CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Excise Appeal No. 52545 of 2018 [DB]

[Arising out of Order-in-Appeal No. BHO-EXCUS-002-APP-090-17-18 dated 24.04.2018 passed by the Commissioner (Appeals) CGST & Central Excise, Raipur]

Principal Commissioner
CGST & Central Excise
GST Bhawan, Tikrapara,
Raipur(C.G.) **...Appellant**

Vs.

M/s Unique Structures & Towers Ltd.
(TLT Division), Plot No. 268 & 306
Urla Industrial Area,
Birgaon,
Raipur (C.G.) **...Respondent**

APPEARANCE:

Shri R.K. Mishra, Authorised Representative (AR) for the Appellant
Shri Manish Saharan, Advocate for the Respondent

Coram: HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING : 04.07.2019
PRONOUNCED ON : 24.09.2019

FINAL ORDER No. 51254/2019

RACHNA GUPTA

Present appeal has been preferred by the department against the Order-in-Appeal No. 002-APP-090 dated 24.04.2018 passed by Commissioner (Appeals) allowing the appeal of the assessee/respondent herein.

2. The relevant facts of this appeal are as follows:

Respondent, M/s Unique Structure and Towers Ltd., is engaged in manufacture of fabricated and galvanized tower parts. During the course of audit some discrepancies as far as the valuation of the goods by the respondent-assessee are concerned were noticed. On perusal of Purchase Order, it was observed that the assessee had to supply 132 KV Tower with accessories & complete erection to M/s Madhya Pradesh Power Transmission Company. The price of said tower is inclusive of packing and freight charges for delivery at the stores to be set up by the assessee at the site, in addition to all costs relating to fabrication/galvanisation. Department formed an opinion that the ownership of goods remains with the assessee respondent till the delivery of the goods i.e till the stores at the site. Hence, the charges pertaining to transportation of goods to the said stores should have been included in the transaction value. Accordingly, they alleged that Central Excise duty has been short paid to an extent of Rs. 50,87,123/- during the period 2012-13 to 2016-17 (June, 2016). As a result, a show cause notice bearing No. 12554 dated 16.08.2010 was served upon the respondent proposing the recovery of said short paid amount of excise duty along with the interest at the appropriate rate and the proportionate penalties. The said proposal was confirmed vide the Order-in-Original bearing No. 03/2017 dated 31.08.2017. Being aggrieved an appeal was preferred before Commissioner (Appeals) which has been allowed vide the order-under-challenge (as mentioned above) holding that freight/transportation charges have not to be included in the transaction value of the assessee’s final product cleared during the relevant period. Being aggrieved the department is before this Tribunal.

3. We have heard Shri R.K. Mishra, learned D.R. for the department and Mr. Manish Sahran, learned Advocate for the respondent assessee.

4. It is submitted on behalf of the department that as per Purchase Order, the delivery of final product is on FOR basis and the place of delivery is other than the factory gate. It is also impressed upon that as per the terms and conditions laid down in the Purchase Order, the ownership of goods gets transferred to the buyers at the site stores set up by the assessee though in buyer premises. Thus, in terms of Section 4(1) (a) of the Act, read with Rule 7 of Central Excise Valuation (Determination of Price of Goods) Rules, 2000 the duty, accordingly, has been short paid. The show cause notice was rightly served proposing the liability of the assessee-respondent about payment of the short paid duty of excise along with interest and the penalty which was rightly confirmed by the original adjudicating authority. Justifying the order-in-original, learned D.R. has submitted that the Purchase Orders were duly examined at the investigation stage. In furtherance whereof buyer was to make the payment only after a certification by its Engineer that the consignment of final products/tower parts have duly been received in the assessee/respondents' stores at the buyers' sites and properly stocked. It was thereafter only that the final product had to be erected in complete shape at the buyer's premises. It was also

impressed upon that even the transaction insurance expenses were to be borne by the assessee-respondent himself. Finally, submitting that since the sale of goods in the present case got completed at the said store in buyer premises that the transportation charges from the respondent's factory to the said store had to be included in the assessable /transaction value of the impugned towers.

