

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Excise Appeal No. 85138 of 2013

(Arising out of Order-in-Original No. 03/SK/MI/2012-13 dated 11.10.2012 passed by the Commissioner of Central Excise, Mumbai-I)

M/s. Godfrey Phillips India Ltd.

Appellant

Chakala, Andheri (E), Mumbai 400 093.

Vs.

Commissioner of Central Excise, Mumbai-I

Respondent

115, New Central Excise Building,
Maharshi Karve Road,
Churchgate, Mumbai 400 020.

Appearance:

Shri Rajesh Ostwal, Advocate, for the Appellant

Shri Xavier Mascarehnas, Superintendent, Authorised Representative
for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 20.02.2023

Date of Decision: 20.02.2023

FINAL ORDER NO. 85772/2023

PER: SANJIV SRIVASTAVA

This appeal is directed against Order-in-Original No. 03/SK/MI/2012-13 dated 11.10.2012 passed by the Commissioner of Central Excise, Mumbai-I holding as follows:-

"ORDER

41. In accordance with the provisions of Rule 21 of the Central Excise Rules, 2002, I reject the request for the destruction of 50 CBBs of Four Square Filter King (FSK 20's) brand of cigarettes and the consequential remission of duty of Rs.10,08,885/- thereof, submitted by M/s. GPIL vide their letter dated 24.05.2011."

2.1 Appellant is engaged in manufacture of various brands of cigarettes which are cleared on payment of central excise duty wherever applicable. Appellant also supplied the goods for

consumption on board a vessel of Indian Navy or Coast Guard. The supply of such cigarettes are exempted from payment of duty vide Notification No. 64/95-CE dated 16.03.1995.

2.2 Appellant received an order from Indian Navy for supply of 60 cases of a particular brand of cigarettes for use as stores for consumption on board a vessel of Indian Navy. Appellant cleared 60 CFCs of cigarettes by marking them with an expression "For I.N./C.G. Ships only" They engaged M/s. Sea Star Marine Services, Chennai as an agent for storing cigarettes on behalf of the appellant and to clear them on their instruction to Indian Navy. The cigarettes so cleared were stock transferred to the private bonded warehouse in Chennai until finally sold to Indian Navy.

2.3 Vide letter dated 22.12.2010 appellant was informed by Indian Navy that they were unable to buy 50 out of 60 CFCs of cigarettes ordered earlier by them. Consequently, as these goods were cleared exclusively for sale to Indian Navy, appellant was left with no choice but to send the goods back to their factory after receipt of permission from Assistant Commissioner vide letter dated 17.01.2011. Appellant filed an application seeking permission for destruction of 50 CFCs of cigarettes and remission of duty of Rs.10,08,885/- under Rule 21 of the Central Excise Rules, 2002.

2.4 A show cause notice dated 28.11.2011 was issued to the appellant asking them to show cause as to why their application under Rule 21 should not be rejected. This show cause notice has been adjudicated as per the impugned order and aggrieved appellant has filed this appeal.

3.1 We have heard Shri Rajesh Ostwal, Advocate for the appellant and Shri Xavier Mascarenhas, Superintendent, Authorised Representative for the Revenue.

3.2 Arguing for the appellant, learned counsel submits:-

➤ Disputed 50 CFCs of cigarettes have not suffered the factum of removal in terms of Section 4(3)(c) of the Central

Excise Act, 1944, as the goods were cleared on stock transfer basis to the private bonded warehouse and brought back to their manufacturing premises.

- Hon'ble Bombay High Court has in the case of Peekay International Pvt. Ltd. [2022 (382) ELT 497 (Bom.)] held that the goods destroyed at warehouse would be considered goods destroyed before removal for the purposes of Rule 21 of Central Excise Rules, 2002.
- In the case of Associated Capsules Pvt. Ltd. [2007 (207) ELT 613 (T)] Tribunal has held that the word 'removal' in Rule 21 of the Central Excise Rules cannot be held to mean removal from factory, that the goods were destroyed while located in a warehouse after being removed from the factory is to be considered before removal.
- Similar view has been expressed in the following decisions:-
 - Kuntal Granites Ltd. [2007 (215) ELT 515 (T)]
 - Honest Bio-Vet Pvt. Ltd. [2010 (262) ELT 465 (T)]
 - Honest Bio-Vet Pvt. Ltd. [2014 (310) ELT 526 (T-LB)]
 - Sangita Printers & Exporters [1994 (73) ELT 182 (T)]
 - Glenmark Pharmaceuticals Ltd. [2018 (6) TMI 472 – CESTAT MUMBAI]
- Commissioner has in his order referred to the order in the case of Honest Bio-Vet Pvt. Ltd. [2010 (262) ELT 465 (T)] that the similar issue has been referred to Larger Bench. The Larger Bench vide its order reported at [2014 (310) ELT 526 (T)] decided the issue in their favour.

