

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.2

Excise Appeal No.604 of 2007

(Arising out of Order-in-Appeal No.58/CE(A)/GHY/07 dated 11.09.2007 passed by
Commissioner, Customs & Central Excise (Appeals), Guwahati.)

M/s. Brahm India (P) Ltd.

(EPIP Industrial Estate Rajabagan, Byrnihat, Dist.-Ri-Bhoi, Meghalaya, Pin-793101.)

...Appellant

VERSUS

Commissioner, CGST & CX, Shillong

.....Respondent

(Crescens Building, M.G. Road, Shillong-793001.)

WITH

Excise Appeal No.605 of 2007

(Arising out of Order-in-Appeal No.58/CE(A)/GHY/07 dated 11.09.2007 passed by
Commissioner, Customs & Central Excise (Appeals), Guwahati.)

M/s. Khasi Alloys (P) Ltd.

(EPIP Industrial Estate Rajabagan, Byrnihat, Dist.-Ri-Bhoi, Meghalaya, Pin-793101.)

...Appellant

VERSUS

Commissioner, CGST & CX, Shillong

.....Respondent

(Crescens Building, M.G. Road, Shillong-793001.)

APPEARANCE

NONE for the Appellant (s)

Shri P.Das, Authorized Representative for the Revenue

**CORAM: HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL)
HON'BLE SHRI RAJEEV TANDON, MEMBER(TECHNICAL)**

FINAL ORDER NO. 76677-76678/2025

DATE OF HEARING : 12.06.2025

DATE OF DECISION : 02.07.2025

Per : RAJEEV TANDON :

The appellant herein is a manufacturer of Ferro-Silicon falling under chapter sub-heading 7202 having its regd. Office and works at EPIP Industrial Estate Rajabagan, Byrnihat, Dist.-Ri-Bhoi, Meghalaya, Pin-793101 and is therefore availing the benefit of area based exemption Notification No.32/99-CE dated 08.07.1999.

2. Though none is present for the appellants, however, as the appeals are of the year 2007 concerning the period of November 2004 to September 2005, it is proposed to examine the present appeals with the help of the Id.AR for the Revenue.

3. The appellants are concerned with the sale of finished goods to different buyers on payment of appropriate central excise duty. While raising such invoices, it is noticed that the appellants do not separately charge for freight to the buyers and whatever freight charges were paid by the appellant is the selling and distribution expenses forming a part of the cost of the goods sold, for pricing of the goods sold to the buyers.

4. During the course of the audit, the department alleged that the appellant sold their finished goods including the cost of transportation charge causing over-valuation of the assessable value of the finished goods thereby contravening Section 4 of the Central Excise Act read with Rule 5 of the Central Excise Valuation (Determination of the Price of Excisable Goods) Rules, 2000 and Notification No.32/99-CE dated 08.07.1999. It is therefore the Revenue's case that the appellant has

taken excess refund of duty paid to an extent of Rs.4,63,599/- in terms of the said area based Notification.

5. Before the lower authorities, the appellant has however contested the aforesaid allegation of the Revenue. In this regard the learned adjudicating authority in its order has made the following observations:

"I find that the assessee has made a very tricky submission without directly acknowledging the fact that they have inflated the assessable value and for that matter transaction value by inclusion of cost of transportation in value for the purpose of assessment of Central Excise duty. The overall submission they made, makes its obvious of clear that expenditure, on freight outward under the head of indirect expenses have been incurred. They admitted in accordance with the agreement with its buyers the freight was paid and realized from those buyers having entered into the agreements. The cost of transportation was obviously reflected in the books of accounts as it has been actually spent and realized. But they argued that the freight has got nothing to do with the duty of excise as it does not form a part of the value."

6. We find this finding to be the basis of the Order-in-Original, upholding the demand raised against the appellant. In appellate proceedings, the learned Commissioner(Appeals) has noted as under:-

"I have gone through the case records and considered the averments made in the appeal. Section 4(1)(a) of the Act is applicable only when the transaction value is for delivery (of goods) at the time and place of removal. The price in the instant case is inclusive of cost of transportation to the place of delivery, which is different than the place of removal."

7. It is therefore evident from the facts of the matter that the only question concerned in the present appeal is with regard to whether the appellant had adopted correct valuation in terms of section 4 of the Central Excise Act. In this regard it is necessary to reproduce Section 4(1) of the Central Excise Act for ready reference. :-

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 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 sole 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.]*

8. A reading thereof would show that with regard to goods cleared with respect to the value, the valuation of excisable goods is required to be determined (for purpose of levy of duty) in accordance with the provisions of section 4(1)(a). In the present circumstances as noted from the records it has been the consistent plea of the appellant that the value of the goods cleared by them is required to be determined in terms of section 4(1)(a) of the Central Excise Act and therefore there is no need to resort to provision of sub-section (1) (b) of Section 4 and thereby adopt Rule 5 of the Valuation Rules. Rule 5 of the Central

Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 is also extracted herein below :

DETERMINATION OF VALUE

[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.

Explanation 1. "Cost of transportation" includes –

- (i) The actual cost of transportation; and
- (ii) In the 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.]

9. We are of the view that the assessee is the best judge to fix their best selling price depending upon market conditions and what the manufacturer is able to obtain from his customers. Section 4(1)(a) of the Act *ibid* does not restrict in law, a manufacturer's – right to fix its selling price. As the duty is required to be paid in accordance with the provisions of section 4(1)(a), thus in order to satisfy the transaction value following ingredients required to be met with consideration are :

- (i) price to be the sale consideration
 - (ii) buyer and seller not to be related
- and

(iii) the goods must be sold by the assessee for delivery at the time of place of removal.

