

REGIONAL BENCH AT HYDERABAD

**DIVISION BENCH COURT NO.I
EXCISE APPEAL NO. 30031 of 2019**

[Arising out of Order-in-Appeal No. VIZ-EXCUS-002-APP-094-18-19 dated 28.09.2018 passed by the Commissioner of Central Excise, Customs & Service Tax (Appeals) Vishakhapatnam.]

MY HOME INDUSTRIES PVT LTD. ... **APPELLANT**
Mulakalapalli(V), K. Purushottapuram
(Post), Yelamanchili (Mandal),
Vishakhapatnam,
Andhra Pradesh-531 055

VERSUS

COMMISSIONER OF CENTRAL TAX, ... RESPONDENT
Visakhapatnam
 New Central Tax Building, Port Area,
 Visakhapatnam

**WITH
EXCISE APPEAL NO. 30032 of 2019**

[Arising out of Order-in-Appeal No. VIZ-EXCUS-002-APP-093-18-19 dated 28.09.2018 passed by the Commissioner of Central Excise, Customs & Service Tax (Appeals) Vishakhapatnam.]

MY HOME INDUSTRIES PVT LTD. ... **APPELLANT**
Mulakalapalli(V), K. Purushottapuram
(Post), Yelamanchili (Mandal),
Vishakhapatnam,
Andhra Pradesh-531 055

VERSUS

COMMISSIONER OF CENTRAL TAX, ... RESPONDENT
Vishakhapatnam
 New Central Tax Building, Port Area,
 Visakhapatnam

**WITH
EXCISE APPEAL NO. 30164 of 2019**

[Arising out of Order-in-Original No. HYD-EXCUS-004-COM-020-18-19 dated 20.12.2018 passed by the Commissioner of Central Tax, Hyderabad 500001.]

MY HOME INDUSTRIES PVT LTD. ... **APPELLANT**
 Sy No. 877 to 884 & 1057, Srinagar,
 Mellacheruvu (Post and Mandal)
 Nalgonda Dist. Telangana State

VERSUS

COMMISSIONER OF CENTRAL TAX, ... RESPONDENT
Ranga reddy GST Commissionerate
Posnett Bhvan, Tilak road,

Ramkote, Hyderabad -500 001.

AND
EXCISE APPEAL NO. 30214 of 2020
with MISC APPLICATION E/CROSS/30149/2020

[Arising out of Order-in-Appeal No. VIZ-EXCUS-001-APP-166-19-20 dated 12.12.2019 passed by the Commissioner (Appeals) Central Tax & Customs, Guntur , Vishakhapatnam 530035.]

COMMISSIONER OF CENTRAL TAX ... **APPELLANT**
VISHAKHAPATNAM CGST,
Commissioner,
GST Bhavan, Port Area,
Vishakhapatnam- 530 035

VERSUS

MY HOME INDUSTRIES PVT LTD. ... **RESPONDENT**
Mulakalapalli, Pulaparthi Post,
Yelamanchili Mandal,
Vishakhapatnam Dist.-531 055

APPEARANCE:

Shri B Venugopal, Consultant for the Appellant
Shri VR Pavan Kumar, Authorised Representative for the Department

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P V SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 13. 09. 2022
DATE OF DECISION: 28. 11. 2022

FINAL ORDER NO. A/30124-30127/2022

PER ANIL CHOUDHARY

The appellant, M/s. My Home Industries Pvt Ltd. are engaged in manufacture of cement which is dutiable under Central Excise Tariff Act. The appellants are registered with the department and filed the periodical returns and had deposited the tax regularly. The dispute relates to manufacturing units of the appellant-

i) located at Srinagar, Mallacheruvu, Dt. Suryapet CER No. AABCM9480CXM001 and

ii) located at Mulakalapalli, Pulaparty post, Elemonchili, Dist. Vishakhapatnam, CER. No. AABCM9480CXM002.

2. The clearance of cement can be broadly categorized into following two types:

- (i) Clearance to their depots and consignment agents, from where the goods are sold;
- (ii) Clearance to industrial users and bulk consumers which were delivered on Free On Road (FOR) basis.

3. Scrutiny of records by Revenue pertaining to sales and supplies of cement dispatched to bulk consumers / industrial users, it was observed that they were selling their goods on FOR basis dispatched by road including packing, forwarding and unloading charges and also including the cost of freight charges. It appeared to the Revenue that the assessee are supplying the final products to the customers' destination/address i.e. at various delivery places as stipulated in the agreement/ purchase order. It was further observed that cost of transportation incurred from the factory to the place of removal (destination) was not included for arriving at the 'assessable value' during the relevant period, and thereby it appeared that the assessee have short paid the Central Excise duty on such goods.

