

ORDER-IN-APPEAL

The Joint Commissioner, Central Excise & Service Tax, Phalnapur, (hereinafter referred to as 'the appellant') has filed this appeal against DIO No. 384-FC/15/1001/400/19/EOs 2014-17 ex-Ad 12.02.2017 (hereinafter referred to as 'the impugned order') passed by the Additional Commissioner, Rajkot, (hereinafter referred to as 'the adjudicating authority') in the case of M/s. Vee Bhagwati Coke, Gujarat Pvt. Ltd. (hereinafter referred to as 'the respondent').

2. Briefly stated, the facts are that the respondent has under a written contract, supplied hard coke to M/s. Ispat Industries (Now M/s. Ispat Steel Ind.) Coles, Maharashtra on FOB basis. On verification of invoices and bill of lading issued by the respondent, it was noticed that they had charged certain amount towards freight from M/s. Ispat Steel Ltd and have not included the freight amount in the assessable value for the purpose of levying Central Excise duty amounting to Rs. 31,00,177/- during the period from March 2011 to March 2017.

3. Feeling aggrieved, the department had filed the appeal on the following grounds:

- That OIA dated 13.02.2017 is not legal and proper. The adjudicating authority has erred in holding that the amount of freight is not liable to be included in the assessable value as the 'place of removal' is factory, etc. in the case.
- The appellant have to prove that the goods have been sold by the respondent on FOB basis and a fixed amount of freight has been collected by them from the buyer which is mentioned in the invoices. Hence, as per contract, the ownership of the assessable goods has been transferred by the respondents to the buyer's premises and thus the place of removal in this case is the buyer's premises.
- The Section 4(a) Central Excise Act, 1944, and provision of Rule 2 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules 2000 have been reproduced by the appellant. On combine reading of section 4(1)(a) of Central Excise Act, 1944 (definition of "Transaction Value") and Rule 2 of Central Excise Valuation, (Determination of Price of Excisable Goods) Rules 2000, it is clear that since respondents had entered into contract for supply of excisable goods on FOB basis, the place of removal would be the buyer's factory gate. Hence the cost of transportation has to be included in the assessable value and Central Excise duty is liable to be discharged on it. The respondent has charged certain amount towards freight and the same amount is repeatedly mentioned in the contracts as well as in the invoices.
- That as per explanation 2 under sub 5 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules 2000, that cost of transportation from the factory to the place of removal, where the factory is not the place of removal, shall not be included for the purpose of determining the value of the excisable goods. Therefore, in the present

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case, wherein, the place of removal of goods is not the factory goods shed in the buyer premises, where ownership of the goods is transferred to the buyers by the respondent, as per terms and conditions mentioned in the contracts for sale, the cost of transportation from the factory to the place of removal is not to be included from the assessable value of the good.

- The adjudicating authority has erred in holding that as per Board's Circular No. 999/12/2014-Exc dated 20.10.2014, in treating the factory goods shed as place of removal, whereas the clarification issued by Board vide Circular No. 110/2017-Exc dated 23.07.17, which clarifies the place of removal as the transfer of property in goods from the seller to the buyer would be the relevant factor to determine the place of removal. In as per the circular the Place of Removal is the Place of Sale and Place of Sale is the time at which the title of property in the goods is passed on to the buyer. Thus, as to the goods which are given to the buyer / transporter, the property is deemed to have been passed on and that is the place of removal.
- Further the appellant has relied on the case of *CC of Mumbai vs. EMM Ltd.* reported in 2015-17(163-SOT) wherein the Hon'ble Apex court, has held that changes of substance (freight and insurance) are to be included only when such changes are incurred before the place of removal. In the present case, the freight charges have been incurred before the place of removal.
- That the appellant has sought a writ under Art 226 No. 1 of the Constitution of India dated 15.09.2017 and confirm the demand of Rs. 81,00,473/- under the provisions of proviso Section 114(1) (now Section 114) of the Central Excise Act, 1944. To recover interest at appropriate rate under Section 114A of the Central Excise Act, 1944. To impose penalty under Rule 25 of the Central Excise Rules, 2002 read with section 114A of the Central Excise Act, 1944.

4. Personal hearing was granted to the respondent on 15.02.2018, vide this office letter T.No. 12/74/FA/1564/2017 dated 27.01.2018 which has been returned back stating that the appellant's office wrote letter to the Commissioner, CEST, Bhavnagar and accordingly the office has received a letter from Assistant Commissioner, Bhavnagar, Dastard, informing that the unit is closed and party is a defaulter and no. unavail. No contact information of the unit is available with them.

5. This appeal was filed before the Commissioner (Appeals), Rajkot. The undersigned has been nominated as Commissioner (Appeals) / Appeals for Bhavnagar in respect to the case of appellant vide Board's Circular No. 2026/2017-Service Tax dated 17.10.2017 and Board's Order No. 35/2017 Service Tax dated 15.11.2017 issued by the Under Secretary (Service Tax, G.O.), M.O. Deptt of Revenue, (CFE), Service Tax Wing.

