

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH**

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REGIONAL BENCH – COURT NO. 1

**Appeal No. E/1807/2010**

[Arising out of OIA- 215-218/CE/APPL/CHD-II(JK-/2010 dated 18/03/2010 passed by the Commissioner (Appeals) of Central Excise-JAMMU & KASHMIR]

**J & K Pigments Pvt. Ltd.**  
VILL-LOGATE MORE, KATHUA (J&K)

**: Appellant (s)**

Vs

**CCE. Jammu & Kashmir**  
OB-32, RAIL Head Complex, Jammu - 180012.

**: Respondent (s)**

**WITH**

**Appeal No. E/2258-2260/2010**

[Arising out of OIA- 215-218/CE/APPL/CHD-II(JK-/2010 dated 18/03/2010 passed by the Commissioner (Appeals) of Central Excise-JAMMU & KASHMIR]

**Appeal No. E/2508,2511-2512, 2514-2516/2010**

[Arising out of OIA- 752-762/CE/APPL/CHD-II(J&K-/2010 dated 04/05/2010 passed by the Commissioner (Appeals) of Central Excise-JAMMU & KASHMIR]

**E/3531-3534/2010**

[Arising out of OIA- 912-916/CE/APPL/CHD-II(JK-/2010 dated 02.08.2010 passed by the Commissioner (Appeals) of Central Excise-JAMMU & KASHMIR]

**E/60550/2017**

[Arising out of OIA-JAL-EXCUS-000-APP-270-277-16-17 dated 31.08.2016 passed by the Commissioner (Appeals) of Central Excise-JAMMU & KASHMIR]

**[Jammu Pigments Ltd. vs. CCE & ST- Jammu & Kashmir]**

**E/60046/2018**

[Arising out of OIA-J&K-EXCUS-000-APP-22-23-17-18 dated 22.09.2017 passed by the Commissioner (Appeals) of Central Excise-JAMMU & KASHMIR]

APPEARANCE:

Shri Sudhir Malhotra, Advocate for the Appellant  
Shri Rajiv Gupta, Shri A. K. Saini, ARs for the Respondent

**CORAM : HON'BLE Mr. ASHOK JINDAL, MEMBER (JUDICIAL)  
HON'BLE Mr. C L MAHAR, MEMBER (TECHNICAL)**

**INTERIM ORDER NO. 28-43/2020 dated 28.02.2020**

**FINAL ORDER NO. 60185-60200/2024**

Date of Hearing: 02.09.2019  
Date of (Interim) Decision: 28.02.2020  
Date of (Final) Decision: 30.04.2024

***Per : Mr. Ashok Jindal***

The appellant is in appeals against the impugned orders wherein the refund claim filed under Notification No. 56/2002-CE dated 14.11.2002 has been rejected.

2. The facts of the case are that the appellant is located in the state of Jammu and Kashmir and manufacturing Lead Ingots & Lead Oxide. The appellant was availing area based exemption under Notification No. 56/2002-CE dated 14.11.2002. As per the said notification, the appellant is entitled to take cenvat credit on inputs, input service and capital goods, thereafter, whatever duty paid in cash, the appellant is entitled to claim refund thereof. During the course of verification of refund claims, it was found that the appellant has incurred outward freight charges from their factory to the place of delivery and the same was included in the assessable value and the duty was paid. The appellant claim refund of duty paid thereon. The case of the revenue is that as the appellant was clearing goods from their factory gate, therefore, they are not required to pay duty on the transportation charges. Consequently, they are not entitled to claim refund of duty paid on outward freight charges. In these set of facts, the refund claims filed by the appellant were rejected. Against those orders, the appellant is before us.

3. The Ld. Counsel for the appellant submits that it is not disputed the fact that the appellant is selling their goods on FOR basis to their buyers and as per the terms between the buyers, the appellant is required to deliver the goods at the buyer's place. Therefore, they are rightly paid duty on 'Outward Transportation Charges' and claim refund. He submits that their case is squarely covered by the decision

of the Hon'ble Apex court in the case of ***Commissioner of Customs & Central Excise, Aurangabad vs. Roofit Industries Ltd. – 2015 (319) ELT 221 (S.C.)***, therefore, they are entitled for claim of refund.

4. The arguments advanced by the Ld. Counsel for the appellant were opposed by the Ld. AR who submits that in their own case this Tribunal has already decided the issue wherein this Tribunal has affirmed the order of rejection of refunds on account of duty paid on 'Outward Transportation Charges'. He also submits that the issue has been finally settled by the Hon'ble apex court in the case of ***Commissioner of Customs & Central Excise, Nagpur vs. Ispat Industries Ltd. – 2015 (324) ELT 670 (S.C.)***.

5. In rebutted the argument advanced by the Ld. AR, the Ld. Counsel for the appellant submits that the earlier decision of this Tribunal has been challenged by the Hon'ble Apex Court and the Hon'ble Apex Court has admitted the appeal filed by the appellant against the order of this Tribunal and notice has been issued to the respondent, reported in 2019 (366) ELT A171 (S.C.). With regard to the decision of ***Ispat Industries (supra)***, it is his claim that the fact of the said case are not applicable to the case in hand, therefore, the impugned orders are to be set-aside and refund claims are required to be sanctioned.