3.3 Learned AR reiterates the findings recorded in the impugned order.

4.1 For rejecting the request made under Rule 21 of the Central Excise Rules, Commissioner has in the impugned order observed as follows:-

"21 In their defense submissions dated 12.08.2012, M/s. GPIL referred to the definition of 'place of removal as contained in sub section (e) of Section 4 of the Central Excise Act, 1944 which was also reproduced by them. M/s. GPIL submitted that their case clearly falls within the purview of sub clause (m) of the

definition of place of removal' which provides that place of removal shall be 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, that the goods in question were stock transferred by M/s GPIL to the premises of M/s Sea Star Marine Services, Chennai being their agent and such goods were proposed to be sold to the buyer Indian Navy from such premises; that the goods in question have not been sold from the premises of M/s Sea Star Marine Services, Chennai and instead returned to the factory of M/s GPIL under bond, that the factum of removal in respect of such goods have never occurred; that these goods have been returned back to their factory prior to their removal in the strictest sense; that the status of M/s. Sea Star Marine Services, Chennai in the present transaction and the fact that goods were stock transferred to their premises is evident from the documents enclosed as Exhibits 4, 5 and 6.

22. The words and expression place of removal as defined in sub-section (3), clause (c), sub-clause (iii) to Section 4 of the Central Excise Act, 1944 is reproduced below:

(3) "For the purpose of this section,

(a)

(b)

(c) 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 or premises wherein the excisable good 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;"

23. The words and expression place of removal as enunciated in Section 4, sub-section(3), clause (c) sub-clause (iii), ibid, has to be strictly interpreted with reference to the "Valuation of excisable goods for purposes of charging of duty of excise," and not otherwise. The words and expression employed in sub-section (3) to Section 4. ibid, is "For the purpose of this section", which corroborates the above view.

24. It is significant to note that CBEC vide its Circular No.251/85/96-CX issued under F.No.6/31/96-CX1 dated 14.10.1996 clarified as under-

"In the Finance Act of 1996, definition of place of removal has been amended to included depot, consignments agent or any other place or premises from where the goods are sold by or on behalf of the assessee within its scope. However, time of removal for these other places of removal added in Section 4 shall be deemed to be the time at which such goods are derived from the factory

The significance of these changes is that sale price at any of the places of removal will be the normal price for levy of excise duty and there can be different assessable values for the same excisable goods depending upon the place of removal. It also means that duty will be required to be paid at the time of clearance of goods from the factory for those goods which are sold by the manufacturer at depot, consignment agents or any other place etc. at a sale price of the place of removal to depot, consignment agents etc Where the goods are sold at the factory gate, there would be no problem."

25. Further, the Ministry of Finance (Department of Revenue) vide letter M.F.(D.R.) F.No.354/81/2000-TRU, dated 30.06.2000 had, inter-alia, clarified that "the term place of removal has been defined in the same manner as was defined in the erstwhile Section 4 prior to its amendment in 1996, if, therefore, the transaction value is with reference to delivery at the time and

place of removal, such transaction value will be the assessable value."

26. In support of their contention, M/s. GPII. relied upon the decision of the Hon'ble Bench of CESTAT, Mumbai Bench in the matter of Associated Capsules Pvt. Ltd. v. Commissioner of Central Excise, Pune 2007 (207) ELT 613 Tri-Mumbai, wherein it is clearly held that the word removal as appearing in Rule 21 Central Excise Rules, 2002 cannot be held to mean removal from factory; that the goods were destroyed while located in a warehouse after being removed from the factory; that the remission of duty under Rule 21 of the said rules was held admissible. Similarly, M/s. GPIL also relied upon the decision of the Hon'ble Bench of CESTAT in the matter of Kuntal Granites Ltd. v. Commissioner of Central Excise, Bangalore, 2007(215)E.LT. 515(Tri-Bung) wherein it is held that where the goods have been cleared under bond, the place of removal of such goods shall be the place where the sale of such goods have taken place

27. In the case of Associated Capsules Pvt. Ltd. v. Commissioner of Central Excise, Pune - 2007/207) E.LT 613/Tri-Mumbai), the excisable goods removed from the factory and located in a warehouse for home consumption were destroyed in the fire thereof. Similarly, in the case of Kuntal Granites Ltd. v. Commissioner of Central Excise, Bangalore - 2007(215) E.LT. 515(Tri-Bang), the excisable goods after removal from the factory and thereafter despatched in a lorry met with an accident resulting in spillage of 51 pieces of granite slabs meant for export leading to its destruction. It is observed that the facts and circumstances as reported in the above mentioned cases are clearly distinguishable, vis-à-vis, in the instant case, hence no relevance significance can be placed upon them.

