

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench-Court No – I**

Excise Appeal No. 30329 of 2016

(Arising out of **Order-in-Original** No.HYD-EXCUS-001-COM-068-15-16 dated 09.02.2016
passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad)

The India Cements Ltd., Malkapur Village, Tandur Mandal, Ranga Reddy District, Telangana – 501 157.		Appellant(s)
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Vs

Commissioner of Central Excise & Service Tax Hyderabad - I L.B.Stadium Road, Basheerbagh, Hyderabad, Telangana – 500 004.		Respondent(s)
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WITH

Excise Appeal No. 30825 of 2018

(Arising out of **Order-in-Original** No.HYD-EXCUS-001-COM-010-17-18 dated 23.01.2018
passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad)

The India Cements Ltd., Malkapur Village, Tandur Mandal, Ranga Reddy District, Telangana – 501 157.		Appellant(s)
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Vs

Commissioner of Central Tax Central Excise & Service Tax Medchal - GST Medchal Commissionerate, H.No. 11-4-649/B, Opposite Mehdi Function Palace, Above SBI Bazarghat Branch, Lakdikapool, Hyderabad, Telangana – 500 004.		Respondent(s)
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AND

Excise Appeal No. 30978 of 2018

(Arising out of **Order-in-Appeal** No.HYD-EXCUS-RRC-APP-001/18-19(APP-I)dated
24.10.2017 passed by Commissioner of Customs & Central Excise (Appeals), Hyderabad)

The India Cements Ltd., Vishnupuram, Wadapally (P O), Nalgonda District, Telangana – 508 355.		Appellant(s)
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Vs

Commissioner of Central Tax Rangareddy - GST Posnett Bhawan, Tilak Road, Ramkoti, Hyderabad, Telangana – 500 001.		Respondent(s)
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Appearance

Shri C. Sumanth, Advocate for the Appellant
Shri V. R. Pavan Kumar, Authorised Representative for the Respondent.

Coram: HON'BLE Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE Dr. RACHNA GUPTA, MEMBER (JUDICIAL)

FINAL ORDER No. A/30010-30012/2023

Date of Hearing: 11.01.2023
Date of Decision:01.02.2023

Dr. RACHNA GUPTA

Present order disposes of three appeals for the reason that appellant being common to three of the appeals and the issue involved is also the same.

Appeal No.	Show Cause Notice	Order-in-Original	Order-in-Appeal
E/30329/2016	O.R.No.107/2015-Hyd-I Adjn dated 05.10.2015	HYD-EXCUS-001- COM-068-15-16 Dated 09.02.2016	--
E/30285/2018	O.R.No.102/2016- Adjn(Medchal)/2878 dated 11.07.2017	HYD-EXCUS-001- COM-010-17-18 Dated 23.01.2018	--
E/30978/2018	O.R.No.135/2017- Adjn(JC)-CE dated 27.07.2017	04/2017-18- Adjn(JC)-CEx dated 24.10.2017	HYD-EXCUS-RRC- APP-001/18- 19(APP-I) Dated 18.05.2018

2. The facts in brief for the adjudication are as follows:

That the appellants are engaged in manufacturing of cement. They are also registered under service tax in relation to taxable service i.e. transport of goods by road service. The appellants were clearing their cement in following two manners:

- (i) Clearances to their depots & consignment agents, from where the goods are sold.
- (ii) Clearances to industrial users and bulk consumers (i.e. other than the clearances made through their depots or consignment agents), which were delivered on 'Free on Road (FOR) basis'.

The Department scrutinized the accounts of the appellant in respect of clearance of cement dispatched on 'Free on Road (FOR) basis' to their customers. Department formed an opinion that to arrive at the assessable value of the goods for calculation duty of excise it is required to determine "place of removal". The place of removal in turn is determined based on terms and conditions of contract of sale between the assessee and their customers and the manner of delivery of the goods. The customers, purchase orders and conditions therein were observed to be as follows:

Name of the Buyer	P.O.No. & Date	Terms & Conditions
Nikhil Construction	NC/PO/2015-16/517/dated 09/03/2016	Taxes 2% inclusive (Against 'C' Form), Excise duty including, Delivery place: Nikhil RMC Plant, Jambhulwadi Ambegaon, Transport: Including
Krishnae Infrastructure Pvt Ltd.,	RPN-PO-HO-160309001 dated 09.03.2015	LBT at their company side. Freight/Transport charges and Unloading charges at ICL side. Material is against 'C' Form billing and for self-use not for resale. Prices are inclusive of all taxes etc.
Bharucha & Co.	RMC/1603/256 dated 16/03/2016	Rate: including Excise duty, 2% CST against 'C' Form, Freight, Packing charges, Service Tax & Delivery at site.