5. It is submitted that the adjudicating authority below has committed an error while submitting that there is no valid ground in the impugned show cause notice for suggesting inclusion of freight / transportation charges. Finally, impressing upon that the decision of Hon'ble Supreme Court in the case of **Commissioner of Customs, Aurangabad Vs. Roofit Industries Ltd. reported as 2015 (319) E.L.T.221 (Supreme Court)** and that it has wrongly been distinguished from another decision of Hon'ble Supreme Court in the case titled as **Commissioner of Customs, Nagpur Vs. Ispat Industries Ltd. reported as 2015 (324) E.L.T 670 (Supreme Court)** that the order-under-challenge is prayed to be set aside and the appeal is prayed to be allowed.

. 6. While rebutting these arguments, it is impressed upon that Purchase Orders based whereupon the impugned show cause notice has been issued, clearly shows that rate of basic price and rate of delivery i.e. rate/transportation charges have been separately negotiated and found separately reflected in the relevant purchase order. Also the amount so recovered on account of transportation charges was paid to the transporter concerned.The said amount has to be excluded from the transaction value as has been settled by the Hon'ble Apex Court in the case of Ispat Industries Ltd (Supra).

The impugned order-under-challenge, therefore, has no infirmity the transportation charges have rightly been excluded from the transaction value. The appeal is accordingly prayed to be dismissed.

7. After considering the rival contentions of the parties, perusing the entire record of the impugned appeals, we observe that the sole question to be adjudicated is here, is :

Whether the freight charges shall be included in the transaction value in the given facts and circumstances?

The admitted facts of the present case are that the goods herein/the towers in CKD condition were to be delivered at assessee's own site stores at the place of the buyer and it is only at that place that the acceptance of supplies was to be affected that too on the certification by the engineer of the buyer about the consignment of tower parts to have been duly received to the satisfaction of the buyer in the assessee's stores at the site at buyer's place.

Admittedly, the buyer/customer has paid the freight charges and even for the transit risk & department has included those charges in the transaction value. The original adjudicating authority had confirmed the demand holding the proposal as correct. However, Commissioner (Appeals) has set aside the order based upon the decision of Hon'ble Apex Court in the case titled as **Ispat Industries Ltd. (Supra)** holding that the amount qua transit risk and transportation cannot be included in the transaction value.

8. To adjudicate the afore-framed issue in the light of the above mentioned facts, we foremost need to have a glance on the relevant provisions. Section 4 of Central Excise Act, 1944, reads as follows:

1. Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall.
    a. in a case where the **goods are sold** by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sold consideration for the sale, be the transaction value;
    b. in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

Explanation
For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.

2...................

3. **For the purpose of this Section**, -
    a. ....
    b. ....

<u>(c)</u> "place of removal" means —

<u>(i)</u> a factory or any other place or premises of production or manufacture of the excisable goods;
<u>(ii)</u> 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;
[(cc) "time of removal", in respect of the excisable goods removed from the place of removal referred to in sub-clause (iii) of clause (c), **shall be deemed to be the time at which such goods are cleared from the factory;]**

<u>(d)</u> "**transaction value**" **means the** price **actually paid or payable** for the goods**, when sold**, **and includes** in addition to the amount charged as price, **any amount that the buyer is liable to pay to, or on behalf**

> **of, the assessee, by reason of, or in connection with the sale**, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, **outward handling,** servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.].

Clause (c) in above definition makes it clear that place of removal is either the place of production/manufacture or it is the place where goods are kept after clearance from factory (without payment of duty) but before sale thereof.

