. Hindi version will follow."

4.2 From the above circular it is has been clarified that any amount reversed under erstwhile Rule 57CC of Central Excise Rules, 1944 or Rule 6 (3) (1) of Cenvat Credit Rules, 2004and even though the same is recovered from the customers, the provision of Section 11D shall not apply. Therefore, the present issue stands clarified by the board under the aforesaid circular. Moreover, this issue has been considered by this tribunal in the case of Jindal Tubular (India) Ltd (Supra) wherein the following order was passed:-

*"**4.** We have heard learned Counsel for the appellant and learned Authorised Representative of the Department and perused the records. We proceed to deal with each of the three items:*

Demand under section 11D

***5.** The appellant manufactures MS pipes which it supplied to M/s Navayuga Engineering Company Limited for use in a project. It is undisputed that the goods supplied under this project were exempted by Notification No. 3/2004-CE dated January 08, 2004 and that this exemption was available to the goods cleared by the appellant. As these goods were exempted, the appellant had an obligation to fulfil one of the conditions under Rule 6(1), 6(2) or 6(3) of the Cenvat Credit Rules, 2004 (CCR). Rule 6(1) requires the assessee not take Cenvat credit on the input and inputs services used manufacture of exempted goods. Rule 6(2) requires the assesee to maintain separate records in respect of common inputs and input services used for manufacture of dutiable and exempted goods. Rule 6(3) requires the assesse to pay an amount equal to 6%/7% of the value of the final products. The appellant chose the third option and paid an amount equal to 6%/7% of the value of the final products.*

***6.** As per the agreement between the appellant and its customer M/s Navayuga Engineering Company Limited, in addition to the price of the goods, M/s Navayuga Engineering Company Limited would pay an amount equal to "7% excise duty reversal" in respect of the pipes and in respect of internal coating of the pipes "7% ED reversal" shall be shared by both parties @ 3.5% each. Therefore, it was clearly understood by two parties that what was being paid by the customer was not Central Excise duty but an amount of 7% of the value of the pipes under Rule 6 (3) of CCR inaccurately mentioned as "excise duty reversed". The invoices produced by the appellant before us clearly indicate "excise duty exempted under Condition No. (ii) of the Notification No. 3/2004-CE dated January 08, 2004 in force from date on 9-1-2004". To enable the supplier to supply the above goods at nil rate of excise duty" the customer has to produce necessary certificate. However, in the invoice after price of the pipes there are two entries one pertaining to VAT @ 5% and another pertaining to the amount paid under Rule 6(3)(1) indicated inaccurately as "Excise duty reversal @ 6%."*

***7.** It is the case of the Department that the appellant has recovered this amount from its customers as representing excise duty and, therefore, the same needs to be deposited in the exchequer as per Section 11D which reads as follows:*

> *"Section 11D Duties of excise collected from the buyer to be deposited with the Central Government. - Notwithstanding anything to the contrary contained in any order or direction (1) of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, every person who is liable to pay duty under this Act or the rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government."*

***8.** The case of the appellant is that what is recovered by them is only an amount which it was required to pay under Rule 6(3)(i) as a part of its obligations under CCR. It has not recovered any amount as representing Central Excise duty. Therefore, Section 11D is not applicable to this case as they have not recovered any amount whatsoever as representing the central excise duty.*

***9.** Learned Counsel for the appellant relies on the judgment of Larger Bench of the Tribunal in the case of Unison Metals v. Commissioner of Central Excise [2006] TIOL 1337 CESTAT-DEL.-LB = 2006 (204) E.L.T. 323 (Tri.) =*

2006 (4) S.T.R. 491 (Tri.). In that case the Tribunal was seized of a matter where an amount was paid by the assessee under Rule 57 CC of the Modvat Rules which is pari materia to Rule 6(3)(1) of CCR and recovered the same from its customers. The case of the Revenue was that this amount having been collected from the customers must be deposited by the assessee under Section 11D. The Larger Bench of the Tribunal held that it was not an amount collected as representing excise duty and hence need not be deposited under section 11D. Paragraphs 9, 10 and 11 of this order are reproduced below:

