IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NOS: E/424 & 425/2009

[Arising out of Order-in-Appeal No: KKS/51&52/Th-I/09 dated 02/03/2009 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone – I.]

For approval and signature:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Dr Suvendu Kumar Pati, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	Yes
2.	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	:	Yes

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Ambhe Ferro Metal Processors Pvt Ltd … ***Appellant***

versus

Commissioner of Central Excise
Thane – I ***…Respondent***

Appearance:

Shri Neerav Mainkar, Advocate for appellant

Shri AS Parab, Assistant Commissioner (AR) and Shri SJ Sahu, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Dr Suvendu Kumar Pati, Member (Judicial)

Date of hearing: 21/01/2019
Date of decision: 21/01/2019

ORDER NO: A/85146-85147/2019

Per: C J Mathew

Both these appeals, of M/s Ambhe Ferro Metal Processors Pvt Ltd and, its director, Shri Ashish Gupta, seek relief from order-in-appeal no. KKS/51&52/Th-I/09 dated 2nd March 2009 of Commissioner of Central Excise (Appeals), Mumbai Zone – I which has upheld the order of the original authority confirming demand of ₹43,054/- and ₹7,214/- respectively as duty of central excise on excess freight of ₹ 2,69,090/- that had, admittedly, been recovered from customers and on the excess amount under various heads recovered from customers by issue of debit notes totaling ₹ 45,090/- besides imposing other penalties.

2. We have heard Learned Counsel for appellants and Learned Authorised Representative.

3. The issue of duty liability on excess freight recovered from customers has been settled by the Tribunal in *Mercedes Benz India*

Pvt Ltd v. Commissioner of Central Excise, Pune – I [2010 (260) ELT 149 (Tri-Mumbai)] wherein it has been held that

> *'6. We have perused the agreement between the assessee and one of the dealers and we find that the sale of goods took place at factory gate and the dealer was liable to take delivery of the goods at factory gate. In other words, the dealer was liable to incur the cost of transportation from the factory gate to his own premises. It is also on record that the cost of transportation was initially incurred by the assessee and subsequently recovered from the buyer. What was actually paid by the assessee to the transporter will, of course, be the actual cost of transportation and the same was liable to be excluded from the assessable value even as per Rule 5 relied on by the Revenue. The question which now arises for consideration is whether the amount collected by the assessee from the dealer in excess of the actual cost of transportation should be held to be includable in the assessable value of the goods by virtue of Rule 5. The rule only provides that actual cost of transportation has to be excluded from the assessable value where the goods are sold in the circumstances specified under Section 4(1)(a) of the Act. In the present case, the place of delivery is the factory gate and, even according to the Revenue, the cost of transportation from the factory gate to the buyers' premises is liable to be excluded from the assessable value of the goods. The rule does not provide for inclusion of any excess freight in the assessable value in the circumstances specified under Section 4(1)(a) of the Act. We do not think that the proposal to include the excess freight in the assessable value is corollary to exclusion of the actual cost of transportation from the assessable value. It has been argued that the excess freight collected by the appellant from their dealers is an*

additional consideration flowing directly or indirectly from the latter to the former and hence should be included in the assessable value of the goods under Rule 6. The term "additional consideration" appears to be referable to the additional amount referred to in the definition of "transaction value" given under Section 4(3)(d) of the Act. This definition indicates that, in addition to the amount charged as price of the excisable goods, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with, the sale, whether payable at the time of the sale or at any other time would also be includable in transaction value. 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, or on behalf of the assessee, be reason of, or in connection with, the sale inasmuch 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 Electric Meters (supra) and therefore, in our considered view, the Revenue is precluded in the present case from contending that such amount 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 the excess freight 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 fact rather than of 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 amount" within the meaning of the 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.'*

4. Learned Authorised Representative places reliance on the statement dated 25th September 2003 of Shri Ashish Gupta in which he did express willingness to pay the differential duty which, according to Learned Authorised Representative, is the stand that brooks no deviation.

5. In view of the decision of the Tribunal in *re Mercedes Benz India Pvt Ltd*, we find that the excess amount collected from customers, on one or both counts, is hit by the impropriety of

inclusion of such amount as ‘additional consideration’ envisaged in the said Rules.

6. Accordingly, the impugned order is set aside and the appeals are allowed.

(Pronounced in Court)

(Dr Suvendu Kumar Pati)	**(C J Mathew)**
Member (Judicial)	***Member (Technical)***

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