Clause (d) above makes it clear that the outward handling charges are includable in transaction value if those are paid by the buyer on behalf of assessee-manufacturer i.e. paid at the stage when property in goods was still with assessee

9. Section 4 has, however, undergone several amendments since 1973, hence, the evolution thereof is also necessary to be looked into for the purpose.

(i) Section 4, as it stood before 1973 :

> "Section 4. Where under this Act, any article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be—
>
> (a) **the wholesale cash price for which an article** of the like kind and quality **is sold** or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production, or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists, or
>
> (b) where such price is not ascertainable, the price at which an article of the like kind and quality is sold or is capable of being sold by the manufacturer or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or other premises for delivery at the place of manufacture or production, or if such article is not sold or is not capable of being sold at such place, at any other place nearest thereto.
>
> Explanation.—In determining the price of any article under this section, no abatement or deduction shall be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other "premises aforesaid."

(ii) By an amendment Act of 1973, which came into force on 1.10.1975, read as follows:-

> "Section 4. Valuation of excisable goods for purposes of charging of duty of excise. – (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value, shall, subject to the other provisions of this section, be deemed to be –
>
> a) **The normal price thereof, that is to say, the price at which such goods are ordinarily sold** by the assessee to a buyer in the course of wholesale trade **for delivery at the time and place of removal**, where the buyer is not a related person and the price is the sole consideration for the sale:
>
> Provided that –
>
> i) Where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause
>
> (a), be deemed to be the normal price of such goods in relation to each such class of buyers;
>
> ii) Where **such goods are sold** by the assessee in the course of wholesale trade for delivery **at the time and place of removal** at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, **in relation to the goods so sold**, be deemed to be the normal price thereof;
>
> iii) Where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons), who sell such goods in retail;
>
> b) Where the normal price of such goods is not ascertainable for the reason, that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.
>
> (2) **Where**, in relation to any excisable goods the **price thereof for delivery at the place of removal is not known** and the value thereof is determined with reference to the price for delivery **at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price**.
>
> (3) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of <u>section 3</u>.
>
> (4) For the purposes of this section, -
>
> (a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;
>
> (b) "place of removal" means –

(i) a factory or any other place or premises of production or manufacture of the excisable goods; or

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, from **where such goods are removed."**

Clause (2) above makes it clear that if the cost of transportation/delivery is paid at a place other than place of removal, the transaction value shall exclude the said transportation charges. The Hon'ble Supreme Court in Para 14 of Ispat case (Supra) has observed that in para 39 of Govt. of India Vs. Madras Rubber Factory Ltd. (1995) 4SCC 349 – Cost of transportation from factory gate to the place of removal not forming part of excise duty was conceded by the Revenue.

The Section 4 again suffered amendment in 1996 w.e.f 28.09.1996 vide which new Sub-Section (ia) was added to Section 4 (1) which reads as follows:

"(ia) Where the price at which such goods are ordinarily sold by the assessee is different for different places of removal, each such price shall, subject to the existence of other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such place of removal;" Also, for the first time, "the place of removal" had one more category added to it. Section 4(4)(b)(iii) and 4(4)(ba) state as follows:-

"(4)(b)(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 and, "(4)(ba) "time of removal", in respect of goods removed from the place of removal referred to in sub-clause (iii) of clause

(b), shall be deemed to be the time at which such goods are cleared from the factory;"

The Hon'ble Supreme Court in Ispat case (Supra) in para 17 thereof has held 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. Thus thought the law of land as established in **Ispat** case (supra) is that expression, "any other place or premises" has reference only to a manufacturer's place or premises but, simultaneously it has been held that the place or premises from where the excisable goods are to be sold are the manufacturer's premises.

(iv) Finally, an amendment in Section 4 came into effect on 01.07.2000 as already quoted above.

10. These amendment since 1973 to year 2000 makes following things clear:

(i) Initially, the assessable value was the whole sale cash price for which an article is sold.

Subsequently, the concept of whole sale cash price was taken over with the concept of normal price at which the goods are ordinarily sold for delivery at the time and place of removal.