> *"9. The scheme of Central Excise duty payment is that a manufacturer removed goods from the factory of production after payment of duty. While selling the goods, the manufacturer recovered the duty so paid. In doing so, an assessee is recouping the tax already paid. The arrangement is not that the assessee first collected the tax from the buyer of the goods and then remits the amount to the government. Section 11D has to be read keeping this scheme in view. Therefore, the provisions for "every person who is liable to pay duty……and has collected any amount from the buyer of any goods in any manner representing as duty of excise, shall forthwith pay the amount so collected to the credit to the Central Government" has application only when equivalent duty had not been deposited at the time of removal of the goods. The scheme of the law is that manufacturers shall not collect amounts falsely representing them as central excise duty and retain them, thus unjustly, benefiting themselves. In the present cases, (irrespective of whether the 8% payments were duty or not) since the 8% amount remain already paid to the revenue, and no amount is retained by the assessee. Section 11D has no application.*
>
> *10. The real identity of the amount 'collected' (whether excise duty payable or not) is of no relevance for Section 11D. What is relevant is only whether the collection was 'represented' as duty of excise. The representation may as well be entirely false. The qualifying of the representation through the words 'in any manner' makes this clear. Therefore, the contentions of both sides on the question, as to whether deposits under Rule 57CC are excise duty or not, are beside the point.*
>
> *11. Reference is answered as above and the appeals are returned to the original Bench for disposal."*

10. *Learned Counsel for the appellant further submits that subsequent to this order of the Larger Bench, the Central Board of Excise and Customs had issued Circular No. 870/08/2008-CX. Dated May 16, 2008 communicating that the Department has accepted this judgment and directed as follows:*

> *"In the light of what is sated above, it is clarified that as long as the amount of 8% or 10% is paid to the Government in terms of erstwhile Rule 57CC of the Central Excise Rules, 1944 or Rule 6 of the CENVAT Credit Rules, the provisions of section 11D shall not apply even if the amount is recovered from the buyers. However, it may be noted that the CENVAT credit of the said amount of 8% or 10% cannot be taken by the buyer since such payment is not a payment of duty in terms of Rule 3(1) of the CENVAT Credit Rules, 2004. Therefore, the said 10% amount should be shown in the invoice as "10% amount paid under Rule 6 of the CENVAT Credit Rules, 2004".*

11. *Learned Counsel, therefore, submits that the impugned order, being contrary to not only the judgment of the Larger Bench of the Tribunal but also to the Board's directions, is unsustainable and needs to be set aside.*

12.*Per contra, blearned Departmental Representative relies on the order of the Tribunal in M/s G.S. Pharmabutor (P) Ltd. v. CCE, Jaipur 2005-TIOL-138-CESTAT-DEL. = 2005 (182) E.L.T. 167 (Tri.) in which it was held that an amount of 8% recovered by the assessee from its customers has to be deposited under section 11D. An appeal against this order was dismissed by* *the Supreme Court in Civil Appeal No. 854/2006 [2015 (323) E.L.T. A131 (S.C.)] having regard to the meager tax involved leaving the question of law open. He submits that the distinction between G.S. Pharmabutor and Union Metals is that in the case of G.S. Pharmabutor the amount which was being recovered was clearly shown as central excise duty. Para 5 of this order reads as follows:*

> *"5. I find that in this case the appellants are not disputing that they were collecting 8% from their customers and in the invoices it was specifically mentioned that as they were collecting this 8% as Central Excise duty. The appellant does not dispute this fact. The only contention of the appellant is that mistake they were mentioning 8% as Central Excise duty showing in the invoices. In these circumstances as the appellants were collected this 8% duty by showing separately in the invoices from their buyers, therefore, the provisions of Section 11D are applicable and the appellants are not entitled for this amount. The appeal is dismissed."*

13. *He submits that the present case is also one where the invoices show "excise duty reversal" and, therefore, G.S. Pharmabutor squarely case applies. It would have been a different matter if the amount was shown as "an amount under Rule 6(3)(1) of CCR, 2004.*

14. *We have considered the submissions of both sides with respect to this part of the impugned order.*