28. Notification No. 64/95-CE dated 16.03.1995 as amended postulates that cigarettes falling under Chapter 24 of the Central Excise Tariff Act, 1985 and supplied as 'ship stores' for consumption on board a vessel of the Indian Navy, is exempted from the whole of the duty of excise, leviable thereon as specified in the said Schedule The paramount condition for

availing the benefit of exemption in the said Notification is that the Commanding Officer of the Indian Navy Ship issues to the Officer-in-Charge of the bonded warehouse from where the supply of cigarettes has been made, a certificate, within a period of six months from the date of supply of cigarettes on board the said ship, to the effect that the cigarettes supplied as 'stores' on board the Indian Navy Ship have been consumed thereof. The facts and circumstances in the instant case clearly connotes that even though no sale of the subject stock/brand of cigarettes have taken place (as pointed out by M/s. GPIL in their written submissions dated 12.08.2012) but the factum of removal' has undisputedly occurred as discussed in the subsequent findings. In this case, there is not only the instance of levy of excise duty, but also the instance of collection thereof has already taken place. Thus, there cannot be any question of remission of duty,

*29. Just as the Hon'ble Bench of the Tribunal have taken the considered view as reported in the above cited case laws that the remission of duty is allowed / permissible under the provisions of Rule 21 *ibid*, I find that the contrary view have also been taken by the Hon'ble Bench of the Tribunal in the following judgments as cited below:*

(i) In the case of Hind Nippon Rural Indus (P) Ltd. v. Commissioner of Central Excise, Bangalore the Hon'ble Bench of the CESTAT vide their Final Order No.474/2004, dated 27.02.2004 in Appeal No.E/763/99-2004(167)E.LT. 414 (Tri-Bang), held as under that under:-

*"We have carefully considered the submissions made by both the sides. We find that since the goods were cleared without payment of duty under band and the some were not exported. the duty has been correctly confirmed by the lower authorities There is no provision for remission of the duty once goods have been cleared from the factory. The Tribunal, in the case of Siraj Sons, Bombay Collector of Central Excise, Bombay (*supra*), has held that waiver of duty not claimable if goods destroyed by fire after clearance and before export. Following ratio of the Tribunal decision referred to above, but do not find any merit in the appeal. In the result, the appeal is rejected."*

(ii) Vide the Final Order No A/1913/2007-WZB/AHD, dated 20-07-2007 in Appeal No.E/1173/2006 in the case of Meghmani Industries Ltd. v. Commissioner of Central Excise, Ahmedabad-1-2007(218)E.LT 50(Tri-Ahmd), the Hon'ble Bench of the Tribunal, inter-alia, held that in this case, the goods have already been cleared from the factory of manufacture Further, in this case, whether the loss was due to natural cause or by unavoidable accidents is an arguable point. Since, goods studs removed from the factory, mil the loss occurred after such clearance, the denial of remission is in order."

(iii) Similarly, the Hon'ble Bench of the Tribunal in the case of S.V.G. Exports (P) Ltd. v. Commissioner of Central Excise, Chennai-III in their Final Order Nos.596 and 597/2008, dated 23.06.2008 in Application No.-E/207/2006 in Appeal No.E/209/2006-2008(232)E.LT.305/Tri-Chennai) held as under:-

" I have carefully considered the facts of the case and the rival submissions. The impugned order sustained demand of duty due on goods cleared for export but there involved in accident and were damaged. As the impugned goods were not exported in terms of the bond executed by the appellants, they are required IMBAL discharge the duty due on those goods. The duty liability on the impugned goods could be waned only if there are enabling provisions in the statute: Rule 21 of Central Excise Rules, 2002 which provides for remission of goods destroyed in accidents is subject to the condition that the damage is suffered by the excisable goods before their removal from the factory. In the instant case, the goods have been damaged after they were cleared for export and outside the factory. There are no expressions enabling authorities to remit duty on such goods. I find that the Tribunal in the case of Hind Nippon Rural Industries (P) Ltd. case (supra), had held that there is no provision for remission of the duty once goods have been cleared from the factory. The Tribunal, in the case of Siraj Sons, Bombay Collector of Central Excise, Bombay-I reported 1988(35) ELT. 597(Tr) has held that water of duty is not claimable if goods are destroyed by fire after clearance and before export. The ratio of the Tribunal's decisions are to the effect that duty is liable to be paid by the assessee in respect of goods cleared for export and

destroyed before export Respectfully following the above ratio, I find that the appeals to be devoid of merit. Therefore, the appeals are dismissed"

