CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
Single Member Bench

Excise Appeal No. 87069 of 2019

(Arising out of Order-in-Appeal No. NGP/EXCUS/000/APPL/514-515/18-19/602 dated 28.02.2019 passed by the Commissioner of CGST & Central Excise (Appeals), Nagpur)

M/s. D.S. Alloyd Pvt. Ltd. **Appellant**
C-235, MIDC, Butibori, Nagpur.

Vs.

Commissioner of Central Excise, Nagpur **Respondent**
GST Bhawan, 2nd floor, Room No.221,
Telangkhedi Road, Civil Lines, Nagpur 440 001.

Appearance:

Shri Kevin Shah, Chartered Accountant, for the Appellant
Ms. Anuradha Parab, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 20.05.2022
Date of Decision: 20.05.2022

FINAL ORDER NO. A/85520/2022

This appeal is directed against Order-in-Appeal No. NGP/EXCUS/000/APPL/514-515/18-19/602 dated 28.02.2019 passed by the Commissioner of CGST & Central Excise (Appeals), Nagpur. By the impugned order, the Commissioner (Appeals) held as follows:-

"ORDER

a) The Order-in-Original no 01/SUPTD/R-II/BTB-I/2018 dated 26/10/2018 passed by Supdt, Range Butibori-II, Division Hingna is set aside and the appeal of the appellant is allowed.

b) The Order-in-Original no 03/SUPTD/R-II/BTB-I/2018 dated 29/10/2018 passed by Supdt, Range Butibori-II, Division Hingna is upheld and the appeal of the appellant is disallowed."

2.1 Two show cause notices were issued to the appellant and confirmed by the original authority as detailed in table below:-

Sr. No.	Appeal No.	OIO No. and date (period for which recovery demanded)	Cenvat amount disallowed (in Rs.)
1	NGP/367/2018	01/SUPTD/R-II/BTB-I/2018 dated 26/10/2018 (12/2015 to 03/2016)	45,182/-
2	NGP/366/2018	03/SUPTD/R-II/BTB-I/2018 dated 29/10/2018 (04/2016 to 06/2017)	3,74,556/-

2.2 While deciding the appeal, the Commissioner (Appeals) has allowed the appeal against order-in-original mentioned at serial No.1 and dismissed the appeal against order-in-original mentioned at serial No.2.

2.3 Appellant is manufacturer of excisable goods and has paid excise duty on the goods cleared by them on FOR basis. They have taken cenvat credit paid on transportation of goods from their factory premises to the point of delivery.

2.4 Revenue was of the view that the cenvat credit availed in respect of outward transportation of goods from the factory gate are not in nature of input services and cenvat credit could not be availed. Accordingly proceedings are initiated and adjudged by the authorities below as indicated in para 1 above. Aggrieved appellant has filed this appeal before this Tribunal.

3.1 I have heard Shri Kevin Shah, Chartered Accountant, for the appellant and Ms. Anuradha Parab, Assistant Commissioner, Authorised Representative, for Revenue.

3.2 I have considered the impugned order along with the submissions made in appeal and during the course of argument.

3.3 Before I take up the matter for discussion, it is pertinent to peruse the purchase order and the invoices in respect of which these demands are made. The said purchase order and the invoices are reproduced below:-

VIRAJ
Viraj Profiles Limited

ISO DOCUMENT NO : F/PUR/05
PO Number : 6200133964 (0)

VIRAJ PROFILES LIMITED-II
G-2,1/2,1/3,G-22,23,32,33,34,, TARAPUR IND AREA, BOISAR, DIST.THANE, MAHARASHTRA - 401 506 ,
TEL: 9049991021/24 FAX : 02525271726
VAT Tin No: 27700298420 V W.E.F. 01.04.06, CST Tin No: 27700298420 C W.E.F. 01.04.06, CIN: U28113MH1996PLC096835
Central Excise Reg No.ECC No :AABCV 1740 NXM 003 / Range:4 / Div : BSR-1 /Comm :THANE-2