6. Heard the parties and considered the submissions.

7. On careful consideration of submissions made by both sides, we find that in this case, the sole issue is that whether the duty paid on 'Outward Transportation Charges' when the goods are sold on FOR

basis, the appellant is entitled to claim refund thereon under Notification No. 56/2002-CE dated 14.11.2002 or not?

The Ld. AR relied on the decision of this Tribunal in the appellant's own case vide final order No. A/60444-60491/2018 dated 06.03.2018. We have gone through the said order, this Tribunal has heavily relied on the decision of **Ispat Industries (supra)** and against the said order, the appellant has gone in appeal before the Hon'ble Apex Court and the Hon'ble Apex Court admitted the appeal filed by the appellant and notice has been issued to the Union of India as reported (supra).

8. We further take a note of the fact that it is not disputed that in the present case, the appellant is clearing goods on FOR basis, the premises of the buyer becomes the premises from where goods are being sold after being cleared from the factory of the manufacturer. In case of sale on FOR basis, the transportation expanses get included in the transaction value for the purpose of payment of duty such transportation takes place before actual sale of the goods. Since the transportation charges incurred before the possession of goods is transferred to the buyer, the same will form part of transaction value. Further, since the sales are effected on FOR destination basis the amount of freight is not deductible from the transaction value.

9. We further take a note of the fact that in the case of **Roofit Industries Ltd. (supra)**, the facts of the case are as under:-

*"2. It is the case of the Revenue that on the basis of general intelligence collected, respondent/assessee was indulging in evasion of Central Excise duty by not computing the assessable value of finished goods properly to the extent that it was deducting the amount of freight, insurance and unloading charges from the price of excisable goods though the place of removal of finished goods was different from the factory gate. The*

*preventive party visited the factory premises of the assessee on 25-3-2000, conducted enquiries and resumed the records for further scrutiny. After scrutiny of various records and documents, it was revealed that the assessee had received work orders from various Government authorities and private contractors and the agreements entered into by the assessee with the above mentioned parties were for designing, manufacturing, providing at site, laying, jointing and testing of PSC pipes of specified sizes. The agreement entered, therefore, entailed upon the assessee, for delivery of the finished goods and not at the factory gate. It was found that no sale took place till the goods reached the test of the projects.*

*3. A show cause notice dated 2-11-2011 was issued as to why the differential Central Excise duty amounting to Rs. 43,56,318/- for the period of 1-1-1996 to 30-6-2000 should not be recovered from them under proviso to Section 11A(1) of the Central Excise Act read with Rule 9(1) of the Central Excise Rules, 1944 and why penalty under Section 11AC and interest under Section 11AB should not be imposed. The assessee replied and was given personal hearing. Learned Adjudicating authority vide its Order-in-Original confirmed the demand to extent of Rs. 36,16,318/- on account of undervaluation and on the ground that place of removal of finished goods was the buyer's premises and not at the factory gate."*

and the Hon'ble Apex Court has observed as under:-

*"15. These are clear finding of facts on the aforesaid lines recorded by the Adjudicating Authority. However, the CESTAT did not take into consideration all these aspects and allowed the appeal of the assessee by merely referring to the judgment in the case of Escorts JCB Ltd. Obviously the exact principle laid down in the judgment has not been appreciated by the CESTAT.*

*16. As a result, order of the CESTAT is set aside and present appeal is allowed restoring the order passed by the Adjudicating Authority."*

10. We further take a note of the fact that in the case of **Ispat Industries (supra)** the Hon'ble Apex Court has observed that in the said case, the prices were "Ex-works", therefore, it was observed by the Hon'ble Apex Court that the goods were cleared from the factory on payment of appropriate sale tax by the assessee itself thereby indicating that they were sold at factory gate and sales were against letters of credit of bank discounting facilities, sometimes in advance. Invoices were prepared only at factory directly in the name of customer in which name of Insurance company as well as number of