15. *We find from the agreement and the invoices that the buyer was fully aware that the goods were fully exempted and no excise duty was liable to be paid. In fact, the buyer was required to provide an excise duty exemption certificate to the appellant to avail the benefit of exemption notification. However, the buyer also agreed to pay to the appellant an amount equal to 7% which it paid under Rule 6(3)(1). However, both the agreements and the invoices inaccurately mentioned this as "excise duty reversal". This might give impression this is an amount recovered by the appellant from the customer as representing the excise duty which would be recoverable under section 11D. Notwithstanding the inaccurate description of this amount recovered by the appellant from its customers, it is clear from the agreement that the buyer was not paying this amount thinking it to be excise duty but was paying it as a reimbursement of an amount under Rule 6(3)(1) of CCR. The invoices also indicate that the excise duty is exempted under Notification NO. 3/2004. Further, below the "excise duty reversal @ 6%" in the invoice, it is mentioned in "amount paid under Rule 6(3)(i) of CCR". Needless to say, since this is not an amount of excise paid by the appellant and the buyer M/s Navayuga Engineering Company Limited will not be entitled to Cenvat credit of the amount so paid. However, that matter is beyond the scope of this appeal. What is important for this appeal is whether the appellant has collected the amount as representing Excise duty from its customers which does not appear to be the case from the agreement and from the invoices. We, therefore, find that this case is different M/s G.S. Pharmabutor (P) Ltd. where the amount was being collected as representing excise duty in each of these invoices. The case is covered by the Larger Bench decision of the Tribunal in M/s Unison Metals Ltd., which has also been accepted by the Revenue by CBEC Circular dated 16-5-2008. Therefore, this part of the demand cannot be sustained and needs to be set aside.*

Denial of Cenvat credit on input services

16. *In respect of rent-a-cab services, an amount of Rs. 4,13,596/- claimed by the appellant as input service for rent-a-cab services is sought to be denied by the impugned order. The appellant claims that the cabs were used by its employees and customers for business travel only and, therefore, it is entitled to the benefit of Cenvat credit as held by the High Court of Gujarat in the case of Commissioner of Central Excise, Customs & Service Tax, Vadodara v. Transpek Industry Ltd. 2017-TIOL-2106-HC-AHM-CX = 2018 (12) G.S.T.L. 29 (Guj.). The High Court framed the following question:*

(i) Whether in the facts and circumstances of the case and law, the Hon'ble Tribunal has committed substantial error of law in holding that the Respondent is entitled to avail the CENVAT credit on outdoor 'catering services' and rent-a-cab services provided in the factory for employees of the factory? "

***17.** Relying on the case of S.R. Oil Ltd. 2016-53-VST-317, the High Court has decided that rent-a-cab services in respect of cab used by the employees of the assessee is an "input service" and Cenvat credit is available on it.*

***18.** Learned Departmental Representative reiterates the findings of the impugned order with respect to this.*

***19.** After considering the submissions of both sides, respectfully following the judgment of High Court of Gujarat in Transpek Industry Ltd., we hold that the appellant is entitled to the Cenvat credit for the service tax paid on rent-a-cab services.*

Demand of Rs. 3,95,550/- towards central excise duty on freight charges of goods sold on FOR basis to the customers premises:

***20.** The appellant has supplied the goods on which it paid excise duty to the customers on FOR destination basis. In other words, in such contracts the appellant was required to deliver the goods at the buyer's premises and not its factory gate. The question is whether cost of freight from the factory/depot of the appellant to the customer's premises is includible in the assessable value for calculating the central excise duty. In the case of CCE & Customs v. Roofit Industries Ltd. 2015-TIOL-87-SC-CX = 2015 (319) E.L.T. 221/[2015] 57 taxmann.com 363/51 GST 350 (SC) the Supreme Court held that where the goods are sold on FOR destination basis the sale is complete only when the change in property takes place at the buyer's premises and, therefore, the place of removal will be the buyer's premises. Subsequently, in the case of CCE, Nagpur v. Ispat Industries Ltd. 2015-TIOL-238-SC = 2015 (324) E.L.T. 670/[2015] 62 taxmann.com 97/52 GST 889 (SC), the Supreme Court held that the "place of removal" under section 4 of the Central Excise Act must be a place relatable to the seller i.e., the factory gate or depot or premises of consignment agent, etc. and cannot be the buyer's premises because the place of removal under section 4 has to be the place from where the goods are to be sold after removal. Once the sale is completed at the buyer's premises there is nothing more to be removed. Accordingly, the place of removal can only be the seller's premises regardless of the fact that the sale is on FOR destination basis. Relevant text of the judgment is as follows:*