30. It would not be out of context to state that in view of the two contrary views of the Tribunal on the disputed issue, the Hon'ble Bench of the CESTAT, WZB Ahmedabad in the case of Honest Bio-Vet Pvt. Ltd. v. Commissioner of Central Excise, Ahmedabad vide Misc. Order No.M/988/2009-WZB/AHD dated 21.08.2009 in Appeal No E 371/2009 2010 (262) E.L.T. 465(Tri-Ahmd.), accordingly placed the papers before the Hon'ble President for consideration as to whether the disputed issue should be placed before the larger Bench. The outcome in the above matter is awaited.

31. It is a settled principle in law that a taxing statute must be interpreted in the light of what is clearly expressed. It is not permissible to import provisions in a taxing statute so as to supply any assumed deficiency. In support of the same, I refer to the decision of the Hon'ble Supreme Court of India in Commissioner of Sales Tax, v. U.P. Modi Sugar Mills Ltd.. reported in (1961) 2 SCR 189, wherein the Hon'ble Apex Court at para 10 has observed as follows:

10.... "In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The Court must Ask squarely at the words of the statute and interpret them. It must interpret taxing statute in the light of what is clearly expressed it cannot imply anything which is not expressed, it cannot import provisions in the statutes so as to supply any assumed deficiency."

32. Rule 11(1) ibid, postulates that no excisable goods shall be removed from a factory or warehouse executed under an invoice signed by the owner of the factory or his authorized agent and in the case of cigarettes, each such invoice shall be also be countersigned by the inspector of Central Excise or The Superintendent of Central Excise before the cigarettes are removed from the factory. In the instant case. I find that the 60

cases of cigarettes Four Square Filter Kings 20% (84mm) brand were originally removed from the factory of M/s. GPIL vide Central Excise Invoice No. 138 and ARE-3 No.06 both dated 28.07 2010, duly countersigned by the jurisdictional Inspector of Central Excise. Therefore, a plain reading of the provisions of Rule 1111) ibid, and Rule 21 ibid, in tandem, leaves no room for any doubt that the words and expression at any time before removal' employed in Rule 21 ibid. is clearly with reference to the factory of the manufacturer and not otherwise.

33. In the above context, I refer to the instructions contained in CBEC Circular No 907/27/2009-CX issued under F.No 267/141/2009-CX 8 dated 07.12.2009 which is as under:-

"As far as finished goods in concerned, it is stated that excise duty is chargeable on the activity of manufacture or production, Even though liability for payment of tax has been Just to the time of removal of goods for the factory, but still the legal liability to pay the excise duty has been fastened on the goods when it has been manufactured or product. Therefore, normally all goods manufactured suffer excise duty at the time of removal, but if the manufactured goods are destroyed due to natural causes etc, Rule 21 of Central Excise Rules, 2002, provides for remission of duty. Further, Rule 315C) of CENVAT Credit Rules, 2004, also requires reversal of credit on the inputs when the duty is ordered to be remitted under the said Rule 21."

34. I agree with the contention of M/s. GPIL that the subject stock/ brand of cigarettes contained in the packets which bear specific remarks For LN. /C.G. Ships Only would legally as well as contractually bar them to sell these stocks to any other customers. As a matter of fact, the Ministry of Finance vide letter F No.354/51/87- TRU dated 10.09 1987 had, inter-alia, instructed "to take suitable measures to ensure that there is no diversion of cigarettes meant for din Navy".

35. The remission Order passed by the Commissioner of Central Excise, Mumbai-! issued under F.No V(30)Misc/T-43/M-1/2011/2841 dated 13.07.2011 (Exhibit 19) has been relied upon by M/s. GPIL in their defense submissions dated

13.07.2011. It is observed that the said remission Order passed by the said competent authority is with regard to the 120 CBBs Nos. of Ultima 20's brand of cigarettes wherein the duty involved was Rs.24,21,324/-. The subject stock / brand of the cigarettes were not removed from the factory of M/s. GPIL on the ground that their buyer had rejected the said goods stating that it did not meet to their specifications. Thus, on account of the cancellation of the order by their buyer, before the removal of the subject stock/ brand of the cigarettes from the factory of M/s. GPIL, had rendered the same thereof unfit for marketing and hence the conditions prescribed in Rule 21 *ibid*, were fulfilled in the aforesaid case. As can be seen from the above, the facts and circumstances in the aforesaid case are clearly distinguishable, *vis-a-vis*, in the instant case, hence no relevance can be placed on the same.