PURCHASE ORDER

PO NO / Date : 6200133964 (0) / 28.01.2016
Last Changed On : 28.01.2016
Vendor Name : D.S.ALLOYD PVT.LTD (FORMELLY KNOWN AS D.S.ALLOYS(P) LTD)
Vendor Address : C-235,BUILBORI INDUSTRIAL AREA BUTIBORI,DIST-NAGPUR. NAGPUR-441122 Maharashtra,India
Contact Person :
Terms of Payment : With in 15 days From GRN date
Inspection : AT OUR END
Incoterms : FOR TARAPUR - WORKS
Special Instruction : Price 561/- pkg on 60% prorata basis

Means Of Transport: Road
Currency : INR
PLEASE DELIVER TO : SMS2 (G-2) VIRAJ PROFILES LTD G - 2, MIDC INDL. AREA TARAPUR - 401506
CONTACT NO. : 9049991029-31

Reason For Amendment :

Item	Material	Description	Qty	UOM	Gross Price	Net Value
00010	110000000075	FERRO MOLYBDENUM LUMPS MOLY: 57% MIN,Si:1.00% MAX, CU: 0.50%MAX, S:0.05% MAX, C:0.05% MAX, P: 0.05% MAX,Al:0.5%MAX, SIZE: 10-100mm, PACKING : IN STEEL OR BAG. (PRICE ON 60% MO. CONTENT PRORATA BASIS)	5.000	TO	561,000.00	2,805,000.00
		Excise Duty %	:		12.50	350,625.00
		VAT %	:		5.00	157,781.25
		SUBTOTAL	:			**3313406.25**

Delivery Date : 31.01.2016
Quotation No / Date : EMAIL / 27.01.2016

GRAND TOTAL : 3313406.25

AMOUNT IN WORDS : (THIRTY THREE LAKH THIRTEEN THOUSAND FOUR HUNDRED SIX RUPEES TWENTY FIVE PAISE ONLY)

Important Notes:
" Without prejudice to the terms and conditions of this Purchase Order, all the terms and conditions contained in the "Annexure-A" attached along with this Purchase Order shall also be binding on the parties".

D.S.ALLOYD PVT.LTD (Seller) **For VIRAJ PROFILES LIMITED-II**

AUTHORISED SIGNATORY **AUTHORISED SIGNATORY**

Regd Off :G-34, M. I. D. C,Tarapur Industrial Area, Boisar,Taluka - Palghar, Dist. - Thane,Maharashtra-401506
Tel. 9049991021-24. Fax: 02525-271726.

Inv. No. 553 Dt. 28.01.16 2 mt.
563 02.02.16 3 mt

Total Quantity: 5.000 TO

This is a Computer Generated copy hence no signature is required.
Viraj Profiles Limited believes in fair and ethical practices. For support please contact +91 9049991258 or email on ethics@viraj.com

ISMA

TAX INVOICE
(Under Rule 11 of Central Excise Rules 2002)

D S Alloyd Pvt. Ltd.

C-235, MIDC Industrial Area, Butibori - 441122
Distt. Nagpur (Maharashtra) INDIA

Duplicate for Transporter

INVOICE NO 553

DATED 28/01/2016

M/s VIRAJ PROFILES LIMITED - II
G -2, MIDC INDL. AREA,
TARAPUR - 401 506 DIST. - THANE

VAT TIN	27230618245 V Dt. 12.07.2007
C.S.T. No	27230618245 C Dt. 12.07.2007
Range	IV- CFC Building, MIDC, Butibori, Nagpur
Division	II- CFC Building, MIDC, Butibori, Nagpur
Commissionerate	Nagpur-1, Telangkhedi Road, Civil Lines, Nagpur
C.E. Reg. No.	AABCD5152GXM003
S.T. Reg. No.	AABCD512GST002
C.I.N. NO.	U27109DL2002PTC115865