Observing that as per those terms and conditions, the place of delivery was the place of removal that Department alleged that the appellant has short paid central excise duty as it has not included the freight charges in assessable values in contravention of the provisions of Section 4 of the Central Excise Act, 1944 read with Rule 5 and 7 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 and the Rule 4, 6, 8, 11 and 12 of the Central Excise Rules 2002. A show cause notice bearing No. 102/2878/2016 dated 11.07.2017 was served upon the appellant proposing a demand of Rs. 3,50,41,000/- for the period from 01.08.2015 to

31.03.2017 along with the proportionate interest and appropriate penalties. The proposal was confirmed initially vide the respective Orders-in-Original as mentioned in the table above. In Appeal No.E/30978/2018 the Order-in-Original has been upheld vide Order-in-Appeal as mentioned in the said table. Still being aggrieved the appellant is before this Tribunal.

3. We have heard Shri C. Sumanth Learned Counsel for the appellant and Shri V R Pavan Kumar Learned Departmental Representative for the respondent.

4. Learned Counsel for the appellant has submitted that the issue is no more *res-integra*. Catena of decisions have held that buyer's premises cannot be called as 'place of removal'. Following case laws have been relied upon:

- i) KJV Alloys Conductors Pvt Ltd., Vs CCE & ST, Medchal GST,
[2019 (7) TMI 55 – CESTAT Hyderabad]
- ii) Vijai Electricals Ltd., Vs CCE & ST Hyd-I,
[2020 (7) TMI – CESTAT Hyderabad]
- iii) CCE Lucknow Vs M/s Shashi Cables Ltd.,
[2016 (12) TMI 1387 – CESTAT Allahabad]
- iv) M/s Aptar Beauty & Home India Pvt Ltd., Vs Commissioner
of Central Tax, Medchal GST, [2020 (10) TMI 674 – CESTAT
Hyderabad]
- v) CCE Allahabad Vs M/s Sarthek Enterprises Ltd.,
[2016 (8) TMI 443 – CESTAT Allahabad]
- vi) M/s Aditya Birla Chemicals India Ltd., Vs CCE & ST Ranchi,
[2021 (1) TMI 709 – CESTAT Kolkata]

Learned Counsel impressed that the Department was wrong in holding the buyers place to be the place of removal of the goods. The duty is wrongly alleged to be short paid. The confirmation of the demand is therefore liable to be set aside. Appeal accordingly is prayed to be allowed. Learned Counsel has relied upon the decision of Hon'ble Apex Court in the case of **CCE, Nagpur Vs Ispat Industries reported as 2015 (324) ELT**

670 (SC). Reliance has also been placed upon the decision of this Tribunal Hyderabad Bench itself in appellant's own case decided by Final Order No. **A/30124-30127/2022 as was decided on 28.11.2022** titled as **My Home Industries Pvt. Ltd. vs. Commissioner of Central Tax, Visakhapatnam** while impressing upon that the present appeals are squarely covered in light of the aforesaid decisions that the orders under challenge are prayed to be set aside and three of the appeals are prayed to be allowed.

5. While making submissions on behalf of the Department Learned DR has acknowledged the findings of the Hon'ble Apex Court in the case of **Ispat Industries (supra)** and also the decision of this Tribunal in appellant's own case dated **28.11.2022**. He, however, submitted that the definition of place of removal in sub-clause C in the explanation of Section 4 of Central Excise Act includes, in addition to factory, warehouse, depot and premises of consignment agent, any other place or premises from where the excisable goods are to be sold after their clearance from the factory. It is submitted that in the present case the purchase orders have been considered by the adjudicating authorities. From the terms and conditions of those purchase orders/contracts it has rightly been held that the appellants were under the obligation to deliver the goods at the customers place in the acceptable condition to them. The conditions therein also revealed that the ownership of goods remains with the assessee till the goods are delivered. Hence, it was rightly held that the goods/cement was sold by the appellant/ assessee at the buyer's place only. The value of freight was, thus, includable in terms of Rule 5 of Central Excise Rules. Impressing upon no infirmity in the orders under the challenge, the appeals are prayed to be dismissed. Learned DR relied upon the decision of Hon'ble Apex Court in the case of **Commissioner of Customs & Excise, Aurangabad Vs Roofit Industries Ltd., reported as 2015 (319) ELT 221 (S.C.)**.

6. Having heard the rival submissions of the parties, perusing the records and the case laws as relied upon by both the parties to these appeals, we observe and hold that the issue involved herein is the same as was the issue before the Hon'ble Apex Court in **Ispat Industries Ltd., (supra)** case that:

“whether excise duty is liable to be paid on freight charges incurred for transportation of goods from the factory gate to the buyer’s premises, treating the buyer’s premises as the place of removal.”

It is also the same issue which has been decided by this Tribunal in appellant’s own case vide Final Order No. A/30124-30127/2022 dated 28.11.2022. There is sufficient acknowledgment to the said observation by the Department.

