IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Excise Appeal No. 605 of 2012

(Arising out of Order-in-Appeal No. 71/KOL-III/2012 dated: 30.05.2012 passed by the Commissioner of Central Excise, (Appeal-I), Kolkata.

M/s Electrosteel Casting Limited
(30, B.T. Road, P.O. Sukchar, Kolkata-700115)

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata-III
(180, Rajdanga, Main Road, Shantipally, Kolkata-700 107)

...Respondent

APPEARANCE :

Shri, Advocate, for the Appellant
Shri, S. Mukhopadhyay, Authorized Representative for the Respondent

CORAM:
HON,BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.75959/2023

Date of Hearing : 19.06.2023
Date of Decision :19.06.2023

PER K. ANPAZHAKAN

M/s Electrosteel Casting Ltd (The Appellant) is a public limited company engaged in the manufacture of Ductile Iron Pipes classifiable under the CETH No. 7303 0030 and the Pipes Fittings under the CETH No. 7307 1120. A Show cause Notice dated 09.08.2010 was issued to the Appellant demanding central excise duty and Education Cess amounting to Rs. 2,19,218 and Rs.4,384/- respectively on the profit made by it during the financial year 2005-06 on the cost of transportation for delivering goods from factory to buyer's premises. The adjudicating authority confirmed the demands made in the Notice vide Order-in-Original dated 24.02.2011. On appeal, the Commissioner (Appeals) upheld the demands vide Order-in-Appeal dated 30.05.2012. The Appellant filed the present appeal against this impugned order.

2. In their submissions, the Appellant stated that most of the supply orders/purchase orders use to specify ex-works price, however, a few of the supply orders/purchase orders state FOR destination price. In case of FOR

destination price orders, they arrange the transportation of goods to the place of buyers and in case of ex-works orders, pursuant to requests of the respective buyers they have to arrange the transportation of goods to buyers' places in some cases. In such cases, the buyers agree to reimburse the transportation cost over and above the ex-work prices. While in some cases the reimbursements are agreed on actual basis and in other cases reimbursements are agreed at fixed unit rate/lump sum amounts based upon a reasonable estimation of freight cost and unloading charges at destination. Wherever the buyer makes his own arrangement for transportation, no reimbursement was claimed by the Appellant from the buyers towards freight charges, transit insurance or unloading at destination

3. In case of ex-works orders, wherever the transportation is arranged and freight was paid by them, they claimed the freight from the buyers at agreed lump-sum amount/at fixed unit rate, as the case may be. However, in case of FOR destination orders involving large quantities and staggered delivery schedule, they determine the unit rate for calculating the assessable value by excluding the freight as per rate contract then in force with the transporter from the unit rate for FOR destination and save such unit rate in the computer system for facilitating smooth processing of bills.

2. For clearance of the goods from factory, all the excise invoices are prepared in the name of the respective buyers at ex-factory price reflecting the excise duty and the freight separately wherever applicable pursuant to respective purchase/supply orders. As the freight charges fluctuate from consignment to consignment and destination, most of the times it was not known at the time of the removal of goods. They, therefore reflects the freight in excise invoices only in the cases where the ordered price is FOR destination but at the contract rate initially stored in the computer system and in other cases wherever the amount of freight was known at the time of preparing excise invoice.

3. The works order-wise details of freight incurred and freight realized reveal that due to fluctuation in freight rate, there were instances of marginal extra recovery and also there were numerous instances where freight paid by them was more than that of recovery made by them from the buyers. The Appellant stated that the department has considered only the excess collection of freight and not the short recovery of freight in many cases.

4. They further submitted that in view of Ministry's Circular F. No. 354/81/2000 – TRU dated 30th June, 2000 and the decision of Hon'ble Supreme Court in case of Baroda Electric Meters Ltd. (1997 (94) ELT 13

(SC)], they had a genuine belief that the marginal extra recovery on account of fluctuation in freight rate cannot form part of assessable value.

5. In this context, the Appellant relied on the ratio of the decision in the case of Indian Oxygen Ltd. vs. CCE [1988 (36) ELT 723 (SC)] wherein the Hon'ble Supreme Court while observing that the duty of excise is tax on the manufacture and not a tax on the profits made by a dealer on the transportation of the goods, has held that the cost of transportation from the factory gate to the place of delivery and the transit expenses were not to be added to the wholesale price at the factory gate for the purpose of duty under the said Act when factory gate price is known.