Finally, to the concept of transaction value i.e. the price actually paid or payable for the goods when sold.

(ii) Irrespective of these changes the common criteria for ascertaining the assessable value for the purposes of excise is the value at the time when the goods are sold.

11. At this stage it becomes important to first know as to when the goods are said to be sold or as to when the sale stands completed. The answer lies in Sale of Goods Act 1874. Section 4 thereof defines sale of goods to mean transfer of ownership i.e. transfer of property in goods to the buyer for a price. Section 5 of the Act further specifies that a contract of sale is made by an offer

to buy or sell goods for a price and the acceptance of such offers. The contract may provide the immediate delivery of the goods or immediate payment of the price or both or for the delivery or payment by instalment or that the delivery or payment or both shall be postponed.

12. Further, Section 19 to 24 of the Sale of Goods Act clarifies as to when property in goods passes to the buyer, as is apparent from the following:

Section 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.

Section 20

Specific goods in a deliverable state –

> Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed.

Section 21

Specific goods to be put into a deliverable state –

> Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

Section 22

Specific goods to be put into a deliverable state, when the seller has to do anything thereto in order to ascertain price –

> Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the

> price, the property does not pass until such act or thing is done and the buyer has notice thereof.

<u>Section 23</u>

Specific of uncertained goods and appropriation –

> (1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.
>
> (2) Delivery to carrier.--Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

<u>Section 24</u>

Goods sent on approval or "on sale or return" –

> When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer-
>
> (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
>
> (b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

13. Once the above discussed evolution of Sections 4 of Central Excise Act, 1944 is read conjointly with above quoted provisions of Sale of Goods Act, the clarity, to our opinion is as follows:

The amendment of 1973 clarifies that where sale is complete at the place of removal and the delivery charges either are not known at that time or are paid by the buyer subsequent to sale the delivery charges have to be excluded from the transaction value. However, in case the sale is not complete at the place of removal transaction value for purposes of accessing excise shall include the freight/transaction charges.

The amendment of the year 1996 also clarifies that transportation of goods to any place till the goods still belong to manufacturer, the amount of freight is includable for assessee the Excise duty. In such circumstance even the place of delivery can be the place of removal, however, in case the sale is complete before transportation of the goods, the place of removal will be the place of clearance and shall be different from the place of delivery the transportation thereto shall not be included in the transaction value for accessing the Excise duty.

14. Similarly, the definition of transaction value itself as got inserted after the amendment of the year 2000 makes it abundantly clear that if the freight is paid prior the sale of goods the outward charges for delivering the same are to be included in the assessable value. However, if freight is paid after the sale of goods, the same shall stand excluded. This definition clarifies that till the sale is not complete, any payment made by the buyer is the payment made on behalf of the manufacturer and that and the same will form the part of transaction value and excise duty shall be assessed accordingly.

We also observe that what is important for transaction value is amount at the time **goods are sold**. Keeping in view the same and the successive amendment in Section 4 as discussed about, we are of the opinion that triggering event for the purpose of ascertaining the transaction value/normal price/whole sale cash price is the sale of goods. Resultantly, the manufacturer’s place can be a place of mere clearance but place of removal since has a nexus with ascertaining the transaction value it cannot be the place meant merely for clearances rather it is the place where clearances are made at certain price to the buyer. It is also clear that Excise duty has not to be paid at the time of mere clearance which may be from the factory to its warehouse or depot or any other place where manufacturer still holds the control, it has to be paid when actually the property in goods is transferred to the buyer against a price agreed for the purpose. It is this place which is the place of removal and time thereof is the time of removal.