Appeal No. E/30164/2019 (By assessee)

4. Show Cause notice dated 5.9.2018 was issued (Mallacheruvu works, C.E. Regn. No. AABCM9480CXM001) proposing to demand Central Excise duty on the freight element which was not included in the assessable value of the finished goods in respect of sale/clearance made to the industrial

consumer on FOR basis, for an amount of Rs. 4,04,24,003/- for the period August, 2016 to June, 2017. Further interest and penalty was also proposed.

5. The appellant contested the Show cause notice by filing reply wherein they *inter alia* stated that the Hon'ble Supreme Court in similar facts and circumstances in the case of **CC and CCE Nagpur vs Ispat Industries Ltd. [2015 (324) ELT 670 (SC)]** have held that Customers place / premises cannot be treated as selling point (place of removal) by the seller, and thus, transportation charges need not be included in the assessable value for the purpose of payment of Central Excise duty. It was further urged that in the facts and circumstances the 'place of removal' is the 'factory gate' and Revenue is in error by treating the buyer's premises as place of removal.

6. The Adjudicating Authority observed that on going through some of the purchase orders during the relevant period, issued by various destination buyers, wherein condition imposed by them, the terms were – material need to be delivered at the site as mentioned in the order. If any damage and /or unserviceable material are noticed in the supplies, cost to the extent of such material will be deducted or it is to be replaced by the supplier. However, in the terms of purchase has been mentioned, in most of the cases, that the purchase rate /price is inclusive of all taxes, duties and VAT, transportation price on FOR. It appeared to the Adjudicating Authority that as per the terms of purchase / sale, it is apparent that the assessee was under the obligation to deliver

the goods at the Customers place in acceptable condition. Further, the ownership of the goods remained with the assessee till the goods were delivered. Hence, the goods were sold at the customers place only, and total money consideration for sale was not merely to supply the subject goods but was to supply the subject goods at the specific / designated location of the customers in acceptable condition / quality. Thus, the risk in transit was on the appellant-assessee. Further, payment terms provided that payment shall be made by the buyer only on acceptance of goods supplied at the purchasers' site; that it appears that the sale or clearance of goods does not take place at the factory gate of the assessee but at the place of buyer on the delivery of goods. It was further observed that as per section 19 of the Sale of Goods Act, property in goods, in effect, passes to the buyer only at the buyer's premises on its delivery. It was further observed that the assessee have paid VAT/ Sales Tax on the price which is inclusive of the cost of transportation. This fact also indicates that in fact the sale took place at the buyer's premises. It was further observed that under section 20 of the Sale of Goods Act, it is provided - "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". Further it was observed that in the facts of the present case, the contract were not unconditional, as there are conditions specified for acceptance of the goods. The fact in

the present case 'deliverable state' of goods, arises only at the time of safe delivery of goods at the customers' premises specified in the purchase order. However, with reference to section 24 of the Sales of Goods Act, it was observed that in the instant case, the property in the goods have passed only at the site of buyer. Therefore such place constitutes the 'place of removal' of goods for section 4 of the Central Excise Act.

7. The Adjudicating Authority after taking notice of ruling of Apex Court in the case of **Ispat Industries** (supra) observed, it is clear that the case of **Ispat Industries Ltd.** deals with a situation wherein the prices were ex-works. The Apex Court observed that the facts of **Ispat Industries Ltd.** falls within the ambit of **Escorts JCB Ltd.** as the title to goods passed to the customer when the goods had been handed over to the transporter at factory gate, and are distinguishable from the facts involved in the case of **CCE Aurangabad vs Roofit Industries Ltd. [2015 (319) ELT 221(SC)]**. The Adjudicating Authority referring to the clarification issued by the Board vide **Circular No. 1965/4/2018-CX dated 8.6.2018**, observed that the intent of purchase orders / contracts regarding transfer of property in the goods to the buyer is required to be ascertained in the facts of each case. It was further observed that in the case of **Roofit Industries Ltd.** (supra) (earlier ruling) the Apex Court have held – "it is to be seen as to whether as to at what point of time, sale is effected namely whether it is at 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. The charges which are to be added have to be up to the stage of the transfer of 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 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 further observed that the facts of the present case being identical to the case of **Roofit Industries**, is applicable to the present case, in such circumstances, the freight and insurance would be includible in the assessable value.

8. Accordingly, vide Order in Original dated 20.12.2018, the learned Commissioner was pleased to confirm the proposed demand along with interest. Further, penalty of Rs.20 lakh was imposed under section 11 A (1)(a) of the Central Excise Act. Being aggrieved the appellant is in appeal.

9. Learned Counsel inter alia urges that the issue for determination is to determine the 'place of removal' in terms of section 4 (3) (c) (iii) of the Act, read with section 4(1)(b) of the Act and explanation to Rule 5 of Central Excise (Determination of Price of Excisable Goods), Rules 2000 for the purpose of arriving at the transaction value.

