

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

Excise Appeal No. 52870 of 2019

(Arising out of Order-in-Appeal No. 765-CRM-CE-JDR-2019 dated 28.08.2019
passed by Commissioner (Appeals), Jodhpur)

M/s. Shri Krishna Detchem (Pvt.) Ltd.

.....Appellant

Plot No. E-1-154, RIICO Industrial Area,
Ajoliya Ka Khera Tehsil, Gangrar
Chittorgarh (Raj.)

Versus

Commissioner

.....Respondent

Central Goods & Service Tax Commissionerate
142-b, Hiran Magri, Sector-11,
Udaipur (Raj.)

APPEARANCE:

Shri Hemand Bajaj, Ms. Sukriti Das and Shri Vaidyanathan, Advocates for the
Appellant

Shri O.P. Bisht, Authorised Representative for the Respondent

**CORAM : HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

Date of Hearing and Decision : **October 14, 2020**

FINAL ORDER No.: 51628/2020

JUSTICE DILIP GUPTA

The appellant has challenged the order dated August 28, 2019 passed by the Commissioner (Appeals), Jodhpur¹ dismissing the appeal that was filed by the appellant to assail the order dated February 27, 2019 passed by the Assistant Commissioner, Chittorgarh.

1 the Commissioner (Appeals)

2. The appellant claims that during the period of dispute i.e. from April, 2013 to June, 2017, all the sales of the appellant were on ex-works basis, which fact was duly indicated in the invoices. However, for some of the buyers the appellant was arranging transportation from the factory to the premises of the buyers on behalf of the buyers and in such cases freight was paid by the appellant but recovered from the buyers. According to the appellant, the freight was also separately mentioned in the invoices. The appellant paid duty on the assessable value without including the value of freight, as according to the appellant, freight was incurred beyond the place of removal which is the factory gate of the appellant.

3. The Department, however, believed that the premises of the buyers' would be the place of removal and, therefore, the freight paid for delivery of goods at such place of removal would be includable in the assessable value.

4. Accordingly, a show cause notice dated February 12, 2018 was issued to the appellant proposing a demand of central excise duty alleging that the freight separately charged on the invoices is includable in the assessable value. The appellant filed a reply to the show cause notice. The Assistant Commissioner, however, by the order dated February 27, 2019 confirmed the demand under section 11A(4) of the Central Excise Act, 1944² with interest under section 11AA and penalty under section 11AC of the Excise Act.

² the Excise Act

5. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals), who by order dated August 28, 2019 dismissed the appeal. The observations made by the Commissioner (Appeals) in the order are as follows:

- (i) The buyer recovered amount of shortages from the appellant, if found at the time of delivery and insurance expenses of goods in transit were also incurred by the appellant. Therefore, the title of goods remained with the appellant till the delivery of goods at the doorsteps of the buyer;
- (ii) The appellant made supply of Acid Slurry to buyers on FOR delivery basis. There is nothing in the invoices to suggest that prices contracted were ex works prices. The appellant admitted that transit risk insurance was taken to cover the transit risk of goods;
- (iii) The title of the goods is transferred to the buyer only when the buyer receives the goods and ownership lies with appellant till the destination;
- (iv) Reliance has been placed on **Commissioner of Customs & Central Excise, Aurangabad Vs. Roofit Industries Ltd.**³ and the **Circular** dated June 8, 2018 that states that place of removal is the buyer's premises when possession of goods passes from the appellant; and
- (v) Non-inclusion of freight charges in the assessable value was nothing but suppression of

facts and, therefore, the extended period of limitation is invokable and penalty is impossible.