C.E. Regn No AABCV 1740 NXM 003

G.R. No 806764803 DT. 28.01.16

TRANSPORT TCI FREIGHT

VEHICLE NO. MH-43-Y-5667

P.O. NO. & DATE 6200133964 (0) DT. 28/01/2016

CHAPTER SUB HEADING - 72027000

PARTY TIN/C.S.T. NO 27700298420

S No	NO. OF PACKAGES	DESCRIPTION	QTY IN KG/MT	RATE PER KG/MT	ASSESSABLE VALUE
1	40 BAGS	FERRO MOLYBDENUM LUMPS (MO 60% PRO-RATA AS BASE) (MO. 60.15%)	2000	562.40	1124800.00
		Against Form C1, F1H			

Excise Duty in words (Payable)
...e Lakh(s) Forty Thousand(s) Six Hundred Only

Date & Time of 28/01/2016 28.01.16
Preparation 06:04 PM Removal 08:05 PM

Total in Words :
...hirteen Lakh(s) Twenty Eight Thousand(s) Six Hundred Seventy Only

SUB TOTAL			1124800.00
B.E.D. @	12.5% of Sub Total	140600.00	
E. CESS @	0% of B.E.D.	00.00	
H.E. CESS @	0% of B.E.D.	00.00	140600.00
SUB TOTAL			1265400.00
VAT / ~~CST~~ @	5%		63270.00
	Frieght Paid		—
G. TOTAL			1328670.00

We hereby certify that out Registration certificate under the Maharastra Value Added Tax Act, 2002 is in force on the date which the sale of the goods specified in this tax invoice is made by us and that the transaction of the sale covered by this tax invoice has been effected by us and it shall be accounted for in the turnover of sales while filling of the return and the due tax, if any, payable on the sale has been paid or shall be paid

Certified that the particulars given above are true and correct and the amount indicated in the invoice represent the price actually charged and there is no Additional consideration either directly or indirectly from such sales over and above what has been declared

All disputes are subject to Delhi Jurisdiction

FOR D S ALLOYD PVT. LTD.

Authorised Signatory

(Registered Office - AN-2, SHALIMAR BAGH, DELHI-110088)

TAX INVOICE
(Under Rule 11 of Central Excise Rules 2002)

D S Alloyd Pvt. Ltd.

C-235, MIDC Industrial Area, Butibori - 441122
Distt. Nagpur (Maharashtra) INDIA

Duplicate for Transporter

INVOICE NO 563
DATED 02/02/2016

M/s
VIRAJ PROFILES LIMITED - II
G -2, MIDC INDL. AREA,
TARAPUR - 401 506 DIST. - THANE

VAT TIN	27230618245 V Dt. 12.07.2007
C.S.T. No	27230618245 C Dt. 12.07.2007
Range	IV- CFC Building, MIDC, Butibori, Nagpur
Division	II- CFC Building, MIDC, Butibori, Nagpur
Commissionerate	Nagpur-1, Telangkhedi Road, Civil Lines, Nagpur
C.E. Reg. No	AABCD5152GXM003
S.T. Reg. No	AABCD5152GST002
C.I.N. NO	U27109DL2002PTC115885

C.E. Regn No AABCV 1740 NXM 003
G.R. No 374 DT. 02.02.16
TRANSPORT MARUTI ROAD CARRIER
VEHICLE NO MH-04-FP-562

P.O. NO. & DATE 6200133964 (0) DT. 28/01/2016
CHAPTER SUB HEADING - 72027000
PARTY TIN/C.S.T. NO 27700298420

S No	NO. OF PACKAGES	DESCRIPTION	QTY IN KG/MT	RATE PER KG/MT	ASSESSABLE VALUE
1	60 BAGS	FERRO MOLYBDENUM LUMPS (MO 60% PRO-RATA AS BASE) (MO. 60.20%)	3000	562.87	1688610.00
		Against Form C/F/H			