10. The place of removal is the factory gate of the appellant as per the appellant, and it is the premises of the Customers, where the delivery of goods have been made, as per the Revenue. That

the Board had issued a clarification by its clarificatory Circular dated 8.6.2018 referring to its earlier Circular(s) with respect to the subject 'place of removal' under section 4 of the Act, the CENVAT Credit Rules and drawn attention to the four judgment of the Apex Court namely;

- 1. Roofit Industries Ltd. [2015 (319) ELT 221(SC)]**
- 2. CCE vs Ispat Industries Ltd. [2015 (324) ELT 670 (SC)];**
- 3. CCE, Mumbai III vs Emco Ltd. [2015(322) ELT 394 (SC)]**
- 4. CCE & ST vs Ultra Tech Cement Ltd. [2018(9) GSTL 337 (SC)]**

The Board rescinded its earlier Circular No. 988/12/2014-CX. dated 20 October 2014 and also omitted clause (c) of para 8.1 and para 8.2 of its circular No. 97/8/2007-CX dated 23.8.2007. It was clarified that by way of general principle as regards determination of place of removal, the principle laid down by the Apex Court in the case of **CCE vs Ispat Industries Ltd.** may be applied wherein the Apex Court have reiterated the principle laid down in **Escorts JCB Ltd.** to the extent that place of removal is required to be determined with reference to point of sale, with the condition that place of removal (premises) has to be referred with reference to the premises of the manufacturer. Para 16 of the ruling of Ispat Industries was reproduced, which reads as follows:

"16. It will thus be seen that where the price at which goods are ordinarily sold by the assessee is different for different places of removal, then each such price shall be deemed to be the normal value thereof. Sub-clause (b)(iii) is very important and makes it clear that a

depot, the premises of a consignment agent, or any other place or premises from where the excisable goods *are to be sold* after their clearance from the factory are all places of removal. What is important to note is that each of these premises is referable only to the manufacturer and not to the buyer of excisable goods. The depot, or the premises of a consignment agent of the manufacturer are obviously places which are referable only to the manufacturer. Even the expression "any other place or premises" refers only to a manufacturer's place or premises because such place or premises is stated to be where excisable goods "*are to be sold*". These are the key words of the sub-section. The place or premises from where excisable goods are to be sold can only be the manufacturer's premises or premises referable to the manufacturer. If we are to accept the contention of the revenue, then these words will have to be substituted by the words "have been sold" which would then possibly have reference to the buyer's premises."

11. The Circular further provides in para 4, that the principle laid down in Ispat Industries Ltd. would apply to all situations except where the contract for sale is FOR contract, in the circumstances identical to the judgment in the case of **CCE, Mumbai-III v. Emco Ltd.** (supra) and **CCE v. M/s. Roofit Industries Ltd.** (supra). That is, 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. The said circular further provides that the guidelines and the judgment of Apex Court may be referred to and based on facts and circumstances of each case. Further provides past cases should be accordingly decided.

12. Learned Counsel further urges that the facts of the present case are squarely covered by the principle laid down by the Hon'ble Sup. Court in the case of **Ispat Industries Ltd.** (supra). With effect from 14.5.2003 section 4 was again amended so as to

re-include sub-clause (iii) of old Section 4(3)(b) (pre 2000). The amended Section 4(3)(c)(iii) reads as follows :-

“(3)(c)(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;”

Further, Rule 5 of the Central Excise Valuation Rule was also substituted, with effect from 1-3-2003, and read 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.

(emp. Supp.)

Explanation 1. - “Cost of transportation” includes -

- (i) the actual cost of transportation; and
- (ii) in case where freight is averaged, the cost of transportation calculated in accordance with generally accepted principles of costing.

Explanation 2. - For removal of doubts, it is clarified that the cost of transportation from the factory to the place of removal, where the factory is not the place of removal, shall not be excluded for the purposes of determining the value of the excisable goods.”

13. The Hon’ble Supreme Court further observed in the case of **Ispat Industries Ltd.** in para 23, that “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.” Further, 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. Thus the view taken by the Revenue that freight charges must be included, as the sale in the present facts took place at the buyer's premises, is incorrect. Further, there cannot be extended place of removal, and the factory premises or the warehouse (as 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.