6. It is against this order of the Commissioner (Appeals) that the present appeal has been filed.

7. Shri Hemant Bajaj learned Counsel appearing for the appellant made the following submissions:

- (i) Sale took place at the factory gate of the appellant, which would be the 'place of removal;
- (ii) The premises of the buyer can never be 'place of removal'. It is merely the 'place of delivery' in view of the decision of the Supreme Court in **Commissioner of Cus. & C.Ex., Nagpur Vs. Ispat Industries Ltd.**⁴, wherein it has been categorically held that the buyer's premises can never be the place of removal. Thus, the freight amount charged separately in invoices, is not includible in the assessable value for the payment of excise duty;
- (iii) The Commissioner (Appeals) placed reliance on the decision of the Supreme Court in **Roofit Industries Ltd. Vs. CCE**⁵, but this decision was considered and distinguished by the Supreme Court in **Ispat Industries**;
- (iv) Reliance has also been placed on the following decisions of the Tribunal on the issue that freight charges are not includible in assessable value for ex-works sales :

⁴ 2015 (324) ELT 670 (SC)
⁵ 2015(319) ELT 221 (SC)

- (a) **Commissioner of GST & Central Excise, Jaipur Vs. M/s Dynamic Cables Pvt. Ltd.**⁶
- (b) **M/s Sharda Ceramics Pvt. Ltd. Vs. Commissioner of Central Excise, Jodhpur**⁷
- (c) **Commissioner of GST & Central Excise, Jaipur Vs. M/s Tirupati Plastomatics Pvt. Ltd.**⁸
- (d) **Bikaner Ceramics Pvt. Ltd. Vs. CCE & CGST, Jodhpur-I**⁹
- (e) **Prakash Packaging Vs. CCE & ST, Bhopal**¹⁰
- (f) **Contimeter & Electrical Vs. CCE, New Delhi-1**¹¹

(v) Payment of transit insurance by the appellant and payment of charges for goods lost in transit is not an important factor to determine the 'place of removal' in view of the **Circular** dated October 20, 2014 issued by the Central Board of Excise & Customs;

(vi) The demand is partially barred by limitation; and

(vii) The penalty is not imposable nor interest is recoverable.

8. Shri O.P. Bisht, learned Authorized Representative of the Department has, however, supported the impugned order and made the following submissions:

6 2019 (7) TMI 783-CESTAT-New Delhi
 7 2018 (8) TMI 732-CESTAT-New Delhi
 8 2018 (8) TMI 1784-CESTAT-New Delhi
 9 Final Order No. 52856-52858/2018 dated 10.8.2018
 10 2018 (2) TMI 909-CESTAT-New Delhi
 11 2018 (9) GSTL 382 (Tri.-Delhi)

- (i) The arrangement between the appellant and the buyer would suggest that the delivery of the goods were FOR on destination basis and the appellant has also taken transit insurance to cover the transit risk. Thus, as the goods were not cleared for sale at factory gate, the value of goods was required to be determined in accordance with section 4(1)(b) of the Excise Act;
- (ii) The cost of transportation from the factory to the place of removal (which is the buyer's place) shall not be excluded for the purpose of determining the value of excisable goods. This issue has been settled by the Supreme Court in **M/s Roofit Industries Ltd.;**
- (iii) The decision of the Supreme court in **Escorts JCB** and **Ispat Industries** relied upon by the appellant would not be applicable to the facts of the present case since in that case goods were sold at factory gate, whereas in the present case the goods have been sold on FOR destination basis at the door step of the buyer; and
- (iv) The Central Board of Indirect Taxes and Customs, New Delhi has also clarified by a Circular dated June 8, 2018 that the principles laid down by the Supreme Court in **Ispat Industries** would not apply in a case where the contract for sale is on FOR basis.

9. The submissions advanced by learned Counsel for the appellant and the learned Authorized Representative of the Department have been considered.

10. The issue that arises for consideration in this appeal is as to whether, in the facts and circumstances of the present case, the value of freight charges should be included in the assessable value of the final product.

11. It is not in dispute that for some of the buyers, the appellant had been arranging transportation from the factory gate to the premises of the buyer. According to the appellant, the transportation was undertaken on behalf of the buyers and the freight charges were not only separately indicated in invoices but were also recovered from the buyer. It is for this reason that the appellant contends that no duty was required to be paid on the freight value.