Excise Duty in words (Payable)
Two Lakh(s) Eleven Thousand(s) Seventy Six Only

Date & Time of Preparation 02/02/2016 02:57 PM
Removal 02.02.16 03:40 pm

G. Total in Words
Nineteen Lakh(s) Ninety Four Thousand(s) Six Hundred Seventy Only

SUB TOTAL			1688610.00
B.E.D. @	12.5% of Sub Total	211076.00	
E. CESS @	0% of B.E.D.	00.00	
H.E. CESS @	0% of B.E.D.	00.00	211076.00
SUB TOTAL			1899686.00
VAT / CST @	5%		94984.00
	Frieght Paid		—
G. TOTAL			1994670.00

We hereby certify that our Registration certificate under the Maharastra Value Added Tax Act, 2002 is in force on the date which the sale of the goods specified in this tax invoice is made by us and that the transaction of the sale covered by this tax invoice has been effected by us and it shall be accounted for in the turnover of sales while filling of the return and the due tax, if any, payable on the sale has been paid or shall be paid

Certified that the particulars given above are true and correct and the amount indicated in the invoice represent the price actually charged and there is no Additional consideration either directly or indirectly from such sales over and above what has been declared

All disputes are subject to Delhi Jurisdiction

FOR D S ALLOYD PVT. LTD.
Rajesh Singh
Authorised Signatory

Registered Office: AN 2 SHALIMAR BAGH DELHI-110088

3.4 From the perusal of the purchase order and the invoices, it is quite evident that the goods have been supplied by the appellant to their customer on FOR basis on payment of excise duty on the value determined FOR. It is clear that the value on which excise duty has been paid includes all the elements for that to go into the valuation till the point of delivery of the goods. Section 4(3)(c) of the Central Excise Act provides as follows:

"Place of removal" means —

(i) a factory or any other place or premises of production or manufacture of the excisable goods;

(ii) a warehouse or any other place on premises wherein the excisable goods have been permitted to be deposited without payment of duty;
(iii) a depot, 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; from where such goods are removed;"

3.5 From the perusal of the above provisions, it is quite evident that valuation has been done on the basis of the value at the point of delivery.

3.6 During the course of argument, Revenue has relied upon the decision in the case of Escorts JCB Ltd. [2002 (146) ELT 31 (SC)].

3.7 In the case of Prabhat Zarda Factory Ltd. [2002 (146) ELT 497 (SC)], Hon'ble Supreme Court has made the following orders:-
"In these matters, the question is whether freight and insurance charges are to be included in the assessable value for the purposes of excise. This question is covered by the judgment of this Court in the case of Escorts JCB Ltd. v. Commissioner of Central Excise, Delhi-II [2002 (146) E.L.T. 31 (S.C.)]. The only difference which has been pointed out is that in the Escorts case (supra) the sale was at the factory gate whereas in these cases, the sale is from the depot. Learned Counsel for the appellants admit that the freight and insurance charges up to the depot would be includible in the assessable value for the purposes of excise. However, the sale being at the depot, the freight and insurance for delivery to the customers from the depot would not be so includible as per the said judgment.
***2.** With the above clarification, the appeals stand allowed."*

In the above judgment, Hon'ble Supreme Court concluded that in case where the sale was at the factory gate, the value should be added in the assessable value till the factory gate. However, if the sale is very depot, then the freight and insurance charges upto depot could be includible in the assessable value.

3.8 In the case of Ispat Industries Ltd. [2015 (324) ELT 670 (SC)], after considering all the provisions for the period after 01.07.2000, Hon'ble Supreme Court has observed as follows:-

*"**24.** It will thus be seen that, in law, it is clear that for the period from 28-9-1996 up to 1-7-2000, 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 which may be either the buyer's premises or such other premises as the buyer may direct the manufacturer to send his goods. As a matter of law therefore, the Commissioner's order and Revenue's argument based on that order that freight charges must be included as the sale in the present facts took place at the buyer's premises is incorrect. Further, for the period 1-7-2000 to 31-3-2003 there will be no extended place of removal, the factory premises or the warehouse (in the circumstances 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 on the facts of the present case."*