| INVOICE CUM CHALLAN                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                              | (Triplicate for Assessee)                                                                                                                                                                                                  |                         |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------|
| <b>Jammu Pigments Pvt. Ltd.</b><br>Village Logate, Near Rly Crossing<br>Teh. & Dist. Kathua (J&K) 184104<br>Tel.0192-2203298<br>E-Mail : rajaagarwal.jppl@gmail.com<br>Excise Regn/Code No. : AABCJ6000HXM001<br>Consignee<br><b>H.M.S Metal Corporation</b><br>B-56 ADDL. Ambernath M.I.D.C Anandnagar<br>Ambernath Distt Thane (MH)<br>ECC No AABFH7990RXM001<br>Tin No : 27880352932 V dt 01.04.2006<br>Buyer (if other than consignee)<br><b>H.M.S Metal Corporation</b><br>B-56 ADDL. Ambernath M.I.D.C Anandnagar<br>Ambernath Distt Thane (MH)<br>ECC No AABFH7990RXM001<br>Tin No : 27880352932 V dt 01.04.2006 |                                                              | Invoice No.<br><b>01</b><br>Delivery Note<br><b>4751</b><br>Buyer's Order No.<br><b>HMS-2014-15/0039</b><br>Despatch Document No.<br><b>JK08C4207</b><br>Despatched through<br><b>Jammu Logistics</b><br>Terms of Delivery |                         |
| Dated<br><b>1-Apr-2014</b><br>Mode/Terms of Payment<br>Dated<br><b>1-Apr-2014</b><br>Destination<br><b>Ambarnath (Thane)</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                              |                                                                                                                                                                                                                            |                         |
| Sl No.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Description of Goods                                         | Quantity                                                                                                                                                                                                                   | Rate per Amount         |
| 1                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | Loose Lead Ingots<br><i>Tariff Classification : 78011000</i> | 16,000.00 KGS                                                                                                                                                                                                              | 143.50 KGS 22,96,000.00 |
| Excise Duty                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                              |                                                                                                                                                                                                                            | 12 % 2,75,520.00        |
| E. Cess on Ex. Duty                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                              |                                                                                                                                                                                                                            | 2 % 5,510.00            |
| SHE. Cess on Ex. Duty                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                              |                                                                                                                                                                                                                            | 1 % 2,755.00            |
| Sales Tax CST EXEMPT Against 'C' Form                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                              |                                                                                                                                                                                                                            |                         |
| Total                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                              | 16,000.00 KGS                                                                                                                                                                                                              | ₹ 25,79,785.00          |
| Amount Chargeable (in words)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                              | E. & O.E                                                                                                                                                                                                                   |                         |
| Indian Rupees Twenty Five Lakh Seventy Nine Thousand Seven Hundred Eighty Five Only                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                              |                                                                                                                                                                                                                            |                         |
| Excise Duty Payable (in words)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                              |                                                                                                                                                                                                                            |                         |
| Indian Rupees Two Lakh Eighty Three Thousand Seven Hundred Eighty Five Only (₹ 2,83,785.00)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                              |                                                                                                                                                                                                                            |                         |
| Company's VAT TIN : 01461102044 dt. 22.12.2006                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                              | Excise Range : Kathua (J&K)                                                                                                                                                                                                |                         |
| Company's CST No. : 01461102044 dt. 22.12.2006                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                              | Excise Division : Kalibari Near BSNL Office, Kathua                                                                                                                                                                        |                         |
| Buyer's VAT TIN : 27880352932C dt 01.04.2006                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                              | Excise Division : Jammu                                                                                                                                                                                                    |                         |
| Declaration                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                              | OB-32, Rail Head Complex, Jammu (J&K)                                                                                                                                                                                      |                         |
| Certified that the particulars given above are true and correct and amount indicated represented the price actually charged and that there is no flow additional consideration directly or indirectly from the buyer. 1. Int. @21% p.a. will be charged on late payment. 2. If any Tax /Duties will be levied or demanded by Central/State Government(s) will be born by the buyer. 3. Once goods are delivered to the carrier for onward despatched to buyer/consignee, our responsibility ceases.                                                                                                                     |                                                              | Serial No. in PL/ARG-23 : _____                                                                                                                                                                                            |                         |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                              | Date & Time of Invoice : 1-Apr-2014 at 14:25                                                                                                                                                                               |                         |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                              | Date & Time of Removal : 1-Apr-2014 at 14:50                                                                                                                                                                               |                         |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                              | for Jammu Pigments Pvt. Ltd.                                                                                                                                                                                               |                         |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                              | <br>Authorised Signatory                                                                                                              |                         |
| SUBJECT TO KATHUA (J&K) JURISDICTION                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                              |                                                                                                                                                                                                                            |                         |
| This is a Computer Generated Invoice                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                              |                                                                                                                                                                                                                            |                         |

In the said invoices, no separate transportation charges have been mentioned. Moreover, these transportation charges have from part of the assessable value of the goods sold by the appellant on FOR basis. Moreover, the CBEC has also issued Circular vide **Circular No. 1065/4/2018-CX dated 8.6.2018** wherein it has been clarified by the CBEC that place of removal has to be ascertain on the basis of the fact of each case and in this case, the appellant remained owner of the goods till they have been delivered to the buyer.

11. The same was taken by this Tribunal in the case of **Ultimate Flexipack Ltd. vs. Commissioner of Central Excise, J & K – 2014 (304) ELT 446 (Tri.-Del.)** wherein this Tribunal observed as under:-

*“7. The invoices issued by the appellant mention only one consolidated FOR price and also mention that the sales are on FOR destination basis. This fact is not disputed by the department. When the invoices themselves mention the sales as on FOR sales, risk of loss of goods or damage to the goods during transit would be of the appellant and the ownership of the goods during transit would be treated as of the appellant and if the Department alleges that the sales are not as FOR basis, the burden of proof in this regard would be on the Department. Just because there are no purchase orders placed by the customers or there are no agreements between the appellant and their customers regarding sale of the goods and the terms of sale, it cannot be concluded that the sales are not on FOR destination basis. We find neither any inquiry in this regard has been conducted by the Department nor any evidence has been produced. In view of this, the impugned orders are not correct. The same are set aside. The appeals are allowed. The stay applications also stand disposed of.”*

As revenue has not rebutted the factual position of the case that the appellant remained owner of the goods till they were delivered to the buyer at their factory gate, in that circumstances, the appellant have rightly paid duty on 'Outward Transportation Charges' which has form part of the assessable value. Therefore, the appellant is entitled to claim refund of duty paid under Notification No. 56/2002-CE dated

14.11.2002 on account of duty paid on 'Outward Transportation Charges'.