> *"16. It will thus be seen that where the price at which goods are ordinarily sold by the assessee is different for different places of removal, then each such price shall be deemed to be the normal value thereof. Sub-clause (b)(iii) is very important and makes it clear that a depot, the premises of a consignment agent, or any other place or premises from where the excisable goods are to be sold after their clearance from the factory are all places of removal. What is important to note is that each of these premises is referable only to the manufacturer and not to the buyer of excisable goods. The depot, or the premises of a consignment agent of the manufacturer are obviously places which are referable only to the manufacturer. Even the expression "any other place or premises" refers only to a manufacturer's place or premises because such place or premises is stated to be where excisable goods "are to be sold". These are the key words of the sub-section. The place or premises from where excisable goods are to be sold can only be the manufacturer's premises or premises referable to the manufacturer. If we are to accept the contention of the revenue, then these words will have to be substituted by the words "have been sold" which would then possibly have reference to the buyer's premises.*

24. It will thus be seen that, in law, it is clear that for the period from 28-9-1996 up to 1-7-2000, the place of removal has reference only to places from which goods are to be sold by the manufacturer, and has no reference to the place of delivery which may be either the buyer's premises or such other premises as the buyer may direct the manufacturer to send his goods. As a matter of law therefore the Commissioner's order and Revenue's argument based on that order that freight charges must be included as the sale in the present facts took place at the buyer's premises is incorrect. Further, for the period 1-7-2000 to 31-3-2003 there will be no extended place of removal, the factory premises or the warehouse (in the circumstances mentioned in the Section), alone being places of removal. Under no circumstances can the buyer's premises, therefore, be the place of removal for the purpose of Section 4 on the facts of the present case.

32. It will be seen that this is a decision distinguishing the Escorts JCB's case on facts. It was found that goods were to be delivered only at the place of the buyer and the price of the goods was inclusive of transportation charges. As transit damage on the assessee's account would imply that till the goods reached their destination, ownership in the goods remained with the supplier, namely, the assessee, freight charges would have to be added as a component of excise duty. Further, as per the terms of the payment clause contained in the procurement order, payment was only to be made after receipt of goods at the premises of the buyer. On facts, therefore, it was held that the sale of goods did not take place at the factory gate of the assessee. Also, this Court's attention was not drawn to Section 4 as originally enacted and as amended to demonstrate that the buyer's premises cannot, in law, be "a place of removal" under the said Section."

***21.** Subsequently, Circular No. 1065/4/2018-CX dated 8-6-2018 was issued by the CBEC communicating this decision. The relevant text reads as follows:*

"3. General Principle: As regards determination of 'place of removal', in general the principle laid by Hon'ble Supreme Court in the case of CCE v. Ispat Industries Ltd 2015 (324) E.L.T. 670 (S.C.) may be applied. Apex Court, in this case has upheld the principle laid down in M/s Escorts JCB (supra) to the extent that 'place of removal' is required to be determined with reference to 'point of sale' with the condition that place of removal (premises) is to be referred with reference to the premises of the manufacturer. The observation of Honb'le Court in para 16 in this regard is significant as reproduced below"

16. It will thus be seen where the price at which goods are ordinarily sold by the assessee is different for different places of removal, then each such price shall be deemed to be normal value thereof. Sub-clause (b) (iii) is very important and makes it clear that a depot, the premises of a consignment agent, or any other place or premises from where the excisable goods are to be sold after their clearance from the factory are all places of removal. What is important to note is that each of the premises is referable only the manufacturer and not to the buyer of excisable goods. The depot or the premises of the consignment agent of the manufacturer are obviously places which are referable to the manufacturer. Even the expression "any other place of premises" refers only to a manufacturer's place or premises because such place or premises is to be stated to be where excisable goods "are to be sold". These are key words of the sub-section. The place or premises from where excisable goods are to be sold can only be manufacturer's premises or premises referable to the manufacturer. If we were to accept contention of the revenue, then these words will have to be substituted by the words "have been sold" which would then possibly have reference to buyer's premises."