36. It is observed that M/s. GPIL vide their letter dated 10.01.2011 (Exhibit 9) addressed to then jurisdictional Assistant Commissioner of Central Excise, *inter-alia*, stated that their local office at Chennai had approached the Customs Authorities for the permission to remove the subject / stock brand of cigarettes from the Customs warehouse to be taken back to their factory at Andheri, that the Customs Authorities had advised to take a 'No Objection' from the local Central Excise Authorities to make sure that the subject goods would in fact be returned to the factory only. However, I find that M/s. GPIL vide their written submissions dated 12.08.2012 and 04.09.2012 have not supported their above claim with any documentary evidence in this regard. Be that as it may, had M/s. GPIL strictly followed the provisions of sub-rule (1) and sub-rule (2) to Rule 16 *ibid*. in the above matter, no permission was required from the Jurisdictional Central Excise Authorities Considering the fact that the then jurisdictional Assistant Commissioner of Central Excise vide his office letter dated 17.01.2011 (Exhibit 10) had accorded the 'No Objection' to M/s GPIL based on his conclusion that "there appears to be no need for reconditioning, remaking or refinishing these goods." I tend to agree with the submissions of M/s. GPIL that there is no contravention of Rule 16 *ibid*, on their part as alleged in the impugned notice and therefore not sustainable.

37. *The further submissions of M/s GPIL as per their letter dated 04.09.2012 is with regard to the non-existence of any written guidelines/policy document available at their end on handling of non-confirming cigarettes in view of their age. M/s. GPIL have also stated that due to the peculiar nature of the basic input used in the manufacture of cigarettes i.e. tobacco, their company endeavours to restrict the shelf life of cigarettes to six months which is duly supported by the certificate dated 24.05.2011 issued by their Quality Assurance Department (Exhibit 4). The above submissions of M/s GPIL is clearly an afterthought as the same was brought to my notice only during the course of the personal hearing held on 29.08.2012.*

38. *In the impugned notice it is alleged at para 5 thereto that M/s. GPIL vide their said letter dated 10.01.2011, by willful mis-statement', inter-alia, submitted that "Once the goods are received at the factory the same would be ripped and the Tobacco used in the manufacturing process," M/s. GPIL has not contended anything on the issue. The issue involved is remission of duty under Rule 21 *ibid* and not bringing back the goods for remaking, reconditioning etc. under the provisions of Rule 16 *ibid*. Thus it is irrelevant to the context whether there has been or not willful mis-statement'."*

4.2 We find that the issue involved in the present case is determination of the fact whether the goods have been removed prior to destruction of the same for remission under Rule 21 of the Central Excise Rules. Hon'ble Bombay High Court in similar circumstances in the case of Peekay International Pvt. Ltd. [2022 (382) ELT 497 (Bom.)] has held as follows:-

11. *Rule 4 of the Central Excise Rules also provides that every person who produces or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty leviable on such goods in the manner provided in Rule 8 or under any other law, and no excisable goods, on which any duty is payable, shall be removed without payment of duty from any place, where they are produced or manufactured, or from a warehouse, unless otherwise provided.*

12. Rule 21 provides for remission of duty in some cases and it reads as under :-

"21. Remission of duty. - Where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal, he may remit the duty payable on such goods, subject to such conditions as may be imposed by him by order in writing :

Provided that where such duty does not exceed one thousand rupees, the provisions of this rule shall have effect as if for the expression "Commissioner", the expression "Superintendent of Central Excise" has been substituted :

Provided further that where such duty exceeds one thousand rupees but does not exceed two thousand five hundred rupees, the provisions of this rule shall have effect as if for the expression "Commissioner", the expression "Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be," has been substituted.

Provided further that where such duty exceeds two thousand five hundred rupees but does not exceed five thousand rupees, the provisions of this rule shall have effect as if for the expression "Commissioner", the expression "Joint Commissioner of Central Excise or Additional Commissioner of Central Excise, as the case may be," has been substituted.

