CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH
Court No. IV

EXCISE APPEAL NO. 52053 OF 2019

[Arising out of Order-in-Appeal No. BHO-EXCUS-001-APP-060-19-20 dated 29.05.2019 passed by the Commissioner of GST, Customs & Central Excise, Bhopal.]

BATHINDA INDUSTRIAL GASES PVT LTD. **APPELLANT**

Vs.

COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX, CUSTOMS,& EXCISE BHOPAL **RESPONDENT**

Appearance:

Shri A K Prasad, Advocate for the Appellant
Shri Rakesh Agarwal , Authorised Representative for the Revenue

CORAM:

HON'BLE P. VENKATA SUBBA RAO, MEMBER(TECHNICAL)
HON'BLE DR. RACHNA GUPTA, MEMBER(JUDICIAL)

Date of Hearing : 11/10/2022
Date of Decision : 30-11-2022

FINAL ORDER No. 51116/2022

PER DR. RACHNA GUPTA

The present appeal has been filed to assail the Order-in-Appeal No. 060/2019-20 dated 29.5.2019 vide which the order of confirming the demand on the basis of inclusion of freight charges for delivery at buyer's place in the transaction value has been confirmed. The facts relevant for the adjudication are as follows:-

That the appellant is engaged in the manufacture of liquid Carobon dioxide (CO_2) and is also availing the Cenvat Credit facility on inputs, capital goods and input services under the provisions of Cenvat Credit Rules, 2004. During the audit of records of the appellant for the financial year 2012-13 to 2016-17 and audit of freight income ledger for the month of March 2015, it was noticed that the appellant had collected "Freight Charges" from the buyers but has not included the same in transaction value. From the perusal of the purchase order, the department observed that the appellant is supplying material (liquid CO_2) on 'FOR destination basis' to the destination through their own vehicles. It was also observed that the transportation cost was highly inflated to reduce the assessable value of manufactured product. Department formed an opinion that the ownership of the goods continued with the appellant till the goods reach the destination. The appellant is thus alleged to have excluded the freight charges with the sole intention to undervalue its manufactured product. Accordingly, vide show cause notice No. 06/2018-7358 dated 03.05.2018, Central Excise duty Rs.1,13,52,289/- was proposed to be recovered, as being short paid from the appellant along with interest and penalty. The said proposal was initially confirmed by the Original Adjudicating Authority vide Order-in-Original No. 06/2019 dated 05.02.2019. The appeal thereof has been dismissed by Commissioner (Appeals) vide Order-in-Appeal No. 1244/2018 dated 29.05.2019. Being still aggrieved by the Order, appellant is before this Tribunal.

2. We have heard Shri A K Prasad, learned Counsel for the appellant and Shri Rakesh Agarwal, learned Authorised Representative for the Revenue.

3. It is submitted on behalf of the appellant that appellants are manufacturing liquid CO_2 at their two units, one is in Gwalior, and another unit is located at Bhatinda, Punjab. Such

manufactured product needs specialized tankers for transportation and the appellants have their own fleet of such specialized tankers. Accordingly, the appellants were selling the said liquid gas to various industrial buyers on the basis of purchase orders on the prices indicated in the purchase order. Further, they are charging transportation charges separately in their commercial invoices. It is mentioned that the department has wrongly confirmed the view that since the sales made by the appellants were on 'F.O.R destination basis', the premises of the buyer was the 'place of removal' and freight charges were to be included in the assessable value.

3.1 It is submitted that it was duly brought to the notice of the Adjudicating Authority below that the purchase orders specifically of M/s. Varun Beverage Ltd. and of M/s. Kanpur Fertilizers and Cement Ltd. are not on 'F.O.R. destination basis'. The transport facility was provided by the appellant only because of a specialized transportation need for their product and that the appellant themselves were owning specialized tankers. Learned Counsel has impressed upon that Rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (hereinafter referred as Valuation Rules) by virtue of which if the invoice indicates the transportation cost separately, the same is not to be included in the assessable value. It is impressed upon that in all the invoices of the appellant, the transportation cost was separately indicated. It is submitted that Authorities below have committed an error while ordering inclusion of the transportation /freight charges in the assessable value and thereby in confirming the impugned demand as being the amount of short paid duty. The order is accordingly prayed to be set aside and appeal is prayed to be allowed. Learned Counsel has relied upon the decision of Hon'ble Apex Court in the case of **CC & CE, Nagpur vs Ispat Industries Ltd.** reported as **[2015 (324) ELT 670 (SC)].**