4. Exceptions:

(i) The principle referred to in para 3 above would apply to all situations except where the contract for sale is FOR contract in the circumstances identical to the judgment in the case of CCE, Mumbai-III v. Emco Ltd 2015 (322) E.L.T. 394 (S.C.) and CCE v. M/s Roofit Industries Ltd 2015 (319) E.L.T. 221 (S.C.). To summarise, in the case of FOR destination sale such as M/s Emco Ltd and M/s Roofit Industries where the ownership, risk in transit, remained with the seller till goods are accepted by buyer on delivery and till such time of delivery, seller alone remained the owner of goods retaining right of disposal, benefit has been extended by the Apex Court on the basis of facts of the cases.

(ii) Clearance for export of goods by a manufacturer shall continue to be dealt in terms of Circular no. 999/6/2015-CX dated 28-2-2015 as the judgments cited above did not deal with issue of export of goods. In these cases otherwise also the buyer is located outside India.

5. CENVAT Credit on GTA Services etc: The other issue decided by Hon'ble Supreme Court in relation to place of removal is in case of CCE &ST v. Ultra Tech Cement Ltd dated 1-2-2018 in Civil Appeal No. 11261 of 2016 on the issue of CENVAT Credit on Goods Transport Agency Service availed for transport of goods from the 'place of removal' to the buyer's premises. The Apex Court has allowed the appeal filed by the Revenue and held that CENVAT Credit on Goods Transport Agency service availed for transport of goods from the place of removal to buyer's premises was not admissible for the relevant period. The Apex Court has observed that after amendment of in the definition of 'input service' under Rule 2(l) of the CENVAT Credit Rules, 2004, effective from 1-3-2008, the service is treated as input service only 'up to the place of removal'.

6. Facts to be verified: This circular only bring to the notice of the field the various judgments of Hon'ble Supreme Court which may be referred for further guidance in individual cases based on facts and circumstances of each of the case. Past cases should accordingly be decided.

7. No extended period: Any new show cause notice issued on the basis of this circular should not invoke extended period of limitation in cases where an alternate interpretation was taken by the assessee before the date of the Supreme Court judgment as the issue is in the nature of interpretation of law."

22. *In view of the above, the learned Counsel for the appellant submits that regardless of the fact that sale of goods is on FOR basis, central excise duty cannot be charged on the cost of freight from their premises to the premises of the buyer. Learned Authorised Representative supports the impugned order.*

23. *Having considered both the submissions, we find that the issue is now settled by the Supreme Court in the case of Ispat Industries that the place of removal in every case has to be only the place relatable to the seller and it cannot be the buyer's premises even though the sale may be completed at the buyer's premises when goods are sold on FOR destination basis. The "place of removal" continues to be the seller's premises whether it be the factory gate or depot or any other place relatable to the seller. In terms of Section 4 of the Central Excise Act, value of the goods is the transaction value of the goods for delivery at the time and place of removal. The freight incurred from the place of removal to the buyer's premises cannot, therefore be includible in the assessable value. Consequently, the demand on this count also needs to be set aside.*

24. *As we find that all the three demands are not sustainable on merits, the penalty also needs to be set aside.*

> ***25.*** *In view of the above, the impugned order dated March 19, 2019 is set aside and the appeal is allowed with consequential relief, if any, to the appellant."*

4.3 In view of the above judgment of this tribunal along with board circular (supra) the amount reversed by the appellant under Rule 6(3) and even though recovered from the customer, provision of Section 11D shall not apply. Hence, the demand under Section 11D is not sustainable.

5. Accordingly, the impugned order is set aside. Appeal is allowed.

(Pronounced in the open court on 29.11.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

Bharvi