12. We further take a note of the fact that it is the case of the revenue that the appellant were not required to pay duty on 'Outward Transportation charges', in that circumstances also, when the appellant is not liable to pay duty they can claim refund of excess duty paid by them. Therefore, it is a revenue neutrality situation. In that circumstances also the appellant is entitled to claim refund of duty paid on 'Outward Transportation Charges' which was not required to be paid by them.

13. We hold that the appellant is entitled to claim refund of duty paid on 'Outward Transportation Charges'.

14. In these terms, we set-aside the impugned orders and allow the appeals filed by the appellants with consequential relief.

*(Pronounced on \_\_\_\_\_)*

**(Ashok Jindal)**  
Member (Judicial)

**(C. L. Mahar)**  
Member (Technical)

G.Y.

**C.L. MAHAR :-**

15. The main point involved in the case is valuation of excisable goods manufactured and cleared by the appellant /assessee from the state of J&K to other places and claiming refund of the central excise duty paid in cash under notification 56/2002-CE dated 14/11/2002.

The appellants have paid outward freight and included the same in the assessable value. The appellants were selling their goods at transaction value and their place of removal is factory gate. Outward freight paid for movement of goods sold beyond place of removal does not form part of assessable value in terms of section 4 of Act read with Rule 5 of valuation (Determination of price of excisable goods) Rules, 2000. During the relevant period the appellant deliberately excess paid the duty and claimed refund. The adjudicating authority rejected the excess refund claimed on freight. In appeal the appellant made various arguments.

I have gone through facts of the case and observe that the appellate authority has elaborately discussed the place of removal and the decision of the Hon'ble Supreme Court in the case of **Commissioner of Central Excise & Customs, Nagpur vs. Ispat Industries Ltd. 2015(324) E.L.T. 670 (S.C.)** in which he explained the term "Goods are to be sold" as used in the meaning of "Place of removal" and referred to the following paras of the Judgement.

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.

17. It will thus be seen that, in law, it is clear that for the period from 28/09/1996 up to 01/07/2000, 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 01/07/2000 to 31/03/2003 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.

Further, the Hon'ble Supreme court has categorically observed in the Judgment that:

18. It is clear, therefore, that as a matter of law with effect from the Amendment Act of 28/09/1996, the place of removal only has reference to places from which the manufacturer is to sell goods manufactured by him, and can, in no circumstances, have reference to the place of delivery which may, on facts, be the buyer's premises.

19. A cursory reading of the substituted provision makes it clear that the concept of "normal value" has given way to the concept of "transaction value". Thus, no longer is there a normative price for purposes of valuation of excisable goods. The actual price that is paid or payable on each removal of goods becomes the transaction value. Interestingly, it will be noticed that under Section 4(3)(c), the place of removal is defined as it had been defined in the substituted Section 4 (by the 1973 Amendment) before its further amendment in 1996. What is conspicuous by its absence in the present Section is Section 4(2) and sub-section (b)(iii) in the previous Section 4 (after its amendment in 1996). It is clear therefore, that for the second period in question in the present case, namely, 01/07/2000 to 31/03/2003, the depot, premises of a consignment agent or any other place from which excisable goods are to be sold after their clearance from the factory are no longer places of removal. Also, the definition of "transaction value" makes it clear that freight or transportation expenses are not included in calculating the excise duty payable.

20. It is clear, therefore, that on and after 14/05/2003, the position as it obtained from 28/09/1996 to 01/07/2000 has now been reinstated. Rule 5 as substituted in 2003 also confirms the position that the cost of transportation from the place of removal to the place of delivery is to be excluded, save and except in a case where the factory is not the place of removal.

21. It will thus be seen that, in law, it is clear that for the period from 28/09/1996 up to 01/07/2000, 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 01/07/2000 to 31/03/2003 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.

22. 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.

23. As has been seen in the present case all prices were "ex-works", like the facts in *Escorts JCB's* case. Goods were cleared from the factory on payment of the appropriate sales tax by the assessee itself, thereby indicating that it had sold the goods manufactured by it at the factory gate. Sales were made against Letters of Credit and bank discounting facilities, sometimes in advance. Invoices were prepared only at the factory directly in the name of the customer in which the name of the Insurance Company as well as the number of the transit Insurance Policy were mentioned. Above all, excise invoices were prepared at the time of the goods leaving the factory in the name and address of the customers of the respondent. When the goods were handed over to the transporter, the respondent had no right to the disposal of the goods nor did it reserve such rights inasmuch as title had already passed to its customer. On facts, therefore, it is clear that *Roofit's* judgment is wholly distinguishable. Similarly in *Commissioner*

*Central Excise, Mumbai-III v. M/s. EMCO Ltd.*, this Court re-stated its decision in the *Rooffit Industries'* case but remanded the case to the Tribunal to determine whether on facts the factory gate of the assessee was the place of removal of excisable goods. This case again is wholly distinguishable on facts on the same lines as the *Rooffit Industries* case.

I also take note of the fact that coordinate bench in its order dated 07/03/2018 in appellant's own case reported under **2019 (366) E.L.T. 837 (Tri. – Chan.)** has held that when clearance are at the factory gate the outward freight is not includable in the assessable value for payment of central excise duty. The relevant extract of the decision are re-produced here under for easy reference.