14. The Appellant submits that in the identical set of facts, the Hyderabad bench of this Tribunal in the case of **Commissioner of Central Tax & Customs, Medchal Commissionerate Vs. ICOMM Tele Limited [2019 (7) TMI 55 - CESTAT HYDERABAD]** has held that issue of including the freight from seller's premises to the buyer's premises, when the sale is for delivery at the buyer's premises, has been settled at the hands of Hon'ble Apex Court and has reached finality with the following observation:

"10....it is now well settled that the buyers' premises can never be the place of removal, therefore the freight from the factory/depot/consignment agent up to the buyers' premises cannot be included in the assessable value, even if the goods are sold or delivered at the buyer's premises. In view of the above, we find that the settled legal position is in favour of the appellants and against Revenue and the demands are unsustainable on merits and need to be set aside and we do so. Since we have taken a decision on the merits of the case, the issue of limitation becomes irrelevant." Further, a similar view was taken in **M/s. Vijai Electricals Ltd., Vs. Commissionerate [2019 (11) TMI 301- CESTAT]**.

15. Similar view was also taken up by the CESTAT Ahmedabad Bench in the case of **Commissioner of Central Excise, Mumbai-IV Vs Emco Ltd. [2016 (12) TMI 1385-CESTAT MUMBAI]** and **M/s. Savita Oil Technologies Ltd., Vs. C.C.E. & S.T., Daman [2022 (7) TMI 138- CESTAT Ahmedabad]**.

16. It is further urged that Hon'ble Supreme Court in the case of **Ispat Industries Ltd.** (supra), have clarified that 'place of removal' are the manufacturers' premises (factory or warehouse or the premises of the consignment agent). In view of the clarification read with rule 5 of the Central Excise Valuation Rules, cost of transportation and transit insurance is not includible in the assessable value for the purpose of calculating duty liability. Accordingly, it is prayed by the appellant assessee for setting aside the impugned order.

17. Opposing the appeal, learned AR for revenue relies on the impugned order passed by the learned Commissioner. He further states that the learned Commissioner have rightly relied on the ruling of the Apex Court in the case of Roofit Industries Ltd. (supra), after examining the later decision in the case of Ispat Industries Ltd. as well as CBIC Circular dated 08/06/2018. The learned Commissioner have recorded the finding that the appellant-assessee are required to supply goods manufactured by them, to the customers sites/premises wherein the risk in transit rests with the appellant supplier till the goods are received in good condition. Further, the price is inclusive of transportation on FOR basis. The appellant is responsible for transportation and

arrangements for safe delivery of goods at the buyer's premises/site(s). That payment shall be made to the appellant on the basis of quantities received in good condition at the buyer's site(s). Thus, the goods dispatched by the appellant are appropriated to the contract only at the stage of delivery at customers' site and that "deliverable state" is when buyer under the contract could be bound to take delivery of goods at his (customers') premises, as specified in the purchases orders. Thus, the property in the goods have passed to the buyer only at the site of the buyer. Therefore, the buyer's site constitutes the place of removal for the purpose of Section 4 of the Act. Further urges that in the case of Ispat Industries Ltd. the situation was that the price is ex works, and the title to the goods passed to the customer when the goods had been handed over to transporter at the factory gate. Thus it has been rightly held that the appellant is liable to discharge excise duty on the assessable value which is inclusive of freight and other charges incurred up to the buyers premises. Accordingly, he urges for dismissing the appeal.

18. Having considered the rival contentions, we find that under the similar facts and circumstances, the Apex Court (in Ispat Industries) distinguishing its earlier ruling in the case of Roofit Industries, have held that the place of removal referred to in Section 4 r/w Rule 5 and Rule 7 of Central Excise Valuation Rules, clearly indicates, that the place of removal refers to only the sellers premises (factory gate, warehouse, depo, consignees premises). It is nowhere stated that the buyer's premises can be

place of removal. Hon'ble Apex Court also observed that in the Roofit case, it did not have occasion to examine the provisions of Section 4, since it was enacted and amended from time to time in the Central Excise Act r/w the Valuation Rules. After examining Section 4 r/w the rules, the Apex Court observed that the cost of transportation from the place of removal up to the place of delivery of excisable goods is excluded from 'Assessable value' for the computation of excise duty.

19. In view of aforementioned observations and findings, we allow this appeal and set aside the impugned order.

Appeal No. E/30214/2020 (by revenue with cross objection by the assessee CO No. 30149/2020).

20. The period involved in this appeal is from August 2016 to July 2017 and is related to Mulla Kalapalli Works Vizag (CER Registration AABCM9480CXM002).