10. In the instant case, as noticed from the records, whatever price has been charged in the invoice is not disputed to be the sole consideration, between unrelated buyer. The goods were not sold to any related person and there is nothing to state that the impugned sales were not at an arms length. Furthermore, it is not disputed that the goods were sold by the assessee at the place of removal at the time of delivery. It is therefore evident from the above, that all the conditions prescribed under Rule 4(1)(a) are satisfied.

11. The hon'ble apex court in the case of **Union of India v. Indalco Industries [2003 (5) SCC 194]** has held as under:-

"where the duty is chargeable on the excisable goods with reference to value, the normal price at which the goods are ordinarily sold to the buyer in course of whole sale trade for delivery at the time and place of removal will be the measure of charge. This is subject to the conditions that : (i) the buyer is not a related person and (ii) the price is the sole consideration for the sale. Where all the requirements of clause (a) were fulfilled, the goods in question were, assessable to excise duty with reference to the normal price at which such goods are ordinarily sold by the assessee to the buyer in the course of wholesale trade for delivery at the time and place of removal."

12. It was thus for the Revenue to show that price has not been the sole consideration for sale of the impugned goods and consequent levy of duty. The audit memo which formed the genesis of the matter, in opening para itself notes that the appellant "have not charged any

transportation cost from their buyers separately". For ease and clarity the same is reproduced below :

"1. It is observed that you have not charged any transportation cost from your buyers separately. It is also found that your finished goods i.e. Fero Silicon are dispatched through goods transport agencies to your buyers and you have borne the transportation charges. That means the transportation charges are included in the assessable value. According to rule 5 of Central Excise Valuation Rules 2000 read with Section 4 of Central Excise Act, 1944 the transportation charges are excludible from the assessable value, in case of sale from the factory gate for delivery to the buyers' premises.

In this context the hon'ble Supreme Court in the case Escorts J.C.B. Ltd. Vs C.C.E. Delli-II and Prabhat Zarda Factory Ltd. Vs. C.C.E. reported in 2002 (146) E.L.T. 31 (SC) and 2002 (146) E.L.T. 197 (S.C.) held that "there is no question of including the freight etc. right up to the buyers premises even though delivery may be effected at that place. Ownership of the goods has no relevance insofar as their transit insurance is concerned. Delivery to the carrier at factory gate is delivery to the buyer and element of freight and transit insurance are not includible in assessable value."

13. It is stated that the Id.appellate authority below has erroneously upheld the Order-in-Original passed by the Original Adjudicating Authority that the Applicants has received excess refund to the tune of rs.4,63,599/- under Notification No.32/99 CE dt.08.07.1999 (as amended) erroneously by resorting to wrong procedure of valuation. In this context, it is submitted that Notificaiton No.32/99 CE dt.08.07.1999 is an exemption Notification issued u/s 5A of Central Excise Act, 1944, which is an independent Notification, allowing fiscal incentives to those eligible units as financial assistance by way of refund of Central Excise Duty paid out of Account Current for a period

not exceeding 10 years from the date of commercial production. This notification envisages that the benefit of fiscal incentive is allowed if the assessee is within the frame work of language used in the said Notification. The law provides for this fiscal incentive to the units located in the notified area of North East for industrial growth in this backward area.

14. We are of the view that the appellant has discharged their duty liability by depositing through account current and whatever amount deposited by the appellant has been claimed as refund in accordance with the said notification and in no case it can be held as "wrongly received excess refund". It is well settled in law that when the exemption is allowed by the department, is within the framework of the law and in strict conformity of the language used in the notification; the assessee cannot be deprived of his legitimate benefit.

15. It may also be apt to state here that Rule 5 of the Valuation Rules, will come into play only when the price of the manufactured goods is not determinable in terms of Section 4(1)(a). It is settled law that in case the price of the goods is determinable in terms of Section 4(1)(a) of the Act *ibid*, Section 4(1)(b) thereof would not come into play. Reliance in this regard is placed on the following decisions.

- a) **Filament India vs. CCE**
[2003 (160) ELT 314 – Tribunal]
- b) **Tata Engineering & Locomotive vs. CCE**
[2005 (185) ELT 165 (CESTAT)]
- c) **Grasim Industries vs. CCE, Indore**
[20024 (164) ELT 257 (Tri.-Del.)]

16. That being the position in law, it cannot be contended that the appellants have passed on higher cenvat credit to their customers and therefore the charge of recovery of excess cenvat credit claimed to be passed in excess as per the orders of the lower authority would not hold good. For argument's sake even if for a moment it was agreed that there was a wrong determination by the appellant of the transaction value, it cannot be disputed that the situation would remain revenue neutral. For reasons foregoing we do not find the order passed by the lower authority as maintainable in law.

17. As the appellants have therefore claimed by way of refund, only such amount as was deposited by them in account current and there being no evidence to impute wrong ascertainment of the transaction value, we do not find sufficient merit in the revenue's charge of appellant having claimed excess refund that is liable for recovery. For reasons foregoing we do not find any malafide intent of the appellant in this regard and appellant cannot be deprived of their rightful and legitimate claim in terms of Notification No.33/99-CE dated 08.07.1999.

18. Under the circumstances, the order of the lower authority is set aside and the appeals are allowed.

(Order pronounced in the open court on 02.07.2025.)

Sd/
(RAJEEV TANDON)
MEMBER (TECHNICAL)

Sd/
(R. MURALIDHAR)
MEMBER (JUDICIAL)