(Emphasis supplied)

13. Therefore, where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by natural causes or by unavoidable accident or claimed by manufacturer as unfit for consumption or for marketing, at any time before removal, he may remit the duty payable on such goods, subject to such conditions as may be imposed by him by order in writing. The admitted position is that goods in this case have been destroyed by fire and it is not respondent's case that the destruction has happened not by an unavoidable accident. The respondent's only case as stated in the impugned order

(Paragraph 6.3) is that goods did not get destroyed before removal. Para 6.3 reads as under :

"6.3 Govt. further notes that the applicants have not produced any remission certificate in terms of rule 21 of the Central Excise Rules, 2002, Gov. also notes that there is no provision in the Central Excise Rules for remission of duty in case goods is lost or destroyed after clearance from the manufacturing place or warehouse. In the instant case the applicants have cleared the impugned goods under bond without payment of duty for export and in terms of rule 19 of the Central Excise Rules, 2002 r/w Notification issued thereunder the applicants should have furnished proof of export before the proper authority. However, admittedly in the case as discussed above the applicants have not furnished proof of export before the proper authority in terms of rule 19 of the Central Excise Rules, 2002. Hence, order of demanding duty cannot be assailed."

14. *Section 4(3)(c) of the Central Excise Act defines "place of removal", which (as it was then in force, prior to amendment by Act 32 of 2003) reads as under :-*

"Section 4(3)(c) *"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 or premises wherein the excisable goods have been permitted to be deposited without payment of duty;*

15. *Therefore, if the goods are destroyed or lost due to unavoidable accident at any time before removal, the Commissioner may grant remission of duty. In this case, the goods were destroyed in fire in CFS, CWC warehouse where it was permitted to be deposited without payment of duty and after Customs inspection, and therefore, CWS CFS is a warehouse or place permitted under Section 4(3)(c)(ii) of the Act. Hence, the goods have been destroyed before removal.*

17. *Mr. Sharma appearing for respondents states that the duty was on the manufacturer, which is fastened as soon as the*

goods are manufactured, payable at the time of removal from factory or warehouse of manufacturer. Mr. Sharma in fairness also agreed that the duty is on manufacturer but collected on removal and that would apply to place from where the sale takes place or the ownership of goods is transferred by seller to buyer at the time of removal from such place. Since the bond given by the exporter also gives an undertaking for the due arrival of the goods at the place of export and the export therefrom under customs supervision, the place from where the sale would take or the ownership of the goods will be transferred from seller to buyer, in the facts and circumstances of this case, will be the CWC, CFS warehouse. Admittedly, the fire took place and the goods got destroyed in the CWC, CFS and, therefore, the goods were destroyed before removal from the place where it was stored. We are of the opinion that the goods cleared for export under bond were destroyed before the same could be exported and, therefore, should be treated as having been destroyed before removal. This would be the fair interpretation of Rule 21 and, therefore, the primary condition of eligibility for remission of duty on the exported goods is fulfilled as required under Rule 21 of the Central Excise Rules, 2001.

18. *Mr. Sharma also submitted that petitioner was not the manufacturer and, therefore, he could not claim remission. There is a primary fallacy in this argument inasmuch as petitioner otherwise would not have been able to export goods from the manufacturer's premises by submitting a general bond.*

Mr. Sharma relied upon an order of Rajasthan High Court in the matter of Union of India v. M/s. Hindustan Zinc Ltd. & Anr. [Central Excise Appeal No. 42 of 2006, dated 13th October, 2008] [[2009 \(233\) E.L.T. 61](#) (Raj.)] to submit that to claim remission, the destruction should have happened within the place of manufacture. We have considered the said judgment and in that case the loss happened due to storage and handling and of course that happened within the place of manufacturer but the said judgment is not an authority to assert that loss ought to happen only in the premises of the manufacturer. In fact, in the said judgment the Court went on to suggest that practical view of things is required to be taken and in the

absence of anything to show any clandestine removal, a reasonable approach has to be taken. In our view, this judgment actually would be to the benefit of appellant.

19. *There was nothing to prevent the Central legislation from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to that afterwards whether it will be consumed, destroyed or given away. That is not the case. Excise duty is collected when the commodity leaves the factory for the first time and also because the duty is intended to be an indirect duty, which the manufacturer or producer is to pass on to the ultimate consumer, which he could not do if the commodity had, for example upon destroyed in the factory itself. It is for that reason, the Act and the Rules framed thereunder provide for satisfactorily accounting for, in case the goods are not exported etc. and the goods are also allowed to be removed under a bond. If we have to accept what Mr. Mishra submits, the Act and the Rules would not have provided for such eventualities in case goods are destroyed before its removal from the place of manufacturer or provide for place of removal to mean a warehouse or any other place where the goods are permitted to be deposited without payment of duty or the bond would not provide for due arrival of the goods at the place of export and their export therefrom under customs supervision.*

20. *In the circumstances, in our view, the goods have been satisfactorily accounted for and petitioner is entitled to the Certificate granting remission of excise duty for the goods, destroyed in the fire. Therefore, we allow the petition in terms of prayer clauses (a) and (b), which read as under :*

"(a) That this Hon'ble Court be pleased to issue a Writ of Certiorari or a Writ, or order or direction in the nature of Certiorari calling for the records and papers in the Petitioners' case relating to the subject matter of this Petition and after probing into the legality and propriety of the impugned action of Respondents of failing to consider that the remission of duty of Rs. 1,56,900/- is required to be granted and thus therefore this Hon'ble Court may further quash and set aside the said impugned orders being Exhibits-A, J & K hereto.

