**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL KOLKATA
EAST ZONAL BENCH, KOLKATA**

Date of Hearing/Decision: 8.6.2018

Appeal No. E/96/2008-(DB)

(Arising out of Order-in-Appeal No. 24/KOL-V/07 dated: 14.11.2007 passed by the Commissioner (Appeal-1) of Central Excise, Kolkata)

M/s VXL Landies & Gyr Ltd. Appellant

Vs

Commissioner of Customs & Excise, Kolkata Respondent

Appearance

Shri Hemant Jajodia,Adv for the appellant

Shri A. Roy (DR) for the respondent

CORAM:**Hon'ble Mr. P.K. Choudhary, Member (Judicial)**
Hon'ble Mr. Bijay Kumar, Member (Technical)

ORDER NO.FO/76592/2018

Per: Bijay Kumar

1. The present appeal arises out of the Order-in-Appeal No.24/KOL-V/07 dated 14/11/2007 in pursuance of the adjudication order No. 07/Comm./CE/DOO/KOL-V/ADJ/205 dated 14/02 passed by the primary Adjudicating Authority.

2. The Issue involved in this is regarding the inclusion of excess amount alleged to have been recovered from the buyer than the actual freight incurred in the accessable value under section 4(1)(a) and (b) of the Central Excise Act,1944 read with Central Excise Valuation(Determination of price of excess able goods) Rules, 2000.

3. The brief facts of the case are that appellant is engaged in manufacture of "electric supply meter" classifiable under Chapter sub heading No. 9028.00 of 1st Schedule to Central Excise Tariff Act, 1984. The period involved in the in dispute is from 1/04/2004 to 31/12/2004. The appellant had been supplying the manufactured goods that are 'electric meter' to various State Electricity Board, TATA Power, Reliance Power etc. The contract was, for 'FOR' that the destination, Factory gate sale and also when the buyers got there goods collected as per the contract from the factory gate itself arranging transport of their own.

4. It is the case of Revenue that the appellant has realized excess transportation charges than actually paid to the transporters for the delivery as buyer's premises, which should have been otherwise the part of assessable value as per provision of Rule 4 of CVR Rules, 2000. By not doing so, the appellant has not discharged the correct Central Excise duty, by suppressing the material facts from the Department.

5. Against this background, we have heard the ld. Advocate on behalf of the appellant and ld. AR on behalf of Revenue. We have also perused the case records.

6. Ld. Advocate submitted herein under;

6.1. There were two separate contracts: one for sale of Electricity Meter which was governed by the provisions of the Sale of Goods Act, and the other governing transportation of the goods. The charges for transportation of the goods were not on actual basis. Appellant was bound to transport the goods from the factory gate to the place of the State Electricity Boards at the rates specified in the tender. Prior thereto, the State Electricity Board Authority were to make inspection of the goods.

13. In the case of ***Associated Strips Ltd.*** **v.** ***Commissioner of Central Excise, New Delhi*** reported in [2002 (143) E.L.T. 131], the Tribunal distinguishing its earlier decision in ***Commissioner*** **v.** ***Prabhat Zarda Factory Ltd***. [2000 (119) E.L.T. 191, held :

"18. In the case of *Associated Strips Ltd.* the goods manufactured are inspected by the representative of the buyer (Electricity Board) and thereafter the manufacturer had to mark the name of the buyer on the poles before they are handed over to the transporter. So also in the case of *Mauria Udyog Ltd.* the LPG cylinders manufactured by the appellant are inspected by the representatives of the oil companies. After getting test certificate from the Bureau of India Standards Cylinders are to be marked with the name of the oil companies before they are handed over to the transporter for the purpose of transmission to the buyer. In the light of the provisions contained in Section 23, it has to be taken that the goods are unconditionally appropriated to the contract when the above procedure was followed and goods handed over to the carrier thus passing on the property in the goods to the buyer.

19. We may also refer to the provision contained under Section 39 of the Sale of goods Act which refers to the legal effect of delivery of the goods to a carrier by the seller. It is provided that where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a

carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is *prima facie* deemed to be a delivery of the goods to the buyer (AIR 1966 Patna 346,) admittedly, in the present case after appropriation of the good to the contract they were delivered to the carrier as per terms of the contract. Therefore, delivery to the carrier has to be taken as delivery to buyer. Revenue has no case that the goods are not sent to the buyer through carrier. On the other hand, as mentioned earlier, the only contention raised is that since the insurance of the goods in transit. At this juncture we may point out that in the case of *Mauria Udyog Ltd.* there is no insurance taken by the seller."

14. The said decision of the Tribunal has been approved by this Court in ***M/s. Escorts JCB Ltd.*** (supra), stating :

"5. The contention is that the fact that the assessee arranged for the transit insurance would in no way lead to an inference that the ownership in the goods was retained by the assessee during the period of the transit until the delivery of the goods at the place of the buyer. The terms and conditions of the sale are clear that the sale is Ex-works at Ballabgarh, Haryana. The payment is to be made before despatch of the goods from the factory premises. The machinery, handed over to the carrier/transporter is as good as delivery to the buyer in terms of Section 39 of the Sale of Goods Act apart from terms and conditions of sale. Section 39 of the Sale of Goods Act reads as under:

39. Delivery to carrier or wharfinger :

(1) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named

by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to wharfinger for sale custody, is *prima facie* deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorized by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so do, and the goods are lost or damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails to do, the goods shall be deemed to be at his risk during such sea transit."

The issue at hand is quite similar to ***M/s. Associated Strips Ltd.*** **(supra) as also** ***M/s. Escorts JCB Ltd.*** (supra) and the ratio laid down in these cases are squarely applicable.

7. On the other hand the ld. DR on behalf of the appellant has justified the impugned order and stated that the order is required to be upheld in appeal in view of the ground contained therein.

8. The issue involved in this case is regarding the inclusion of freight which has been collected in excess of actual freight incurred. It has been held in the case of ***M/s Baroda Electric Meter Vs. Commissioner of Central Excise***,1997 (22) RLT (ST), Indian Oxygen Ltd 1988 (36) ELT 723 by the Hon'ble Supreme Court that even if the excess amount is released on the account of freight from the buyers it cannot be part of the excessable value under Rule 5 of CVR-2000, their view is further upheld in case of ***Commisioner of Central Excise, Noida vs. Accurate Metes Ltd*** [20099235) ELT 581 (SC)] at para 15, which is extracted as under;

> **15.**In that view of the matter and for the reasons stated hereinbefore, we have no doubt in our mind that the authority in appeal as also the Tribunal were correct in their view that the amount claimed by way of transportation charges and insurance cannot be considered for determining the value of the electric meters supplied.

9. In view of the above we are of the view that the excess amount of freight realized is not required to be added for the purpose of computation of excisable value for the payment of Central Excise duty accordingly we set aside the impugned order and allow the appeal.

(Dictated and pronounced in open court)

Sd/ **Sd/**

(P K Choudhary) (Bijay Kumar)
Member(Judicial) Member(Technical)

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