16. Another relevant provisions for the purpose of adjudication are Rule 5 and 7 of Central Excise of Valuation (Determination of Price of Excisable Goods) Rules, 2000 which came into force w.e.f. 01.07.2000 these reads as follows :

> Rule : 5
> **Where any excisable goods are sold** in the circumstances specified in clause (a) of sub-section (1) of section 4 of the Act except the circumstances in which the excisable goods are sold for delivery at a place other than the place of removal, **then the value of such excisable goods shall be deemed to be the transaction value, excluding the cost of transportation from the place of removal upto the place of delivery of such excisable goods.**
>
> Rule : 7
> **Where the excisable goods are not sold** by the assessee at the time and place of removal but are transferred to a depost, premises of a consignment agent or any other place or premises (hereinafter to as "such other place") from where the excisable goods are to be sold after their clearance from the place of removal and where the assessee and the buyer of the said goods are not related and the price is the sole consideration for the sale, **the value shall be the normal transaction value of such goods sold from such other place at or about the same time** and, where such goods are not sold at or about the same time, at the time nearest to the time of removal of goods under assessment.

17. No doubt Rule 5 talks about excluding the actual cost of transportation from the place of removal upto the place of the delivery of the excisable goods which otherwise is the finding of Supreme Court in Ultra Tech (Supra) case but the subsequent rider is sufficient to corroborate the above observations i.e. for excluding

the transportation charges, the cost thereof is charged to the buyer in addition to the price of goods and is shown separately in the invoice for such excisable goods. The word "in addition to" is used in reference to the Act of sale of goods. Thus it stands reiterated that when the sale of excisable goods is concluded and any amount in addition is charged towards transportation, since it is not the amount paid by the buyer on behalf of assessee, the same shall be excluded from the transaction value. Rule 7 clarifies the situation where excisable goods are not sold i.e it talks about of the clearance of goods from the place of production to a captive place as that of depot or warehouse. Since, during this stage the buyer is not in picture nor the sale is, the question of inclusion or exclusion of the transportation charges from the place of production to the place of captivity has no meaning. It further reiterates that the place of production or captivity will become the place of removal only and only when sale takes place at that particular place. This situation stands corroborated from Section 4(ia) as inserted in 1996 w.e.f. 28.09.1996 i.e. different places of removal may have a different price and the value relevant for assessing excise duty of such goods shall be the value in relation to each such place of removal.

18. The Hon'ble Apex Court in the case of **Union of India Vs. Bombay Tyre International Ltd.** reported as 1984 (1) SCC 467, subsequently, in the case of **Government of India Vs. Madras Rubber Factory Ltd**. (1995) 4 SCC 349 and recently in the case of **VIP Industries Ltd. Vs. Commissioner of Customs & Central Excise** reported as (2003) 5 SCC 507 has adjudicated the issue,

"whether in cases where manufacturer includes equalised freight in the price of the goods and sells the goods all over the country at a uniform price, the department is entitled to compute value by including the cost of transportation."

It was held and reiterated in another decision titled as **Escort JCB Ltd. Vs. CCE** reported in 2002 (146) ELT 31 Supreme Court, that normal price is the price at the 'time of delivery' and 'at the place of removal'. It is held:

> *Before the amendment, the place of removal was only the factory or any other place or premises where the excisable goods were produced or manufactured or a warehouse or any other place or premises where any excisable goods have been permitted to be deposited without payment of duty. Thus, the price would be the price at that place. By the amendment proviso (ia) to Section 4(1)(a) has been added. Under Section 4(1)(a)(ia) where the price of the goods is different for different places of removal, each such price was deemed to be the normal price of such goods in relation to "such place of removal". Thus, if the place of removal was the factory, then the price would be the normal price at the factory. If the place of removal was some other place like a depot or the premises of a consignment agent and the price was different then that different price would be the price. It is because the newly added proviso (i-a) to Section 4(1)(a) was now providing for different prices at different places of removal that the definition of the term "place of removal" had to be enlarged. Thus the amendment was not negativing the judgments of this Court.* ***If that had been the intention it would have been specifically provided that even where price was the same/uniform all over the country, the cost of transportation was to be added***

19. Reverting to the facts of present case, as apparent from the Purchase Order issued by MPPTC Ltd. the price of 132 KV towers is:

(i) Inclusive of packing & freight charges;

(ii) Includes all costs relating to fabrication, galvanization and delivery at Stores (to be set up by the assessee-respondent).