4. To rebut the submissions, the Adjudicating Authority has relied upon the **CBEC Circular No. 988/12/2014 –CE dated 20.10.2014** wherein it has been clarified that the 'place of removal' needs to be ascertained in terms of provisions of Central Excise Act, 1944 read with the provisions of Sale of Goods Act, 1930. It also clarified that it is the place where sales have taken place or where the property of any goods has passed on from seller to buyer which is relevant consideration to determine the 'place of removal'. Learned Departmental representative has impressed upon that in the present case there is sufficient evidence discussed by the adjudicating authority about sale to have concluded at the buyer's place and as such, the buyer's place was the place of removal. Transportation charges up to such place have rightly been included in the assessable value of the liquid CO_2 manufactured by the appellant. The appeal is accordingly, prayed to be dismissed.

5. Having heard the rival contentions, we observe as follows:

The issue involved herein is of the valuation and as to whether the freight charges recovered by the appellant manufacturer from the purchasers of manufactured product / liquid CO_2 for transporting the said product in its own specialized tankers to the buyers premises have to be included in the transaction /assessable value or not.

6. The relevant provision for the purpose is section 4 of Central Excise Act, 1944 and Rule 5 of Central Excise Valuation Rules, 2000. Section 4(1) reads as follows:

> "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

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.]"

And said Rule 5 reads as follows:

"**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 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."**

7. A bare perusal of Rule 5 of Valuation Rules clarifies that the cost of transportation from the 'place of removal' up to the place of delivery of the excisable goods has to be excluded. In this connection, the phrase "place of removal" needs determination, however taking into account the facts of this individual case. The phrase "place of removal" is defined under section 4 of the Central Excise Act, 1944 as:

"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 stored 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."

From this definition, it is clear that in case of a factory gate sale from a non-duty paid warehouse, or from a duty paid depot (from where the excisable goods are sold, after their clearance from the factory), the determination of the 'place of removal' does not pose much problem. However, there may be situations where the manufacturer /consignor may claim that the sale has taken place at the destination point because of following terms of the sale contract/agreement

(i) the ownership of goods and the property in the goods remained with the seller of the goods till the delivery of the goods in acceptable condition to the purchaser at his door step;

(ii) the seller bore the risk of loss of or damage to the goods during transit to the destination; and

(iii) the freight charges were an integral part of the price of goods.

However for place of sale to be the place of removal, it is the place from where the 'goods are to be sold' instead of the place where goods 'have been sold'. The place falling in former category can never be the place of delivery. The place from where goods are to be sold can be the place of manufacturer /seller only.

8. From the definition of "place of removal" also it is seen that 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 the 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 these premises is referable only to the manufacturer and not to the buyer of excisable goods.

9. Hon'ble Apex Court in the case of **Union of India vs Bombay Tyre International Ltd.** reported as **[(1984) 1 SCC 467]** held that cost of transportation from 'place of removal' to the 'place of delivery' is statutorily excluded. The relevant paragraph is quoted herein below:

> "Where the excisable article or an article of the like kind and quality is not sold in wholesale trade at the place of removal, that is, at the factory gate, but is sold in the wholesale trade at a place outside the factory gate, the value should be determined as the price at which the excisable article is sold in the wholesale trade at such place, *after deducting therefrom the cost of transportation of the excisable article from the factory gate to such place*. The claim to other deductions will be dealt with later."

The Court further went on to say :

> "Where the sale in the course of wholesale trade is effected by the assessee through its sales organization at a place or places outside the factory gate, the expenses incurred by the assessee upto the place of delivery under the aforesaid heads cannot, on the same grounds, be deducted. *But the assessee will be entitled to a deduction on account of the cost of transportation of the excisable article from the factory gate to the place or places where it is sold. The cost of transportation will include the cost of insurance on the freight for transportation of the goods from the factory gate to the place or places of delivery."*

10. To our opinion the harmonious reading of three of above provisions (Section 4 of Central Excise Act, Rule 5 of Valuation Rules and definition of place of removal under section 4 of Central Excise Act, 1944) makes it clear that buyer's premises can never

be, by any law, can be called as the place of removal of excisable goods. The place of removal can never be equated with the place of delivery. Place of removal alone is relevant for the purpose of section 4 i.e. for the purpose of calculating the transaction value as it was held by Hon'ble Apex Court in the case of **Escorts JCB Ltd. vs CCE, Delhi** reported as **[2002 (146) ELT 31 (SC)].** In the **Escorts case** the price charged from the buyer was 'ex-work' and was exclusive of freight insurance. The Hon'ble Apex Court observed that since the transit insurance was arranged by the assessee, the Tribunal inferred with the ownership of the goods so retained by the assessee only. It was delivered to the buyers on the reasoning that otherwise there would be no occasion for seller namely the assessee to take the risk of any kind of damage to the goods during transportation. The Hon'ble Supreme Court while relying upon **Bombay Tyre International** (supra) case has held that insurance of goods during transportation cannot possibly be the sole consideration to decide the ownership or the point of sale of goods.