3.9 In the present case what I am considering is the case of admissibility of cenvat credit in respect of outward transportation of the goods from the factory premises to the buyer's premises. Following Ispat Industries case, if place of removal was to be considered only the factory gate, then the cost of outward transportation needs to be excluded from the value determined for payment of duty. It is not the case of the Revenue that these freight charges are part and parcel of the assessable value determined. If they are part of the assessable value determined, cenvat credit in respect of the services of outward transportation needs to be allowed. Similar view has been expressed by Hon'ble Supreme Court in the case of Roofit Industries Ltd. [2015 (319) ELT 221 (SC)], as follows:-

*"**11.** In Commissioner of Central Excise, Noida v. Accurate Meters Ltd. - (2009) 6 SCC 52 = 2009 (235) E.L.T. 581 (S.C.), the Court took note of few decisions including in the case of Escorts JCB Ltd. and reiterated the aforesaid principles by*

emphasising that the place of removal depends on the facts of each case.

12. *The principle of law, thus, is crystal clear. It is to be seen as to whether as to at what point of time sale is effected namely whether it is on factory gate or at a later point of time, i.e., when the delivery of the goods is effected to the buyer at his premises. This aspect is to be seen in the light of provisions of the Sale of Goods Act by applying the same to the facts of each case to determine as to when the ownership in the goods is transferred from the seller to the buyer. The charges which are to be added have put up to the stage of the transfer of that ownership inasmuch as once the ownership in goods stands transferred to the buyer, any expenditure incurred thereafter has to be on buyer's account and cannot be a component which would be included while ascertaining the valuation of the goods manufactured by the buyer. That is the plain meaning which has to be assigned to Section 4 read with Valuation Rules.*

13. *In the present case, we find that most of the orders placed with the respondent assessee were by the various Government authorities. One such order, i.e., order dated 24-6-1996 placed by Kerala Water Authority is on record. On going through the terms and conditions of the said order, it becomes clear that the goods were to be delivered at the place of the buyer and it is only at that place where the acceptance of supplies was to be effected. Price of the goods was inclusive of cost of material, Central Excise duty, loading, transportation, transit risk and unloading charges, etc. Even transit damage/breakage on the assessee account which would clearly imply that till the goods reach the destination, ownership in the goods remain with the supplier namely the assessee. As per the 'terms of payment' clause contained in the procurement order, 100% payment for the supplies was to be made by the purchaser after the receipt and verification of material. Thus, there was no money given earlier by the buyer to the assessee and the consideration was to pass on only after the receipt of the goods which was at the premises of the buyer. From the aforesaid, it would be manifest that the sale of goods did not take place at the factory gate of* *the assessee but at the place of the buyer on the delivery of the goods in question.*

14. *The clear intent of the aforesaid purchase order was to transfer the property in goods to the buyer at the premises of the buyer when the goods are delivered and by virtue of Section 19 of Sale of Goods Act, the property in goods was transferred at that time only. Section 19 reads as under :*

"19. Property passed when intended to pass. - (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in Sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer."

15. *These are clear finding of facts on the aforesaid lines recorded by the Adjudicating Authority. However, the CESTAT did not take into consideration all these aspects and allowed the appeal of the assessee by merely referring to the judgment in the case of Escorts JCB Ltd. Obviously the exact principle laid down in the judgment has not been appreciated by the CESTAT."*