6 I have carefully gone through the facts of case and the grounds mentioned in the appeal. The issue to be decided in the appeal is whether freight charges are to be included in the transaction value for the purpose of determining excise duty.

For deciding the issue whether the freight charges are to be included in transaction value it would be useful to refer to the provisions of section 4 of the Central Excise Act, 1944 and Rule 5 of the Central Excise Rules (Determining the Place of Excisable Goods) Rules, 2000 both have already explained in the originating Show Cause Notice of this issue (page 1, 2, 3) bearing HM.No.125-UG/Geny/02/043/14 dated 22.10.2012 issued by M/s. Janta Cement works, Dharampur.

7 I find that raw goods were to be delivered at the place of the buyer and it is the only place where the acceptance of supplies was to be effected. The ownership of the goods remains with the respondent till the goods reach the destination as the seller actually takes place at the destination. Therefore, the place of removal for the purpose of valuation under Section 4 of the Central Excise Act, 1944 is the buyers premises.

8 Further, I find that the ratio of the Supreme Court of India decision in the case of *Tata Iron & Steel Co. Ltd. v. Commissioner* (2013) 350 ELT 223 (SC) equated to herein, where the goods are delivered at place of buyer then price of goods was not cost of material, Central Excise duty, loading, transportation, etc. risk is on loading the goods, it was held that transit freight charge was on the assessee which implied that till goods reached the destination, ownership then is remained with the respondent. Further the intent of purchase order was to transfer property in good to the buyer at premises of buyer when goods were delivered, thus the property in goods was transferred at that time and therefore the sale of goods was at place of buyer on delivery of goods and not at factory gate of respondent and hence freight charges were included in the valuation of goods.

9 Further, I find that HM No. Circular No. 8220/01/04-02 dated 27.10.2014 has clarified that the value of excisable goods to be ascertained in terms of provision of Central Excise Act, 1944 read with a section of the sale of goods Act, 1930. Payment of freight, the value of transport charges in value, payment of insurance or who bears the risk are not the relevant consideration to ascertain the place of removal. The place where sale has taken place or when the property in goods passed from the seller to a buyer is the relevant consideration to determine the place of removal.

10 I find the view that the ownership of the goods is transferred to the buyer at their premises only and the sale actually takes place at the destination and the place of removal for the purpose of the valuation under Section 4 of the Central Excise Act, 1944 is the buyers premises. Therefore, the transaction value will include the freight charges.

11 As for the issue of penalty on the assessee, I find that there is a voluntary element of suppression with an intent to evade payment of duty in case of goods declared without including them in valuation under Section 4 of the Central Excise Act, 1944.

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12. As the interest payable under 10%, I find that the notice has been paid to the concerned state and said duty has been paid to the vendor and such recovery shall be alongwith interest.

13. In view of the above, pass the following orders:

- (i) I confirm the demand of Central Excise duty amounting to Rs. 51,00,000/- (fifty one lacs seven thousand one hundred and seventy seven only) for the period from 01-01-2011 to March 2012 under the provisions of Section 11-A(1)(c) of the Central Excise Act, 1944.
- (ii) I confirm the demand of Interest under sub-section 11-A(4) of the Central Excise Act, 1944 and order recovery of the same.
- (iii) I impose penalty amounting to Rs. 2,50,000/- (two lacs fifty thousand only) of the Central Excise Rules, 2002 read with section 11-AC (1)(c) of the Central Excise Act, 1944 for the goods cleared without incurring the freight charges in the assessable value for the period from March 2011 to March 2012.
- (iv) In terms of provision of Section 11-AC (1)(c) of the Central Excise Act, 1944, the applicant has an option of paying reduced penalty of 25% of a sum so determined, subject to payment of such duty as per the said.

14. The appeal filed by the applicant is disposed of on above terms.


DR. SURESH SINGH
ADDITIONAL DIRECTOR GENERAL, CUSTOMS,
CENTRAL EXCISE & SERVICE TAX,
MUMBAI

Date: 05/01/12

S.No. 1094/EA/HR/2012

BY ROAD

To,

- 1) The Assistant Commissioner,
CGST & Central Excise
Division 7

Blawagan (Alongwith the copy of the OIA to be sent to M/s Man Shyamari
Co. Q's of Pvt.Ltd., Mumbai, Maharashtra)

Copy to :

1. The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone.
2. The Principal Commissioner, CGST & Central Excise, Bhavnagar.
3. The Assistant Commissioner, Central Excise & Service Tax Division 7, Bhavnagar.
4. The Joint Commissioner, Bhavnagar, CGST & Bhavnagar.
5. ¹CC/CPD
6. F.A.