11. This decision of **Escorts JCB** Ltd. was distinguished by Hon'ble Apex Court in its decision in the case of **CCE & Customs vs Roofit Industries Ltd.** reported as **[2015 (319) ELT 221 (SC)].** It was held therein as follows:

> "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 the 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 the Valuation Rules.
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> 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."

12. These findings have been modified by Hon'ble Apex Court in its recent decision in the case of **CC & CE, Nagpur vs Ispat Industries Ltd.** (supra) while upholding 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' is to be referred with reference to the premises of the manufacturer.**

12.1 In the case of **Ispat Industries** the Assessee was making the payment of duty by declaring that their factory gate was the place of removal, and not the buyer's premises. The period involved therein was from 28.9.1996 to 31.3.2003. Five show cause notices were issued to the assessees stating that the property in goods manufactured by them remained with the Assessee while the goods were in transit as Assessee had taken out an insurance policy to cover the risk of loss or damage to the goods while in transit. It was stated that the buyer's place or the place of delivery should be treated as the place of removal of the goods for the purpose of Section 4 of the Central Excise Act. In reply to the five show cause notices, the Assessee stated that all

their prices were ex-works, and that the goods were cleared from the factory on payment of central or local sales tax. Most of their sales were against Letters of Credit opened by the customer or through Bank discounting facilities. Invoices were prepared at the factory directly in the name of the customers, and the name of the Insurance Company as well as the number of Transit Insurance Policy were both mentioned. Based on the details mentioned in the invoice, the lorry receipt was prepared by the transporter and was in the buyer's name. This receipt carried a caution notice as well a notice to the effect that deliveries were to be made to the buyer alone, and to nobody else. Further it was stated that these transactions were entered in their sales register and were booked as sales, the stock or inventory of finished goods being reduced by such sales. In the event that there was an insurance claim, recovery was credited to the customer's ledger account against the recovery due from the customer in respect of the sale of the said goods. Excise invoices were prepared at the time that the goods left the factory in the name and address of the customers, and once the goods were handed over to the transporter, the respondent did not reserve any right of disposal of the goods in any manner. It had no right to divert the goods so handed over to the transporter and meant for a particular customer not to anybody else.

12.2 The Hon'ble Supreme Court in this case considered the amendments made after 1973 in relevant section 4 and observed that there were three important changes made in the Section 4. "Place of removal" has been defined for the first time to mean not only the premises of production or manufacture of excisable goods but also a warehouse or any other place or premises wherein such goods have been permitted to be deposited without payment of duty and from where such goods are ultimately removed. Section 4(2), which was introduced for the first time, where in relation to excisable goods the price thereof for delivery

at the place of removal is not known, and the value is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery was statutorily excluded. It was further observed by the Hon'ble Supreme Court that Section 4 as substituted by the 1973 Amendment Act suffered a further amendment in 1996. 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. The important point which was noted was that each of these premises is referable only to the manufacturer and not to the buyer of excisable goods. Even the expression "any other place or premises" refers only to a manufacturer's place or premises because such place or premises is stated to be where excisable goods "are to be sold". Further, it was observed that as a matter of law with effect from the Amendment Act of 28.9.1996, the place of removal only has reference to places from which the manufacturer is to sell goods manufactured by him, and can, in no circumstances, have reference to the place of delivery which may, on facts, be the buyer's premises.

12.3 The amendment made in year 2000 was also discussed and it was observed that under Section 4(3)(c), the place of removal is defined as it had been defined in the substituted Section 4 (by the 1973 Amendment). Then the Hon'ble Supreme Court discussed the provisions of Rules 5 and 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, and observed that the actual cost of transportation from the place of removal up to the place of delivery of excisable goods is excluded from the computation of excise duty provided it is charged to the buyer in addition to the price of goods and shown separately in the invoices for such goods. Rule 7 deals with the normal transaction value of goods transferred to a depot or other

premises which is said to be at or about the same time or the time nearest to the time of removal of goods under assessment.