3.10 In the case of Emco Ltd. [2015 (322) ELT 394 (SC)] Hon'ble Apex Court again reiterated as follows:-

*"**16.** The Commissioner, Central Excise while deciding that the transportation charges as well as transit insurance charges are to be included for fixing the transaction value. The order reveals that the Commissioner had scanned through the agreements entered into between the assessee and with various customers and other documents on the basis of which the Commissioner concluded that the property in goods was passed on to the customers only at the destination. According to him, there was a specific condition in the contracts that the goods will be*

dispatched from freight pre-paid by road and up to the destination of the customers. It was also stated that material should be dispatched duly insured by the assessee up to the customers' destination and the cost towards obtaining insurance was included in the price. These contracts further contain a clear stipulation that in case of any damage to the goods during transit, the supplier will lodge the claim and obtain compensation from the insurance company. So much so, one Deputy Manager of the assessee, viz. Shri D.K. Bhattacharya in his statement, recorded under Section 14 of the Act, had specifically stated that "the responsibility of the goods lies on M/s. Emco till the delivery of the said goods to the customer's premises and, therefore, freight incurred and transit insurance charges were recovered from the customers......for covering the transit risk they had taken out transit insurance policy and whenever there was a loss or damage to goods M/s. Emco claims the same from the insurance company.....the possession of the goods is transferred only at the premises of the buyers/customers". The Commissioner also noted that the aforesaid statement was even confirmed by the General Manager of the assessee."

4.1 In view of the above decisions, I am of the view that valuation of the goods has to be done at the point of delivery of the goods and it has been done so in the present case including the cost of transportation in the assessable. Once the cost of transportation has been included in the assessable value, the services of outward transportation of goods from factory gate till the premises are to be considered as input services for the purpose of determining admissibility of cenvat credit. This view has been clarified by the Board vide its Circular No. 1065/4/2018-CX dated 08.06.2018, as follows:-

*"3. **General Principle :** As regards determination of 'place of removal', in general the principle laid by Hon'ble Supreme Court in the case of CCE v. Ispat Industries Ltd. - 2015 (324) E.L.T. 670 (S.C.) may be applied. Apex Court, in this case has upheld the principle laid down in M/s. Escorts JCB (supra) 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) is to be referred with reference to the*

premises of the manufacturer. The observation of Hon'ble Court in para 16 in this regard is significant as reproduced below :

"16. It will thus be seen 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 normal value thereof. Sub-clause (b)(iii) is very important and makes it clear that a 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 the premises is referable only the manufacturer and not to the buyer of excisable goods. The depot or the premises of the consignment agent of the manufacturer are obviously places which are referable to the manufacturer. Even the expression "any other place of premises" refers only to a manufacturer's place or premises because such place or premises is to be stated to be where excisable goods "are to be sold". These are key words of the sub-section. The place or premises from where excisable goods are to be sold can only be manufacturer's premises or premises referable to the manufacturer. If we were to accept 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 buyer's premises."

4. ***Exceptions :***

(i) The principle referred to in para 3 above 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. - 2015 (322) E.L.T. 394 (S.C.) and CCE v. M/s. Roofit Industries Ltd. 2015 (319) E.L.T. 221 (S.C.). To summarise, in the case of FOR destination sale such as M/s. Emco Ltd. and M/s. Roofit Industries 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, benefit has been extended by the Apex Court on the basis of facts of the cases.

(ii) Clearance for export of goods by a manufacturer shall continue to be dealt in terms of Circular No. 999/6/2015-CX., dated 28-2-2015 as the judgments cited above did not deal with issue of export of goods. In these cases otherwise also the buyer is located outside India."

4.2 Similar view has been expressed by the Tribunal for allowing cenvat credit in similar circumstances in the following cases:-

- Sanghi Industries Ltd. [2019 (369) ELT 1424 (T)
- Kirloskar Oil Engines [Order dated 27.04.2022 – CESTAT Ahmedabad]
- Rane Brake Lining Ltd. [2020-TIOL-1236-CESTAT-MAD]
- Dalmia Laminators Ltd. [2020-TIOL-298-CESTAT-HYD]
- Shree Cement Ltd. [Order dated 06.04.2022 – CESTAT Delhi].

4.3 In view of the above discussions, I do not find any merit in the impugned order to the extent challenged in this appeal.

4.4 In the result, appeal is allowed and the impugned order set aside.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

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