(iii) Includes works relating to fabrication, galvanizing, delivery ex-contractors stores.

(iv) Appellant had to arrange, secure & maintain insurance as necessary for all such amounts to protect interest of the supplier and interest of the purchaser, against all the risk.

(v) The costs on account of insurance liability covered under the contract will be on contractor's account and the same is deemed to be included in the contract price.

(vi) The payment would be made on certification by the engineer that the consignment of Tower parts has been duly received in the assessee's stores at the site.

These facts clarify two things peculiar to the present case i.e.

1. In view of Section 22 & 24 of Sale of Goods Act and also in view of above interpretation arrived by us about the meaning of place of removal & transaction value, the sale of the tower gets completed only at the assessee's store at buyers site. Thus, the property in the impugned goods (tower) passed on from assessee to the buyer only at the store at site.

2. Store at site, though is not the factory gate but is actually the place of manufacturer irrespective store was created at buyer's site as stands clear from Section 4 (c)(iii) as was inserted w.e.f. 14.05.2003 and reads as follows :

(iii) Place of removal means a depot, premises of consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from factory.

These two peculiar facts and the provision as above make it abundantly clear that the sale in the present case gets completed only at stores at site. Thus, the transportation / freight charges in the present case though were agreed to be paid by the buyer but these were on behalf of the assessee itself. Hence, there remains no doubt that these charges shall form the part of transaction value as per Section 4 (3)(d) of the Central Excise Act, 1944 (as discussed/interpreted above).

20. Now coming to the various case of law decisions of Supreme Court, as cited by both the parties, we are of the firm opinion that there is no apparent contradiction as impressed upon by the parties among these decisions as far as the place of removal is concerned. The opinion formed herein is absolutely in line with the law laid down in those decisions. We try to clarify the same in the following discussions :

(1) Ispat Industries case 2015 (324) E.L.T. 670 S.C : In this case a show cause notice was issued to the assessee/ Ispat Ltd. alleging that the property in goods manufactured by assessee remained with them while the goods were in transit as Ispat had taken up an insurance policy to cover the risk of loss or damage to the goods while in transit.

The original adjudicating authority confirmed the demand holding that since Ispat had taken out an insurance policy to cover the risk to the loss or damage of the goods while in transit, the property in goods remained with Ispat and was not transferred to the buyer at the factory gate. The decision was set aside by the Tribunal holding that the question of ownership of goods in transit cannot be determined solely with reference to an insurance policy taken out by the manufacturer.

The Hon'ble Apex Court in an appeal of the department against the said decision of Tribunal held that as a matter of law w.e.f Amendment Act of 28.09.1996, the **place of removal only has a reference only to places from which manufacturer is to sell goods** manufactured by him and can in no circumstance has the reference to the place of delivery which may, on facts, be the buyer's premises. Relying upon the case of Bombay Tyre International Ltd. [1984(1)SCC 467 SC], it was held that the cost of transportation will include the cost of insurance on the freight for transportations of goods from the factory gate to the place or places of delivery.

These findings to our opinion were only in reference to the context of the fact that once the goods have been sold at the factory gate with an agreement to have the payment after 30 days of the delivery, the amount of insurance risk as borne by the transporter is the part of the transportation charges. Hon'ble Apex Court after observing that the delivery of the goods in this case since was post sale, the value paid for transportation, including the value for insurance cannot be the part of transaction value.