"4. We have heard both the sides and perused the appeal record. On the second issue it is noted that the impugned order held that based on the statutory definition of "place of removal" under Section 4 of the Central Excise Act, 1944 it is clear that the same could be factory, warehouse or any other premises or depot or premises of a consignment agent from where the excisable goods are sold after the clearance from the factory. We note in the present case the appellant/assessee is claiming that the goods were sold on FOR basis and as such the place of removal is the delivery point to the buyer. The freight element incurred by the appellant/assessee should form part of the assessable value in such FOR sale. In this connection, we note that the Learned AR relied on the decision of Hon'ble Supreme Court in *CCE, Nagpur v. Ispat Industries Ltd.* - [2015 \(324\) E.L.T. 670](#) (S.C.). In the said decision the Apex Court held "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". The Apex Court also distinguished their earlier decision in *Rooffit Industries* - [2015 \(319\) E.L.T. 221](#) (S.C.). The Apex Court observed as below :-

"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".

The Apex Court also held that insurance of goods during transit cannot possibly be the sole consideration to decide ownership or the point of sale of goods.

5. In the present case, the impugned order records that the appellant/assessee have not produced anything on record which would show that they had cleared the goods from the factory gate to a warehouse, any other premises, a depot, consignment agents premises etc. from where such excisable goods were sold. Admittedly, the goods sold by the appellant/assessee delivered at the buyer's premises will not make the place of removal as buyer's premises. Following the ratio of the Apex Court in *Ispat Industries Ltd.* (supra), we hold that there is no justification for the appellant/assessee to consider the assessable value with Inclusion of freight element after the goods were sold/removed from the factory. As such, the question of paying duty on such value addition to be covered by the exemption under Notification No. 56/2002-C.E. does not arise. Accordingly, we hold the claim of the appellant/assessee in these appeals are not sustainable".

24. In view of entire above discussion, I am of view that refund of central excise duty paid on the element outward freight charges is not admissible and therefore I do not find any legally infirmity in the impugned order-in-appeal. Since there is a difference of opinion with the Member (Judicial), the file may be put up to the Hon'ble President for referring the matter to third member for majority decision.

(Order pronounced on 28/02/2020.)

**(C.L. Mahar)**  
**Member (Technical)**

As there is a difference in the opinion of the Member (Judicial) and Member (Technical), the following points of difference emerge which need to be referred to the third Member for a decision :-

- (i) Whether in the facts of the present matter where the sale of the goods have taken place at the buyer's premises at the factory gate whether it is correct to include the amount of the freight in the assessable value of goods ;
- (ii) Whether the appellant is entitled for refund of the central excise duty paid by him on the element of freight and other expenditures made beyond the point of clearance i.e. factory gate.

2. In view of above, it is requested that Hon'ble President may nominate a third Member for majority decision in this case.

**(Ashok Jindal)**  
**Member (Judicial)**

**(C.L. Mahar)**  
**Member (Technical)**

**Hon'ble President**

DATE OF HEARING: 15.02.2024

**APPEARANCE:**

Present for the Appellant: Sh. Rajat Mittal, Advocate

Present for the Respondent: Sh. Aneesh Dewan &  
Sh. Yashpal Singh, Authorized Representatives

**PER : S.S. GARG**

25. The difference on the following issues recorded in two separate orders passed by two Members of the original Division Bench, has been placed before me to give my opinion as a Third Member:

- (i) Whether in the facts of the present matter where the sale of the goods have taken place at the buyer's premises at the factory gate whether it is correct to include the amount of the freight in the assessable value of goods ;
- (ii) Whether the appellant is entitled for refund of the central excise duty paid by him on the element of freight and other expenditures made beyond the point of clearance i.e. factory gate.

Though the facts of the case have already been recorded by the Members of the original bench, but I still feel the necessity to record the facts once again in brief.

26. The appellant are located in the state of Jammu & Kashmir and manufacture Lead Ingots and Lead Oxide. The appellant were availing area based exemption under Notification No. 56/2002-CE dated 14.11.2002. As per the said Notification, the appellant is entitled to take Cenvat Credit on inputs/input services and capital goods.

Thereafter, whatever duty is paid in cash, the appellant are entitled to claim a refund thereof. During the course of verification, it was found that the appellant have incurred outward freight charges from their factory to the place of delivery and the same was also included in the assessable value and the duty was paid. The case of the Revenue is that the appellant was clearing the goods from their factory gate, therefore, they are not required to pay duty on the transportation charges. Consequently, they are not entitled to claim a refund of the duty paid on the outward freight charges. In these set of facts, the refund claims of the appellant were rejected. Against these orders of rejection, the appellant filed the appeals before this Tribunal and this Tribunal after considering the submissions made by both the parties recorded the difference of opinion as above.

27. Heard both the parties; perused the material on record and also perused the respective opinions recoded by both the Members.

28.1 Shri Rajat Mittal, the learned Counsel appearing for the appellant has submitted that the view taken by the Member (Judicial) is correct in law and has been recorded after considering the judgment of the Hon'ble Supreme Court in the case of ***Commissioner of Customs & Central Excise, Aurangabad vs. M/s Roofit Industries Ltd – 2015 (319) ELT 221 (SC)***, wherein the facts were identical as in the present case.