(b) That this Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ, order or direction in the nature of Mandamus directing the respondents to grant remission of duty and set aside the Order-in-Original and Order-in-Appeal and Revision Order passed by the Respondents being exhibits-A J & K hereto."

4.3 The issue as discussed by the Commissioner was referred to the Larger Bench and the Larger Bench decided against the Revenue by the decision in the case of Honest Bio-Vet Pvt. Ltd. [2010 (262) ELT 465 (T-LB)] holding as follows:-

"9. We have given anxious consideration to submissions by both sides and the various case laws cited by them and also considered written submission, filed by both sides. Hearing submissions made at length by both sides and perusing relevant case records, it is seen that there is no dispute on the facts of case. In order to resolve the issue, it is imperative that reference to Provisions of Rule 21 of the Central Excise Rules, 2002 as reproduced hereinabove, we reproduce the provisions of Rule 4 of the Central Excise Rules, 2002 which provides for payment of duty on removal :-

"RULE 4. - Duty payable on removal. - (1) Every person who produces or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty leviable on such goods in the manner provided in Rule 8 or under any other law, and no excisable goods, on which any duty is payable, shall be removed without payment of duty from any place, where they are produced or manufactured, or from a warehouse, unless otherwise provided."

Thus Rule 4 ibid reads that the duty of excise becomes payable in normal circumstances on removal from factory, unless otherwise provided. However, in case of clearances for exports, otherwise has been provided to this effect vide Notification No. 42/2001-C.E. (N.T.), dated 26-6-2001, with primarily conditions that goods cleared without duty under Bond for export, if not exported within 6 months the manufacturer will be liable to pay duty. These conditions also show that it will be the duty liability of the said manufacturer exporter to pay duty if the goods are

not exported after clearance from factory. Furnishing Bond with surety and security suggest that ownership and possession of the goods cleared for export remains with the manufacturer only and such ownership and possession has not changed.

10. *It is clear from Sections 3 & 4 of Central Excise Act, 1944 that duty is levied on manufacture and collected on removal of goods on the value of the goods on date, time and place from where such goods are sold for consideration. As duty is on "manufacture", and collected on "removal", the term 'removal' is more relevant, which would apply to place from where the sale takes place or the ownership of goods transferred from seller to buyer at the time of removal from such place. The provisions of Rule 21 of the Central Excise Rules, 2002 provides that Remission can be allowed when goods in question have been lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal. Hence, in absence of any clear definition of "Removal", in our considered view, the phrase "place of Removal" is an important expression/factor, which has to be decided first for charging duty or considering Application for Remission of duty. In the present case, question of Remission of duty is under consideration, we will confine our views only to the question of Remission of duty. The Appellant claims that they had cleared goods on CIF sale basis for export, but such sale would be completed at the port of shipment because in terms of CIF Sale Contract, such goods and the property in the goods remained with the seller [appellant] of the goods till the delivery of the goods in acceptable condition to the purchaser (ii) the seller [Appellant has borne the risk of loss of or damage to the goods during transit to the destination and (iii) freight charges were an integral part of the price of goods. As the goods in question were destroyed before sale was completed i.e. goods have to be treated as destroyed in the hands of appellant before its removal.*

11. *On the other hand Id. Departmental Representative's reliance on the decision of the Hon'ble Supreme Court in case of J.K. Spinning & Weaving Mills Ltd & Another - [1987 \(32\) E.L.T. 234](#) (S.C.) to argue that "Place of removal" will be factory only*