(2) Commissioner of Customs, Aurangabad Vs. Roofit 2015 (319(E.L.T 221(SC) : In this case the assessee had received the work orders from various government authorities and private contractors. He entered into the agreements with them for designing, manufacturing, laying, jointing and testing of PSE pipes of specified sizes. The department served him a show cause notice alleging that from these agreements since assessee was delivering the finished goods from the place of removal other than the factory gate and that no sale of goods took place till the goods reached the test of the projects, the value of transportation from the factory to the testing site was the assessee's liability. The same was accordingly proposed to be recovered. The original adjudicating authority confirmed the demand on the ground that place of removal of finished goods was the buyer's premises and not the factory gate. The appeal thereof, however, was allowed by this Tribunal relying upon the decision of Escorts JCB Ltd. Vs. Commissioner of Central Excise (Supra).

Being aggrieved the department approach, the Hon'ble Apex Court. It was held that it is to be seen as to whether and 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.

It was observed by the Hon'ble Apex case in that case that as per the terms of payment clause in procurement order therein, 100% payment for the supplies was to be made by the purchaser after the receipt and verification of material. Since the consideration was to pass on only after the receipt of goods which was at the premises of buyer, it would be manifest that sale of goods did not take place at factory gate of the assessee but at the place of buyer on the delivery of goods in question by virtue of Section 19 of Sale of Goods Act, 1930 (as reproduced above). The appeal was accordingly allowed.

(3) Commissioner of Central Excise and S.T Vs. Ultra Tech Cement Ltd. [2018(19) GSTL 337(SC)] :

The assessee in this case was involved in packing and clearing/forwarding of cement. He was observed to avail cenvat credit of service tax paid on outward transportation of goods through a transport agency from their premises to the customer premises. Department, forming an opinion that the transport agency service used by the assessee for transportation of their product from their premises to customer premises cannot be considered to have been used directly or indirectly in relation to clearance of goods from the factory that is the place of removal in terms of Rule 2(1) of Cenvat Credit Rules, 2004, served a show cause notice alleging that assessee cannot avail the cenvat credit on the transportation charges not being the input service.

The original adjudicating authority confirmed the demand holding that once the final products are cleared from factory premises, extending credit beyond the point of clearance of final product is not permissible under Cenvat Credit Rules, as the post clearance use of service in transport of manufactured goods cannot be the input service for the manufacturer of the final product.

Commissioner (Appeal), however, allowed the appeal of the assessee holding him eligible for availment of service tax paid on GTA service on the outward freight from the factory to the customer premises.

Appeal of Revenue was rejected by this Tribunal, further appeal to High Court was also dismissed.

In appeal by the department, Hon'ble Supreme Court restored the order-in-original ordering reversal of cenvat credit on the ground that the outward freight is not in input service, it was held by the Hon'ble Apex Court as :

> It may be relevant to point out here that the original definition of 'input service' contained in Rule 2(l) of the Rules, 2004 used the expression 'from the place of removal'. As per the said definition, service used by the manufacturer of clearance of final products 'from the place of removal' to the warehouse or customer's place etc., was exigible for Cenvat Credit. This stands finally decided in Civil Appeal No. 11710 of 2016 (Commissioner of Central Excise Belgaum v. M/s. Vasavadatta Cements Ltd.) vide judgment dated January 17, 2018. However, vide amendment carried out in the aforesaid Rules in the year 2008, which became effective from March 1, 2008, the word 'from' is replaced by the word 'upto'. Thus, it is only 'upto the place of removal' that service is treated as input service. This amendment has changed the entire scenario. The benefit which was admissible even beyond the place of removal now gets terminated at the place of removal and doors to the cenvat credit of input tax paid gets closed at that place. This credit cannot travel therefrom. It becomes clear from the bare reading of this amended Rule, which applies to the period in question that the Goods Transport Agency service used for the purpose of outward transportation of goods, i.e. from the factory to customer's premises, isnot covered within the ambit of Rule 2(l)(i) of Rules, 2004. Whereas the word 'from' is the indicator of starting point, the expression 'upto' signifies the terminating point, putting an end to the transport journey.