6. In this connection, the Appellant also cited the decision of the Tribunal in the case of Mercedes Benz India(p) Ltd. Vs. CCE[2010(260)ELT149(T)] wherein the Tribunal has held as under:

> We find that the excess freight collected by the appellant from their dealers was not an amount which the dealers were liable to pay to pay to, or on behalf of the assessee, be reason of , in connection with the sale in as much as the relevant agreement of sale did not provide for such payment, the transportation of the goods, having been undertaken under a separate agreement between the assessee and the transporter concerned. The buyer was not a party of this agreement. If any excess amount was collected by the assessee from a dealer towards freight, it cannot be considered to be an amount collected by the assessee by a reason of, or in connection with, the sale of the goods. It would be an amount collected by the assessee in connection with the transportation of the goods, the nexus is not between the amount and the sale of the goods but between the amount and the transportation. This aspect was noted by their lordships in the case of Baroda Electric Meters (Supra) and it was held that any excess amount collected by the assessee from their customers would be a profit made on transportation and hence such amount would not be includable in the assessable value of the goods since the duty of excise was a tax on manufacture and not on any profit made on transportation. The character of the excess amount collected by the assessee from their dealers stands determined vide Baroda Excess amount collected by the assessee from their dealers stands determined by Baroda Electric Meters(Supra) and therefore, in our considered view, the Revenue is precluded in the present case from contending that such amounts represents additional consideration flowing directly or indirectly from buyer to the seller. We are also of the

view that the decision of the Hon'ble Supreme Court with regard to the nature of would not have been different, had their lordships considered the case for any period after 1.7.2000. The reason is that the crucial question is one of the fact rather than of the law. The question of fact as to the nature of the excess freight stands determined for all times by the Apex court and accordingly, we hold that the excess freight collected from the dealers was only a profit on transportation and not an "additional consideration" within the meaning of this expression used in Rule 6, nor an "additional consideration within the meaning of this expression used in Rule 6 nor an "additional amount" within the meaning of this definition of "transaction value" under section 4(3)(d)of the Act. In this view of the matter, we further hold that the distinction drawn by the learned consultant for the Revenue between "normal value" and "transaction value" is not relevant in this case.

7. The Ld. A.R. reiterated the findings in the impugned order.

8. Heard both sides and perused the appeal records.

9. We observe that the issue to be decided in this case is whether the excess cost of transportation recovered by the Appellant from their buyers is includable in the assessable value or not. We observe that the excess freight collected by the Appellant is not related to the sale of goods made by the Appellant. The Appellant arranges transportation at the request of buyers. In some cases they earn a profit and in some cases they incur losses on account of fluctuation in rates. The profit or loss earned has nothing to do with the manufacture or sale of the goods. Accordingly, we hold that the profit earned are not be included in the assessable value for the purpose of payment of central excise duty. We observe that this view has been held by the Hon'ble Supreme Court in the case of Indian Oxygen Ltd Vs CCE 1988 (36) ELT 723 (SC). The relevant portion of the order is reproduced below:

> **5.** The Tribunal noted that the appellant had not come forward to offer concrete evidence of actual freight charges etc. It, however, emphasised that the price at the factory gate is ascertainable. Assessment should, therefore, be made in terms of that price. Hence, there was no scope of deduction from that price. It, therefore, directed that if the ex-factory prices were not ascertainable and the goods were to be assessed ex-depot, then it would be for the manufacturer to claim on the basis of actual evidence. It remanded the case to the Asstt. Collector to refix the assessable-value as directed. It is necessary to reiterate the principle upon which the assessable-value will have to be determined in this. The cost of transportation from factory at Visakhapatnam and the depot at Vijayawada cannot be included normally in computation of the value. The value has to be computed under Section 4(1)(a) read with Section 4(4)(d)(i) of the Act, where the wholesale price is ascertainable at the factory gate, the question of transportation charges becomes entirely irrelevant.

> The cost of transportation from the factory gate to the place of delivery and transit expenses were not to be added to the wholesale price at factory gate for purposes of duty under the Act. In this case the price of the goods at the factory gate Visakhapatnam is known. It is clear from Section 4 that the delivery and collection charges have nothing to do with the manufacture as they are for delivery of the filled cylinders and collection of the empty cylinders. These charges have to be excluded from the assessable-value. Insofar as the loading charges Incurred for loading the goods within the factory are concerned, they are to be included in the assessable-value, irrespective of who has paid for the same but the loading expenses incurred outside the factory gate are excludible. Duty is excise to a tax on the manufacture, not a tax on the profits made by a dealer on transportation.

10. In view of the settled position of law, we hold that the demands confirmed in the impugned order is not sustainable. Since the demand is not sustainable, penalty is also not imposable. Accordingly, we set aside the demands confirmed in the impugned order.

11. In view of the above discussion, we allow the appeal filed by the Appellant.

(Dictated and Pronounced in the open Court)

Sd/-

(Ashok Jindal)
Member (Judicial)

Sd/-

(K. Anpazhakan)
Member (Technical)

Pinaki