may not carry the case of the Revenue any further for the reason that in the said case, the issue was for the period prior to the amendment to Section 4(3)(C)(iii) w.e.f. 14-5-2003. We also find from the records that prior to 14-5-2003, the place of removal was only "Factory" or "Warehouse" as referred to in Section 4(3)(C)(i) and (ii). Therefore, this decision pertaining to the period prior to 14-5-2003, will not apply to the facts of this case, which pertains to the year 2008. Similarly, the decision of the Larger Bench in case of Gupta Metal Sheets - [2008 \(232\) E.L.T. 796](#) (Tri.-LB.) is also not applicable in this case. The view taken in the said case was that said case the issue was about availability of remission in case of theft of the goods and it was held that, the term 'loss' in Central Excise Law to be understood as being unavailable for consumption in market and the Goods not lost or destroyed in case of theft or dacoity and further that Stolen goods enter market for consumption after removal from approved premises and it was held that "Theft or Dacoity" not a natural cause and not an unavoidable accident. Ultimately holding that the Goods lost in theft or dacoity is not eligible for remission. However, there is no dispute in this case that the goods in question have been destroyed and the same are not available for consumption. Hence, the decision of Larger Bench in case of Gupta Metal Sheets - [2008 \(232\) E.L.T. 796](#) (Tri.-LB.) is also not applicable. Similarly, decision in the case of Hind Nippon Rural Indus. (P) Ltd. - [2004 \(167\) E.L.T. 414](#) (Tri-Bang.) which had followed decision of Siraj Sons v. Collector - [1988 \(35\) E.L.T. 597](#) (Tribunal). However, we find that those decisions are not applicable in the facts of this case as pertaining to period prior to amendment made in Section 4(3)(C)(iii) of CEA 1944 w.e.f. 14-5-2003.

12. As goods in question were cleared under ARE-1 for export under bond, in our view the sale would be completed at load port only as per definition of "Place of Removal" given u/s 4(3)(C)(iii) of the Central Excise Act, 1944. Under these circumstances, ownership of the goods and duty liability is also extended up to the load port and if, the goods are not exported, concerned manufacturer will be required to discharge the duty liability. Therefore, 'removal' also gets extended up to the port of shipment from where the sale would be completed and when the

goods were to be exported. Hence, if the goods cleared for export under Bond are destroyed before the export, ownership of the said goods and also duty liability, if any, would be always to the account of appellant assessee and that the said goods could be considered having been destroyed before removal and the benefit of Remission of duty is allowable in such an exceptional situation in terms of Rule 21 of Central Excise Rules, 2002. Clause (iii) in Section 4(3)(C) for "Place of removal" was inserted w.e.f. 14-5-2003 vide Section 136 of the Finance Act, 2003 which has stipulated as under :-

"(iii) 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."

Hence, the provision under clause (iii) in Section 4(3)(C) for "Place of Removal" will be applicable in the case under consideration.

13. By referring to Section 5 of Central Sales Tax Act, we also find that sale of goods can be deemed to take place in the course of Export of goods out of the territory of India only if the sale for such export is effected by a "transfer of documents of title to the goods, have crossed the custom frontier of India". It is settled position of law, in view of the decisions placed before us, that in case of exports the "place of removal" is the port of shipment. Accordingly, we have no hesitation in following the recent decision of the Hon'ble Gujarat High Court in case of *Commissioner v. Dynamic Industries Ltd* in the Tax Appeal No. 912 of 2012 decided on 25-7-2014, wherein the Hon'ble High Court has also upheld view taken by CESTAT to the effect that port of shipment is the 'place of Removal' in the cases of exports". Once such a view is taken, we find that the decisions in case of *Kuntal Granites Ltd. v. C.C.E*, reported at [2007 \(215\) E.L.T. 515](#) (Tri.-Bang.) and followed in subsequent decisions like in case of *Liva Healthcare Ltd. v. CCE, Nasik* - [2008 \(222\) E.L.T. 243](#) (Tri.-Mum.) and others is a good law, and requires to be upheld. There is no reason to take a different view.

14. We are of the view that the goods cleared for export under Bond which were destroyed before the same could be exported,

can be treated as having been destroyed before removal only. This would be the fair interpretation of the Rule 21 of the Central Excise Rules, 2002. Thus, primary condition of eligibility of Remission of duty on the destroyed goods is fulfilled as required u/r 21 of Central Excise Rules, 2002. Appellant is eligible for the Remission of duty in respect of goods for export under Bond which were destroyed before the same could be exported.

15. *We find that the issue as referred to the Larger Bench, as now decided by the Hon'ble High Court of Gujarat in Tax Appeal No. 912 of 2012 decided on 25-7-2014. Accordingly, reference to the several precedents by the Id. counsel for the assessee and by the SDR, would be of academic interest, since the judgment of the Hon'ble High Court of Gujarat in the case of Commissioner v. Dynamic Industries Ltd. has considered the very same point which is in favour of the appellant."*

5.1 In view of the above decisions, we do not find any merits in the impugned order and set aside the same.

5.2 Appeal is allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)