21. Under similar facts and circumstances as in the above appeal, SCN dated 28/08/2018 was issued. The SCN was adjudicated by the Joint Commissioner vide OIO dated 28/12/2018 confirming the duty of Rs. 1,04,51,353/- alongwith interest and equal amount of penalty under Section 11AC (1) (a) of the Act. Aggrieved the appellant preferred appeal before the Commissioner (appeals) who vide impugned OIA dated 12/12/2019 was pleased to allow the appeal relying on the ruling of this Tribunal in Vijay Electricals Ltd reported at 2019 7 TMI 55 CESTAT, Hyderabad and also Final Order dated 01/07/2019 in M/s

KGV Alloy Conductors Pvt Ltd in favour of the assessee. Being aggrieved, revenue is in appeal on the ground that the Commissioner (appeals) have erred in not properly appreciating the ruling of the Apex Court in the case of Roofit Industries (supra) as well as the CBIC Circular dated 08/06/2018 for determining the place of removal. Although the Commissioner (appeals) have observed that the assessee have borne the risk of transit and the selling price includes freight element and the ownership lies with the assessee till the goods are delivered at the site of the buyer, but have erroneously held that freight and transit insurance are not includible in the assessable value.

22. The issue in this appeal is wholly covered by the facts and findings in the aforementioned Appeal E/30164/2019. Accordingly, in view of the finding recorded hereinabove, we dismiss this appeal by revenue and allow the cross objections of the respondent-assessee.

Appeal No. E/30031/2019 & E/30032/2019

23. These appeals have been filed by the appellant-assessee against rejection of the refund claim, wherein they had deposited excise duty (short paid) pursuant to audit objection for the period 2010-2011 to 2015-2016, and subsequently, after the ruling of Hon'ble Supreme Court in the case of Ispat Industries Ltd., judgment dated 07/10/2015, the assessee applied for refund which was rejected. Both assessee and revenue were in cross appeal before the Commissioner (appeals) which have been disposed by the common impugned order-in-appeal. Whereby, the

appeal of the appellant-assessee was rejected and appeal of revenue was allowed.

24. The issue involved in these appeals relates to determination of assessable value for the purpose of payment of duty. The appellant in the normal course of business was paying the duty by calculating the assessable value for sales made to institutional buyer's on FOR destination basis. Admitted fact is that as per the various purchase orders, the price is inclusive of freight element, as well as taxes in most of the cases. The appellant have cleared the goods from their factory to the institutional buyer's by raising the excise invoice, wherein, the amount of freight has been separately shown. The appellant (Vijag Unit Regn. No. AABCM9480CXM002) was regularly filing their returns and paying the admitted amount of duty (without including the freight).

25. Based on the Audit observations made in Letter C. No. V/1/286/2014-Audit Gr.I dated 07.04.2015 issued by the Superintendent (Audit), Group-I, Kakinada Circle, from the Office of the Asst. Commissioner of Central Excise & Service Tax, Audit Commissionerate, Kakinada Circle to provide the details of differential duty liability i.r.o. clearances made to depots for the period from 17.03.2012 to 31.12.2014 and details of POs, details of freight i.r.o. the FOR clearances made during the period from 17.03.2012 to 31.12.2014. In response, the Appellant vide letter dated 24.11.2015 informed the Asst. Commissioner of Central Excise & Customs, Kakinada Commissionerate, Visakhapatnam that they have paid the differential duty and interest thereon on

the freight element, enclosing the copies of the challans and requested to drop further proceedings. The details of the payments made are as below:

Year	Diff. Duty (Rs.)	Interest (Rs.)	Total (Rs.)	Challan No.	Date
2012-13	5,25,384	2,90,776	8,16,160	00228	21.11.015
2013-14	12,60,434	4,53,803	17,14,237	00239 / 00230	13.10.2015 / 21.11.2015
2014-15	72,26,642	8,36,156	80,62,798	00285	27.06.2015
TOTAL	90,12,460	15,80,735	1,05,93,195		

26. The Appellant informed the jurisdictional Central Excise Officer regarding the payment of duty and interest as detailed above and requested to drop the further proceedings vide letter 24.11.2015. In response, the Department vide letter dated 26.11.2015 informed the Appellant that the further proceedings can be dropped only after payment of penalty @ 15% and making a request accordingly. In response the Appellant vide letter dated 22.12.2015 informed the Department, that as advised they have paid an amount of Rs. 13,51,869/- towards the penalty and requested for a 'letter of closure' of audit observations for their record. In response to their request, no letter for closure of audit observations was issued by the Department, neither SCN was issued.

27. The appellant pursuant to pronouncement of the judgment dated 07/10/2015 by Hon'ble Supreme Court in C.C. & C.E. Nagpur vs. Ispat Industries Ltd., formed the opinion that they had been rightly paying the taxes without including the freight element and as such by application dated 09.08.2016, received by

revenue on 12.10.2016, applied for refund of duty paid on freight element alongwith interest and penalty calculated as follows:

Year	Freight Amount	Excise duty (Including Edn. Cess and S&H Edn. Cess)	Interest	Penalty	Total-In Rs.
(1)	(2)	(3)	(4)	(5)	(6)=(3+4+5)
2010-11	1,61,28,772	16,61,264	14,49,547	2,49,190	3,360,001
2011-12	4,28,65,844	44,73,532	33,93,468	6,71,030	8,538,030
2012-13	3,02,51,804	37,39,124	21,23,622	5,60,869	6,423,615
2013-14	6,42,36,585	79,39,640	30,67,692	11,90,946	12,198,278
2014-15	6,77,99,620	74,95,107	8,71,752	11,24,266	9,491,125
2015-16 upto 8 th Jun-15	1,88,18,760	23,52,345	18,246	0	2,370,591
Total	24,01,01,385	2,76,61,012	1,09,24,327	37,96,301	4,23,81,640

28. Upon verification of above refund claim, the Appellant were issued a Deficiency Memo vide letter C. No. V/18/454/2016-Refund (My Home) dated 25.08.2016 and a reminder letter asking them to furnish certain documents/information, etc. observing the following discrepancies/deficiencies.

- (i) Audit note issued was in the nature of communicating tentative observations of audit seeking their view points and requesting to pay the liability, if agreeable. Further the audit has not quantified the duty liability and only called for relevant documents for the period from 17.03.2012 to 31.12.2014. Therefore, the assessee's contention that the subject amounts are paid pursuant to the directions of audit appears to be incorrect.
- (ii) Assessee had not provided any worksheets for payment of differential duty. Also, no copies of relevant invoices purchase orders, transport bills, etc., were enclosed.
- (iii) As per Certificate dated 30.05.2016 of Chartered Accountant, the amounts claimed as refund are shown in their books of accounts under Excise Duy Receivable Account. However, no supportive documents in this regard were enclosed.

29. Thereafter, the Appellant was issued Show Cause Notice dated 28.11.2016 proposing to reject the refund claim for the following reasons:

- (i) The Refund claim for Rs. 4,23,81,640/- filed on 12.08.2016 is liable to be rejected inasmuch the cost of transportation from factory to the place of removal i.e., buyers' premises shall not be excluded for the purposes of determining the value of excisable goods in terms of Section 4 of the Central Excise Act, 1944 read with Explanation II to Rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods] Rules, 2000.
- (ii) The refund claim to the extent of Rs. 1,04,33,389/-, as detailed in the table below, out total amount of Rs.4,23,81,640/- is also hit by limitation of time under Section 11B of the Act, inasmuch as the same is not within the period prescribed therein, notwithstanding the admissibility or otherwise of the entire claims on merits.

Sl. No.	Challan No.	Date	Diff Duty (Rs.)	Interest (Rs.)	Penalty (Rs.)	Total (Rs.)
1	0285	27.06.2015	72,26,642	8,36,156	0	80,62,798
2	0487	09.06.2015	10,88,199	18,246	0	11,06,445
3	2747	06.06.2015	11,47,269	0	0	11,47,269
4	4306	06.07.2015	1,16,877	0	0	1,16,877
TOTAL			95,78,987	8,54,402	0	1,04,33,389

30. The above SCN was adjudicated by the Asst. Commissioner vide Order-in-Original No. 36/2017 dated 17.02.2017, rejecting the refund claims on the following grounds:

- (i) The 'place of removal' of good sold by the Appellant on FOR basis was the buyer's premises and not the factory gate which implied that the duty paid on freight charges was in order. Reliance is placed on the decision of the Apex Court in the case of *CCE Vs. Roofit Industries Ltd. – 2015 (319) ELT 221 (SC)* and *CCE Vs. Emco Ltd. – 2015 (322) ELT 394 (SC)*;
- (ii) Besides the entire refund claim is liable for rejection on merits, the refund claim to the extent of Rs. 1,04,33,389/- out of the total amount of Rs.4,23,81,640/- is also hit by limitation of time under Section 11B of the Act, since the refund claim has been

filed on 12.08.2016 i.e., after one year from the date of payment of duty.

31. The Appellant preferred an Appeal against the above Adjudication order dated 17.02.2017 before the Commissioner (Appeals) contesting both on merits and also that the provisions of Section 11B of the Act, on the limitation stipulated therein, is not applicable. The Revenue also filed cross-appeal against the said order, on the ground that-on the audit intervention, the Appellant had *suo-moto* paid Rs. 2,55,27,656/- as CE duty with interest Rs.1,10,23,634/- and reduced penalty Rs. 38,29,149/- and vide Letter dated 22.12.2015, admitted the non-inclusion of freight charges in the assessable value was a mistake on their part and requested to drop further proceedings. Since the proceedings are deemed to have been closed under Section 11AC(d), thus the Appellant does not have right to claim any consequential refund.