28.2 He has further submitted that the decision of the Hon'ble Apex Court in the case of ***Commissioner of Customs & Central Excise, Nagpur vs. M/s Ispat Industries Ltd – 2015 (319) ELT***

**221 (SC)** is not applicable to the facts of the present case. He has further submitted that after the decision of the Hon'ble Apex Court in the case of **M/s Ispat Industries Ltd** (supra) and **M/s Roofit Industries Ltd** (supra), the Department clarified the position vide Circular No. 1065/4/2018-CX dated 08.06.2018 and distinguished between the facts in the cases of **M/s Ispat Industries Ltd** (supra), **M/s Roofit Industries Ltd** (supra) and **CCE Mumbai-III vs. M/s Emco Ltd – 2015 (322) ELT 394 (SC)**. The relevant extract of the Circular has been reproduced as follows:

*"Exception:*

*(i) The principle referred in para 3 above would apply to all situations except where the contract for sale is FOR contract in the circumstances identical to the judgments in the case of CCE, Mumbai-III vs. Emco Ltd [2015 (322) ELT 394 (SC)] and CCE vs. M/s Roofit Industries Ltd [2015 (319) ELT 221 (SC)]. 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 the 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."*

28.3 The learned Counsel has further submitted that the facts of the **M/s Ispat Industries** (supra)'s case are clearly distinguishable and have no bearing on the present case of the appellant.

28.4 He has further submitted that the decision of **M/s Roofit Industries** (supra) has neither been doubted nor overruled in **M/s Ispat Industries** (supra)'s case by the Hon'ble Supreme Court. In fact, the same has been distinguished as it was rendered under different facts.

28.5 He has further submitted that the facts of the present case are distinguishable from the facts of the ***M/s Ispat Industries*** (supra)'s case, inasmuch as in the present case - (a) the goods were cleared by the appellant on FOR basis i.e. goods were to be delivered at the place of buyer and the appellant took responsibility of the transportation of goods to the buyer's premises; (b) the price of the goods as can be deduced from the purchase order was inclusive of the transportation cost as well as transit insurance; (c) transit damage was on account of the appellant as can be deduced from the fact that transit insurance was procured by the appellant; (d) the terms of payment would also reveal payment for supplies was to be made by the purchasers once the appellant has delivered the said goods to the buyers.

28.6 He has further submitted that applying the ratio of the case of ***M/s Roofit Industries*** (supra) to the facts of the present case, it clearly emerges that the 'place of removal' in case of FOR destination sales will be the buyer's premises and therefore, the outward freight ought to be included in the assessable value. Therefore, the appellant is entitled to refund of excise duty paid on outward freight in terms of Notification No. 56/2002.

29. On the other hand, the learned AR Shri Aneesh Dewan assisted by Shri Yashpal Singh supported the view expressed by Member (Technical) and has submitted that the view taken by the Member (Technical) is correct in law and has been taken after considering the judgment of Hon'ble Supreme Court in the case of ***M/s Ispat***

**Industries** (supra). The learned AR has further submitted that in the present case all their prices were 'ex-works' and the goods were sold at the factory gate. He has further submitted that in the appellant's own case reported in 2019 (366) ELT 837 (Tribunal), the Tribunal has held that if the clearance of the goods is at the factory gate, the outward freight is not includable in the assessable value for the payment of central excise duty.

30. I have considered the submissions of both the parties and perused the material on record and also perused the views expressed by both the Members. I find that in the present case it is not in dispute that the sale is FOR and the freight element is included in the assessable value. Now the question arises whether in the facts and circumstances, the appellant are entitled to get the refund of central excise duty paid by them on the element of freight or not? This question has been considered recently by the Larger Bench of the Tribunal in the case of **M/s The Ramco Cements Limited vs. CCE, Puducherry** and vide **Interim Order No. 40020/2023 dated 21.12.2023**, the Larger Bench of the Tribunal after considering all the judgments of the Hon'ble High Courts as well as of the Hon'ble Supreme Court on this issue, has held in para 31 onwards as under:

**"31.** *The Karnataka High Court in Bharat Fritz Werner considered the judgment of the Supreme Court in Ultratech Cements and also the Circular dated 08.06.2018 of the Board and held as follows:*

*"13. The CESTAT, in the case of Bharat Fritz Werner Ltd. v. C.C., C.E. & S.T-Commissioner of Central Tax [CEA 56/2019], has recorded in paragraph No. 5 that as per the*

*purchase orders, appellant was required to supply the goods at the buyer's premises and the price of goods would include 'outward freight. Similarly, in the case of MAPAL India Pvt. Ltd. [CEA 71/2019], the CESTAT has recorded a similar finding.*

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*16. This Court in the case of Madras Cements Ltd., has held as follows:*

*"11. From the facts of the present case, it is clear from the invoices that title of the goods had passed on from seller to buyer only at the place of destination, which is the address of the buyer As such, the buyer had no right over the goods till delivered to it. The Tribunal has not considered this aspect and has only relied on the amendment made to the definition of "input service" with effect from 1-4-2008 and rejected the claim of the appellant-assessee after that date. No further reason has been given by the Tribunal nor any finding has been recorded with regard to place of completion of sale of the goods.*

*12. Since we are of the opinion that the sale had concluded only after the delivery of the goods was made at the address of the buyer, in the facts of the present case the appellant-assessee would be entitled to the benefit of Cenvat credit on Service Tax paid on outward transportation of goods by the assessee even after 1-4-2008. The appellant- assessee would thus be entitled to such benefit for the period 1-4-2008 to 31-7-2008 which has been denied to it by the authorities below.*