Thus, the limited scope of this decision was as to whether the service tax paid on GTA service on the outward freight from the place of removal to the customer premises was eligible input service or not. There seems no difference of opinion about the place of removal to mean a place where the property in goods stands transferred to the buyer. .

21. In view of entire above discussion, we are of the firm opinion that factory gate or any other place as mentioned in Section 4 of CEA, 1944 (as quoted above) from where the manufacturer sells its goods is the place of removal. Any transportation charges if paid for delivery of goods till the place of removal other than factory i.e. warehouse, depot or any other such place from where the excisable goods are actually sold, are to be included in the transaction value for the purposes of assessing the excise duty because till the property in goods is not passed on to the buyer any payment made by him shall be the payment made on behalf of the assessee and as per the definition of transaction value the said payment shall be includible. However, the delivery charges when paid by the buyer after the sale is completed and the property in the purchased goods has already vested in him, since the same is no more the payment by the buyer on behalf of assessee, the same cannot form the part of transaction value for the purposes of assessing excise duty. Since, in the present case the transportation charges have been paid for delivery of goods from the factory gate to a store at site but prior the sale of towers to MPPTP Ltd. which was subject to verification and approval of the buyer's engineer and the payment/consideration was to be passed on thereafter only. The site store, in this place, is the case of removal and the value of transportation charges to the store at site has to be included in the transaction value.

We also observe that department has also been cautious of this issue as has time and again being issuing clarifications as follows :

1. CBEC Circular No. 6/6/2003 dated 03.03.2003 : clarifying that "it would be essential in each case of removal of excisable goods to determine the point of sale". This clarification was based upon the decision of Hon'ble Apex Court in the case of Escort JCB Ltd. (Supra). It was also clarified that the determination will depend upon the terms/conditions of Contract of Sale. However, the insurance of the goods during transit will not be the sole consideration to decide the ownership or the point of sale of the goods. It is this aspect which was, subsequently, clarified by Hon'ble Apex Court in the Ispat Industries (Supra) case.

2. CBEC Circular No. 988/12/2014 dated 20/10/2014 clarifying that the place of removal needs to be ascertained in terms provisions of Central Excise Act, 1944 read with the provisions of 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 consideration to ascertain the place of removal. The place where sale has taken place or when the property in goods passes from seller to buyer is the relevant consideration to determine the place of removal.

3. CBEC Circular No. 999/6/2015 dated 28.02.2015 reiterated that in accordance of Section 23 of Sale of Goods Act, 1930, the place of removal is a place where the property in goods passes from seller to buyer. It further clarifies that handing over of the goods to the carrier/transporter for further deliver of goods to the buyer, with the seller not reserving the right of disposal of the goods, would lead to passing on of the property in goods from the seller to the buyer and it is the factory gate or the warehouse or the depot of manufacturer which would be the place of

removal. Since it is here that the goods are handed over to the transporter for the purpose of transmission to the buyer.

It is in this backdrop that the eligibility to CENVAT credit on related input services has been decided by the Supreme Court in Ultra Tech (Supra) case.

22. We hold that the Commissioner (Appeals) has committed an error while ignoring that the goods were not sold at the factory gate but at the ex-factory store at the buyer's site. Thus factory here is not the place of removal but merely the place of clearance of goods. It was also ignored that the prices as agreed to be paid were not only including the charges of insurance risk but all such other charges as mentioned above and were agreed to be paid only after approval/ certification by engineers of buyer (MPPTC). These facts are sufficient to hold that present is not the case of payment of sale consideration in future but is the case of sale in future subject to approval. We, accordingly, set aside the said order and restore the order-in-original dated 31.08.2017.

23. As a result of entire above discussion, the order-under-challenge is hereby set aside and appeal stands allowed.

[Pronounced in the open Court on **24.09.2019**]

(BIJAY KUMAR)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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