32. Thereafter, the Appellate Commissioner vide Order-in-Appeal Nos. 093-094-18-19 dated 28.09.2018, concurring with the findings of the Adjudicating Authority on merits held- the freight is liable to be added to the transaction value for the purpose of levy and payment of Central Excise duty and the 'place of removal' in this case is not Appellant's factory gate, but the buyer's premises. Further Appellate Commissioner also allowed the grounds raised in the cross-appeal filed by the Revenue, that amounts paid voluntarily by the Appellant due to audit intervention for dropping the proceedings, are concluded in terms

of Section 11AC(d) of the Central Excise Act, 1944. On these findings the Appellate Commissioner dismissed the Appeal filed by the Appellant and allowed the Appeal filed by the Revenue, upholding the OIO dated 17.02.2017 impugned before him.

33. Being aggrieved the appellant-assessee has filed these two appeals against the impugned common order-in-appeal.

34. In the aforementioned paragraphs, we have already held that place of removal, in the facts and circumstances is always the premises of the seller, following the clarification by Hon'ble Supreme Court in the case of Ispat Industries Ltd. (supra). Now, the only issue to determine is whether the refund claim have been rightly rejected by the court below.

35. Learned Counsel for the appellant *inter alia* urges that admittedly, the appellant at the time of clearance of the goods have determined or assessed the assessable value without including the freight element, and have accordingly paid the duty and filed the returns. It was only on subsequent audit objection communicated vide letter dated 07/04/2015, by the superintendent (audit), office of the Audit commissionerate, the appellant on being so advised in view of the ruling dated 23.04.2015 of the Apex court in the matter of Roofit Industries Ltd. (supra), deposited the differential duty on the freight element. The appellant had also deposited interest and requested for closure of the audit observation. Further, admittedly, revenue advised the appellant by their letter dated 26.11.2015 to deposit

penalty @ 15% of tax under provision of Section 11AC(d) as only then proceedings can be dropped. Admittedly, the appellant paid the amount of penalty calculated at Rs. 13,51,869/- on 11.12.2015, and filed intimation with the department on 22.12.2015 with the prayer to issue 'Letter of closure' of audit observations. Admittedly, no such closure of audit observation was issued. Further, no show cause notice, which is the condition precedent under Section 11AC (1) (d), was issued and thus, there is no closure of the dispute in the spirit of the said section. This fact is also evident from the show cause notice dated 28.11.2016, issued in response to filing of refund application in para 4 of the SCN, revenue has referred to the defect memo reiterating that the letter dated 07/04/2015 of the audit was in the nature of communicating tentative observation of the audit, seeking the view point of the assessee and requesting to pay the duty/liability, if agreeable. Further, audit had not quantified the duty liability and had only called for the relevant documents for the period from 17.03.2012 to 31.12.2014.

36. Thus, the amounts paid towards duty/interest/penalty still remains to be 'Revenue deposit', since no SCN was issued for appropriating the said amounts and/or no letter for conclusion of the proceedings in respect of amounts paid towards the levies (short paid) was issued. Accordingly, the refund amounting to Rs. 1,04,33,389/- invoking time limit under Section 11B of the Act, cannot be sustained. In this reference, the Appellant rely upon the following decisions:

- ***Monnet International Ltd. Vs. Commissioner of C. Ex., New Delhi - 2017 (3) G.S.T.L. 380 (Tri. - Del.)***
- ***SafexElectromech (P) Ltd. Vs. Commissioner of C. Ex., Ahmedabad-I - 2019 (27) G.S.T.L. 535 (Tri. - Ahmd.)***
- ***Nirlep Alliances Ltd. Vs. Commissioner of Central Excise, Aurangabad - 2018 (362) E.L.T. 915 (Tri. - Mumbai)***
- ***Maheshraj Chemicals Pvt. Ltd. Vs. Commissioner of C. Ex., Ahmedabad - 2015 (317) E.L.T. 366 (Tri. - Ahmd.)***

37. It is further urged that the show cause notice dated 28.11.2016 (in refund matter) does not contest the amounts paid by the appellant pursuant to audit intervention, nor the proceedings stood concluded. In other words, this issue was never a part of the refund proceedings. Revenue had filed cross appeal mainly on the ground that the dispute of payment of differential duty pursuant to audit letter dated 07.04.2015, stood concluded under Section 11AC (1) (d), as the assessee had requested to drop further proceedings. Thus, the proceedings are deemed to have been 'closed' under Section 11Ac (1)(d) and the assessee does not have any right to claim any consequential refund. This issue of conclusion of proceedings was never raised in the show cause notice dated 28.11.2016, and thus, the learned Commissioner (Appeals) have travelled beyond the show cause notice in entertaining the ground and allowing the appeal of revenue. No new case can be made at the appellate stage by revenue, as have been held by the Apex court in Warner Hindustan Ltd. vs. CCE Hyderabad 1999-113-ELT-24 (SC)