*13. For the forgoing reasons, this appeal stands allowed. The question of law is answered in favour of the assessee and against the Revenue. The order of the Tribunal to the extent of disallowing Cenvat credit to the appellant for the period after 31-3-2008 is quashed."*

*17. The Ministry of Finance (Department of Revenue) Central Board of Indirect Taxes and Customs, New Delhi,*

*has issued Circular dated 8-6-2018 and clarified the definition, Place of Removal. In Para 5 of the Circular, the Ministry has referred to the judgment in the case of CCE & ST v. Ultra Tech Cement Ltd. [Civil Appeal No. 11261 of 2016, dated 1-2-2018] [2018 (9) G.S.T.L. 337 (S.C.)] and stated that, in that case, the Apex Court has held that Cenvat credit on GTA Service from the place of removal to the buyer's premises is not admissible.*

*18. In the instant cases, the place of removal is buyer's premises Therefore, the authority in the case of Madras Cements Ltd., is applicable to the facts of this case and these appeals merit consideration. Hence, the following ORDER*

*(a) The questions of law framed by this Court in CEAS No. 56/2019 and 71/2019 are answered in favour of the assessee holding that the Tribunal's view is unsustainable in law,*

*(b) CEA No. 56/2019 is allowed and impugned order vide Final Order Nos. 21960-21962/2018, dated 31-12-2018 passed in Appeal Nos. E/21756/2017-SM, E/21757/2017-SM and E/21758/2017-SM are set aside, and*

*(c) CEA No. 71/2019 is allowed and impugned order vide Final Order No. 20224/2019, dated 27-2- 2019 passed in Appeal No. E/20302/2018-SM is set aside"*

**32.** *The interpretation of the judgment of the Supreme Court by the High Courts as above throws light on the controversy. The Rajasthan High Court in Mangalam Cements simply referred to the judgment of the Supreme Court without analyzing its applicability in the context of the case in denying the credit on GTA service. The Supreme Court set aside the said judgment and remanded the case to examine the facts in the light of the judgment. On the other hand, in the judgment of the Karnataka High Court in Bharat Fritz Werner, all aspects of the case have been*

*considered, including the Circular dated 08.06.2018 of the Board, and the judgments of Supreme Court in Emco Ltd. and Roofit Industries to conclude that the place of removal is the buyer's premises.*

**33.** *No evidence has been placed by either side that the said judgment of the Karnataka High Court has been challenged before the Supreme Court by the department.*

**34.** *In such circumstances, following the ratio laid down by the Larger Bench of the Tribunal in Collector of Central Excise, Chandigarh vs. Kashmir Conductors, it is the judgment of Karnataka High Court which would be binding on the Tribunal.*

**35.** *In the result, in a case where clearances of goods are against FOR contract basis, the authority needs to ascertain the 'place of removal' by applying the judgments of the Supreme Court in Emco and Roofit Industries, the decision of the Karnataka High Court in Bharat Fritz Werner, and the Circular dated 08.06.2018 of the Board to determine the admissibility of CENVAT credit on the GTA Service upto the place of removal."*

31. It is pertinent to note that the Jurisdictional High Court of Himachal Pradesh recently in the case of ***M/s Inox Air Products Pvt Ltd vs. CCE & ST in C.E.A. No. 2 of 2019 decided on 21.03.2024*** has considered this issue in details. The Hon'ble High Court has also considered all the decisions of the Hon'ble Supreme Court as well as of the various High Courts and has held in para 26 onwards as under:

**"26)** *It is not in dispute that for a manufacturer/consignor, the eligibility to avail credit of the service tax paid on the*

transportation during removal of excisable goods would depend upon the "place of removal" as per the definition contained of the said term in the Central Excise Act, 1944. Such place of removal is the place where the sales take place.

**27)** It is also not in dispute that in an F.O.R sale which the appellant was doing in the instant case, freight charges form part of assessable value, the ownership of goods remains with seller till delivery at customer's doorstep, seller bears risk of loss or damage to the goods during transit to the destination, and property in the goods is not transferred till delivery. So outward transportation qualifies as 'input service' and is eligible for CENVAT Credit.

**28)** The sale being of gases manufactured by the appellant, due to the peculiar nature, sale happens at the buyer's premises and admittedly such sale is on F.O.R basis.

**29)** In M/s Roofit Industries (Supra), the Supreme Court held:

"13. The principle of law, thus, is crystal clear. It is to be seen as to whether as to at what point of time sale is effected, namely, whether it is on factory gate or at a later point of time i.e. when the delivery of the goods is effected to the buyer at his premises. This aspect is to be seen in the light of the provisions of the Sale of Goods Act by applying the same to the facts of each case to determine as to when the ownership in the goods is transferred from the seller to the buyer. The charges which are to be added have put up to the stage of the transfer of that ownership inasmuch as once the ownership in goods stands transferred to the buyer, any expenditure incurred thereafter has to be on buyer's account and cannot be a component which would be included while ascertaining the valuation of the goods manufactured by the buyer. That is the plain meaning which has to be assigned to Section 4 read with the Valuation Rules.