7. The Hon’ble Apex Court in **Ispat Industries** (supra) had examined the intention of legislature under Section 4 of Central Excise Act. It was observed that the Apex Court earlier while deciding the case of Union of India Vs Bombay Tyre International Ltd., (1984) 1 SCC 467 has held as follows:

“Where the excisable article or an article of the like kind and quality is not sold in wholesale trade at the place of removal, that is, at the factory gate, but is sold in the wholesale trade at a place outside the factory gate, the value should be determined as the price at which the excisable article is sold in the wholesale trade at such place, after deducting there from the cost of transportation of the excisable article from the factory gate to such place. The claim to other deductions will be dealt with later.

.....

.....

Where the sale in the course of wholesale trade is effected by the assessee through its sales organisation at a place or places outside the factory gate, the expenses incurred by the assessee upto the date of delivery under the aforesaid heads cannot, on the same grounds, be deducted. But the assessee will be entitled to a deduction on account of the cost of transportation of the excisable article from the factory gate to the other places where it is sold. The cost of transportation will include the cost of insurance on the freight for transportation of the goods from the factory gate to the place of delivery.”

7.1 The Apex Court further observed that Section 4 of the Act in the year 1996 brought about three important changes. The Court observed as follows:

"Place of removal" has been defined for the first time to mean not only the premises of production or manufacture of excisable goods but also a warehouse or any other place or premises wherein such goods have been permitted to be deposited without payment of duty and from where such goods are ultimately removed. Interestingly, in Section 4 (2), which is introduced for the first time, where in relation to excisable goods the price thereof 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 is statutorily excluded.

7.2 The amendment in the said provision which came into effect on 01.07.2000 was also discussed by the Hon'ble Apex Court. It was appreciated that amendment has given the concept of "transaction value" which makes it clear that the freight or transportation expenses are not to be included in calculating the excise duty payable.

8. Rule 5 and 7 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 were also discussed by Hon'ble Apex Court in the said decision, it was held that Rule 5, as was substituted in the year 2003, also confirms the position that cost of transportation from place of removal to place of delivery is to be excluded from the assessable value.

9. We observe that Learned DR has laid emphasis upon clause 3 of the definition of place of removal as was relevant for the period in question because said clause includes the place from where the goods are to be sold in the definition of 'place of removal', the buyer's place becomes the place of removal where sale gets concluded at buyer's place. The said submission is not acceptable in the light of decision of Hon'ble Apex Court in **Ispat Industries Ltd.**, (supra) only wherein the Hon'ble Apex Court has held that the words used in the provision are "goods are to be sold". The contention of the Revenue would be correct if and only if the words in the provision would have been "goods have been sold". Resultantly, it was held in para

24 of the judgment that the place of removal refers only to the place from where goods are to be sold by the manufacturer and thus it has no reference to the place of delivery which may be either the buyers premises or the premises as the buyer may direct the manufacturer to send his goods. The earlier decision in the case of **Escorts JCB Ltd., Vs CCE (2003) 1 SCC 281** was held to have similar facts as were there in the case of **Ispat Industries Ltd.** (supra). The Hon'ble Court also observed that in the case of **Commissioner of Customs & Excise, Aurangabad Vs Roofit Industries Ltd., reported as 2015 (319) ELT 221 (S.C.)** the Hon'ble Supreme Court had distinguished **Escort's JCB's** case (supra). But based on the facts of that case (**Roofit's**), it was held that the sale of goods in terms of Section 19 of sale of goods Act did not take place at the factory gate of assessee. The Court also observed that the Court's attention was not drawn to Section 4 of Excise Act 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. Hence, the reliance of Department on the decision of **Roofit Industries Ltd.**, (supra) is also no more sustainable.

10. This Tribunal also while deciding the same issue on same set of facts and circumstances vide **Final Order No. A/30124-30127/2022 dated 28.11.2022 in Appeal titled as My Home Industries Pvt. Ltd. vs. Commissioner of Central Tax, Visakhapatnam** has relied upon the said decision of Hon'ble Apex Court in the case of **Ispat Industries** (supra) and has held:

"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 E/30031 & 30032 & 30164/2019 & E/30214/2020 & 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 E/30031 & 30032 & 30164/2019 & E/30214/2020 9 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 subsection. 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.

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, E/30031 & 30032 & 30164/2019 & E/30214/2020 11 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]."

10.1 This Tribunal has thereafter held as follows:

"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, depot, consignees premises). It is nowhere stated that the buyer's premises can be E/30031 & 30032 & 30164/2019 & E/30214/2020 14 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.'

11. We have no reason to differ from the aforesaid decisions, the discussion therein and the conclusion arrived therein. Following the said '*ratio decidendi*' we hold that the value of freight charged by the appellant for delivering the cement to their buyers premises is not to be included while assessing the value for the purpose of payment of central excise duty. Appellant has rightly excluded the same. The differential duty confirmed by the order under challenge is therefore wrong. The impugned orders accordingly, are hereby set aside and all three appeals are allowed.

(Order pronounced in the open court on **01.02.2023**)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(Dr. RACHNA GUPTA)
MEMBER (JUDICIAL)