38. Further, in the grounds of cross-appeal filed by the Revenue, it was contended that during the course of audit

intervention the assessee has suo-moto paid Rs. 2,55,27,656/- as CE duty with interest Rs. 1,10,23,634/- and reduced penalty Rs. 38,29,149/- and vide letter dated 22.12.2015 and admitted that the non-inclusion of freight charges in the assessable value was a mistake on their part, and requested to drop further proceedings. This entire ground is bereft of factual position, for the following reasons:

- (a) Firstly, the full amounts actually paid towards the duty(short paid), interest and penalty in the instant are Rs.2,76,61,012/- , Rs.1,09,24,327/- and Rs.37,96,31/-,respectively and not Rs. 2,55,27,656/-, Rs.1,10,23,634/- and Rs. 38,29,149/- as stated in the Revenue's grounds of appeal.
- (b) Secondly, the amounts actually paid upon receipt of letter dated 07.04.2015 issued by the audit team towards duty, interest and penalty are Rs.90,12,460/-, Rs.15,80,735/- and Rs.13,51,869/- respectively. This position is very clear from the letters dated 24.11.2015 and 26.11.2015
- (c) Thirdly, as can be seen from the letter dated 26.11.2015, the Appellant had asked only for issuing a 'letter for closure' of audit observation for record.

Thus, the new ground raised in the cross-appeal, besides being making out entirely a new case, which is not permitted in law, is also based on incorrect facts.

39. Further, the ground taken by the revenue of closure of the matter, is also bad in law as Section 11AC (1)(d) provides for payment of interest and 15% penalty, within 30 days from the date of issue of SCN, and only then the proceedings resting with such SCN is deemed to be concluded. In absence of any show cause notice, Section 11Ac (1)(d) has got no application.

40. It is further urged that, if the amounts paid are towards conclusion of the proceedings, as claimed by the Revenue, then the amounts of Rs.90,12,460/-, Rs.15,80,735/- and Rs.13,51,869/- paid towards duty, interest and penalty, respectively, totally amounting to Rs. 1,19,45,064/ alone have to be considered, and not the entire refund claim amounting to Rs. 4,23,81,640/-.

41. The learned AR for revenue relies on the impugned order, he further states that evidently department have not quantified any demand in the audit letter dated 07/04/2015. Only relevant details were called for, the appellant as per their own understanding have quantified the demand of duty (short paid) alongwith interest and further paid penalty on being so advised by the department, thus it is the case of self-assessment by the assessee. Unless the self assessment is challenged, there can be no application made for refund as held by the Apex Court in **ITC Ltd vs. CCE Kolkata 2019-TIOL-418-SC-CUS-LV.**

42. It is further urged that the assessee failed to discharge the burden of unjust enrichment, to the effect that they have not passed on the burden of duty on their customer. Further, the appellant failed to provide the extract of books of account duly audited by their auditor in support of the chartered accountant certificate. Further urged that the amount of Rs. 1,04,33,389/- have been rightly held to be hit by limitation under Section 11B of the Act.

43. Further urges that Commissioner (appeals) have rightly held that the place of removal in the facts of the present case is the

place of delivery, of the premises of the buyer relying on the ruling of the Hon'ble Supreme Court in the Roofit Industries.

44. Having considered the rival contentions, we find that the issue of inclusion of freight in the assessable value, under the admitted facts and circumstances, has already been held in favour of the appellant-assessee relying on the ruling of the Apex Court in the Ispat Industries (supra).

45. So far, the issue of conclusion of dispute under the provisions of Section 11AC (1)(d) is concerned, we find that in absence of the condition precedent, that is issue of show cause notice, no proceedings/dispute can be concluded. Also there is no provision for waiver of SCN, under Section 11AC (1) (d). Further, admittedly, no letter of closures was issued by the revenue as requested by the appellant-assessee. Thus, the amount deposited by the appellant-assessee pursuant to audit letter, was in the nature of revenue deposit. Admittedly, the appellant have done the self-assessment at the time of clearance of the goods without including the freight element. In the facts and circumstances, there cannot be any subsequent self assessment. Further, admittedly no revised return was filed. In this view of the matter, we hold that the limitation prescribed under Section 11B is not applicable. Accordingly, we hold that the appellant-assessee is entitled to refund of the amount deposited totaling Rs. 4,23,81,640/- alongwith interest as per rules. Thus, these appeals are allowed in favour of the appellant-assessee and the impugned order is set aside.

46. To sum up Appeal Nos. E/30164/2019, E/30031 & 30032/2019 have been allowed in favour of the appellant-assessee.

47. Appeal No. E/30214/2020 by revenue has been dismissed and cross-objection by the assessee C/Cross/30149/2020 stands allowed.

(pronounced in the open Court on 28.11.2022)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(P.V. SUBBA RAO)
MEMBER(TECHNICAL)

Sb