14. In the present case, we find that most of the orders placed with the respondent assessee were by the various government authorities. One such order i.e. order dated 24-6-1996 placed by Kerala Water Authority is on record. On going through the terms and conditions of the said order, it becomes clear that the goods were to be delivered at the place of the buyer and it is only at that place where the acceptance of supplies was to be effected. Price of the goods was inclusive of cost of material, Central excise duty, loading, transportation, transit risk and unloading charges, etc. Even transit damage/breakage on the

assessee account which would clearly imply that till the goods reach the destination, ownership in the goods remain with the supplier, namely, the assessee. As per the "terms of payment" clause contained in the procurement order, 100% payment for the supplies was to be made by the purchaser after the receipt and verification of material. Thus, there was no money given earlier by the buyer to the assessee and the consideration was to pass on only after the receipt of the goods which was at the premises of the buyer. From the aforesaid, it would be manifest that the sale of goods did not take place at the factory gate of the assessee but at the place of the buyer on the delivery of the goods in question.

15. The clear intent of the aforesaid purchase order was to transfer the property in goods to the buyer at the premises of the buyer when the goods are delivered and by virtue of Section 19 of the Sale of Goods Act, the property in goods was transferred at that time only. **Section 19** reads as under:

"**19.** Property passes when intended to pass.—(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in Sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer."

**30)** This was reiterated in Emco case (supra).

**31)** The CBIC, in its circular dt. 8.6.2018 has considered these two decisions and also the decision in Ultra Tech cement (supra) and had specifically held (as set out in para 23 supra) that in the case of FOR destination sale 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.

**32)** This circular binds the respondents though it had been issued by the CBIC on 8.6.2018 after the decision was rendered in the instant case by the CESTAT on 27.2.2018.

**33)** In Ranadey Micronutrients etc. vs. Collector of Central Excise, the Supreme Court held that in view of Section 37B of

*the Central Excise & Salt Act, 1944, instructions issued by the Board in order to ensure uniform practice of assessment of excisable goods throughout the country get statutory status and significance, and they are binding on officers of the Central Excise Department.*

**34)** *Similar view was also taken by the Supreme Court in Commissioner of Customs, Calcutta and others vs M/s Indian Oil Corporation Ltd. & another, Commissioner Of Central Excise, Bolpur vs M/s Ratan Melting & Wire Industries.*

**35)** *We may also point out that the decisions of the Supreme Court in EMCO Ltd. (supra) and M/s Roofit Industries Ltd. (supra) which specifically dealt with FOR contract sales were not referred to or considered in Ultra Tech Cement Ltd. case (supra) and the said case was not a case of F.O.R contract.*

**36)** *Learned counsel for the respondent has also brought to our notice decision rendered in the very case of the appellant in M/s. Inox Air Products Limited vs. Commissioner of GST and Central Excise, by the Customs, Excise and Service Tax Appellate Tribunal, Chennai rendered on 22.02.2024, where a plea similar to that one raised by the appellant in the instant case was accepted by the Customs, Excise and Service Tax Appellate Tribunal, Chennai. In the said case, the Tribunal has also held that there is no dispute in the payment of service tax or in regard to the documents and the appellant need not to produce one-to-one co-relation and it has no need to establish nexus of the input services with manufacturing activity.*

**37)** *Reliance was also placed by the Tribunal on its Larger Bench decision in M/s Ramco Cements Limited vs. Commissioner of Central Excise, Puducherry dt. 21.12.2023, wherein the Larger Bench had held that the credit availed on outward transportation services is eligible when the freight charges are included in the taxable value.*

**38)** *Therefore, we hold on issues mentioned above that the Tribunal was not justified in holding that place of removal for the GTA Services provided under FOR sale contract is the manufacturer's premises and not the place where the goods are*

*sold; that the Tribunal was not justified in holding that the GTA services in the present case are being received beyond the place of removal and therefore not covered within the definition of Input Service under Rule 2(1) of CANVET Credit Rules, 2004.*

**39)** *Accordingly, the appeal is allowed and the impugned orders are set aside."*

32. Since the issue is no more *res interga* and has been settled by the jurisdictional High Court of Himachal Pradesh in the case of **M/s Inox Air Products Pvt Ltd** (supra) as well as by the Larger Bench of the Tribunal in the case of **M/s The Ramco Cements Limited** (surpa), therefore, by following the ratios of the above cited decisions, I am of the considered opinion that the view taken by the Member (Judicial) is correct in law and hence, I hold that when the sale is FOR and the outward freight charges are included in the assessable value then, the appellant are entitled to claim the refund of the central excise duty paid by them on the element of freight.

33. Now the matter be placed before the Regular Division Bench for majority order.

**(S. S. GARG)**  
**MEMBER (JUDICIAL)**

**MAJORITY ORDER**

34. Considering the facts and circumstances of the case and after following the ratios of the law laid down by the Larger Bench of the Tribunal in the case of ***M/s The Ramco Cements Limited*** (supra) and the decision of Hon'ble High Court of Himachal Pradesh in the case of ***M/s Inox Air Products Pvt Ltd*** (supra), we are of the considered view that the impugned orders denying the refund of the excise duty paid by the appellant on transportation of the goods up to the buyer's premises are not sustainable in law and hence, we set aside the same by allowing all the appeals of the appellant with consequential relief, if any, as per law.

(Final order pronounced in the court on 30.04.2024)

**(S. S. GARG)**  
**MEMBER (JUDICIAL)**

**(P. ANJANI KUMAR)**  
**MEMBER (TECHNICAL)**