12. The Commissioner, however, found that the buyer could recover the amount for any shortage found at the time of delivery from the appellant and insurance expenses to cover the goods in transit were also borne by the appellant. The Commissioner also found that invoices did not suggest that the price contracted was ex-works price. Thus, according to the Commissioner, the title of the goods were transferred to the buyer only when the buyer received the goods and the ownership of the goods was with the appellant till they reached the destination. In arriving at such a conclusion, the Commissioner (Appeals) placed reliance upon the decision of the Supreme Court in **Roofit Industries Ltd.**

13. The place of removal has been defined in section 4(3) of the Excise Act as follows:

"4(3)(c) "place of removal" means-

- (i) a factory or any other place of premises of production or manufacturing of the excisable goods;
- (ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;
- (iii) a depot, 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;
from where such goods are removed;"

14. According to the appellant, the goods were sold to the buyer at the factory gate and were thereafter delivered to the buyer at his premises and, therefore, the factory gate would be "place of removal". It is for this reason that duty was to be paid on the price of the goods at the factory gate.

15. This contention of the appellant has force. The sale invoices raised by the appellant clearly mentioned at serial number 4 that "our responsibility ceases when goods leave factory". Rule 5 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 also provides that the cost of transportation from the place of removal to the place of delivery is not includable in the assessable value. The cost of transportation has also been separately mentioned in invoices and this cost is paid by the buyer. It is, therefore, evident that the factory gate is the place of removal and duty is charged at the price of the goods charged at the factory gate. Merely, because the payment of transit insurance has been made by the appellant would not mean that the place of removal would be the place of the buyer. The Central

Board of Excise and Customs in the Circular dated October 20, 2014 also clarified as follows:

"(6) It is reiterated that the place of removal needs to be ascertained in term of provisions of Central Excise Act, 1944 read with provisions of the Sale of Goods Act, 1930. **Payment of transport, inclusion of transport charges in value, payment of insurance or who bears the risk are not the relevant considerations to ascertain the place of removal.** The place where sale has taken place or when the property in goods passes from the seller to the buyer is the relevant consideration to determine the place of removal."

(emphasis supplied)

16. Thus, the payment of transit insurance by the appellant is not a decisive factor for determining the place of removal.

17. The Supreme Court in **Ispat Industries Ltd.** considered this situation in detail. According to the Department, the said Industry evaded Central Excise duty by mis-declaring that the factory gate was the place of removal and not the buyer's premises and, consequently, the freight charges were required to be added in determining the assessable value. The Commissioner held that the premises of the customer was actually the place of removal and not the factory gate of the Industry. The Tribunal, however, by decision dated July 24, 2006, reversed the order of the Commissioner in view of the decision of the Supreme Court in **M/s Escorts JCB Ltd. vs CCE, Delhi**¹² and the Circular dated March 3, 2003 issued by the Board, which acknowledged that the question of ownership of goods in transit cannot be determined solely with reference to the insurance policy taken out by the manufacturer. The Supreme Court examined the provisions of section 4 of the Excise Act and observed as follows:

¹² 2002 (146) ELT 31(SC)

"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 is clear, therefore, that as a matter of law with effect from the Amendment Act of 28.9.1996, 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."

(emphasis supplied)

18. The Supreme Court also considered its earlier decision in **Roofit Industries** and observed as follows:

"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.

33. 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 Roofit 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 Roofit Industries case."

19. The Commissioner relied on the decision of the Supreme Court **Roofit Industries** but as noticed above, the Supreme Court in the subsequent decision in **Ispat Industries** distinguished this decision on facts. The decision of the Supreme Court in **Ispat Industries** would clearly apply to the facts of the present case since it is clearly a case where the price was on "ex-works" basis, like in **Escorts JBC**.

20. The decision of the Supreme Court in **Ispat Industries** has been followed by the Tribunal in :

- a) **Dynamic Cables Pvt. Ltd.**
- b) **Sharda Ceramics Pvt. Ltd.**
- c) **Tirupati Plastomatics Pvt. Ltd.**
- d) **Bikaner Ceramics**
- e) **Prakash Packaging**
- f) **Contimeter & Electrical**

21. In regard to the payment made by the appellant to the buyer for any transit loss, the appellant has submitted that such charges were paid only in cases where the transit loss was more than 30 kg and even these cases, the charges were recovered from the transporters.

22. In this view of the matter, the Commissioner (Appeals) was not justified in holding that the value of freight charges was required to be added in the assessable value of the goods.

23. The Order of the Commissioner (Appeals), therefore, cannot be sustained and is set aside. The appeal is, accordingly, **allowed.**

(Order pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.L. MAHAR)
MEMBER (TECHNICAL)

Babita