12.4 The amendments in Year 2003 relating to section 4 and Rule 5 were discussed and it was observed that Rule 5 which was substituted in 2003 also confirms the position that the cost of transportation from the place of removal to the place of delivery is to be excluded, save and except in a case where the factory is not the place of removal. 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. Position remains same post 2003 as well. Further, the Hon'ble Supreme Court held that Goods were cleared from the factory on payment of the appropriate sales tax by the assessee itself, thereby indicating that it had sold the goods manufactured by it at the factory gate. Sales were made against Letters of Credit and bank discounting facilities, sometimes in advance. Invoices were prepared only at the factory directly in the name of the customer in which the name of the Insurance Company as well as the number of the transit Insurance Policy were mentioned. Above all, excise invoices were prepared at the time of the goods leaving the factory in the name and address of the customers of the respondent. When the goods were handed over to the transporter, the respondent had no right to the disposal of the goods nor did it reserve such rights inasmuch as title had already passed to its customer.

12.5 As far as Roofit (supra) decision is concerned, the Hon’ble Court observed that “This Court’s attention was not drawn to section 4 as originally enacted and as amended to demonstrate that the buyer’s premises cannot, in law, be a ‘place of removal’.

However it was clarified that principle of place of removal will now be distinguishable based on facts of the case.

13. Subsequently Hon'ble Apex Court in the case of **CCE & ST vs. Ultra Tech Cement Ltd.** reported as **[2018 (9) GSTL 337 (SC)]** has held that the depot, or the premises of a consignment agent of the manufacturer are obviously places which are referable only to the manufacturer. Even the expression "any other place or premises" refers only to a manufacturer's place or premises because such place or premises is stated to be where excisable goods *"are to be sold".* These are the key words of the sub-section. The place or premises from where excisable goods are to be sold can only be the manufacturer's premises or premises referable to the manufacturer. If we are to accept the 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 the buyer's premises.

14. In the light of the entire above discussions of the relevant provisions and the various decisions mentioned above, when we revert to the facts of the present case, we observe that undisputed fact remains is that appellants are mentioning the freight charges as separately in the invoices issued by them to the purchasers, there is nothing in the invoices or any other documents which shows that sales are on FOR destination basis, though the authorities below have given the finding that sales were on FOR destination basis but no evidence in this regard has been discussed. The distinguished fact of the present case is that manufactured liquid CO_2 was to be transported by specified tanker and the appellant itself owns fleet of such tankers because of this, the appellant was arranging transportation of the liquid CO_2 gas to their customers at their premises, however the fact remains that there is no evidence in the present case that liquid CO_2 was to be sold at the buyer's place. The invoices were issued on the basis of purchase orders at the premises of

appellant-manufacturer itself. No question of retaining the ownership in such 'sold out' product arises to still retain with the manufacturer. Accordingly we hold that the cost of transportation in the given circumstances is the one which has expressly been excluded in terms of Rule 5 of Valuation Rules.

15. Hon'ble Apex Court in its earlier decision in the case of **Baroda Electric Meters Ltd. vs CCE** reported as **[1997 (94) ELT 13 (SC)]** has held that when the sales were at factory gate there arises no question of including the freight charges in the assessable value even if the freight charges by the appellant from their customers is more than the actual expenses incurred in renting of tanker, i.e. in case the differential amount not includible in the assessable value since the duty of excise is on manufacturer and not on profit made by a dealer on transportation. We also observe that this Tribunal in appellant's own case vide Final Order No. A/51352/2014 dated 05.03.2014 has held that differential freight is not includible on the assessable value of the liquid CO_2 when same was transported by the appellant to its purchasers in the specified tankers owned by the appellant.

16. With respect to the circular, as relied upon by the Adjudicating Authority we observe that the circular is contrary on the basis of its record. At one point of time it is citing the outcome of **Ispat Industries** (supra) decision and at another point of time, it is defining place of removal in terms of the place where sale gets completed in terms of Sales Act. Otherwise also Circular cannot supercede the Statute nor it can supercede even the finding of Hon'ble Apex Court which becomes law of land in terms of article 141 of the Constitution of India.

17. In the light of entire above discussion, we hereby follow the outcome of **Ispat Industries** (supra) case and hold that, the freight charges are not includible in the assessable value of liquid

CO_2 those being separately charged in the invoices and the gas was sold at the time of clearance from the factory of the appellant. The authorities below are held to have wrongly confirmed the duty demand against the appellant on the basis of inclusion of freight charges in assessable value. We, therefore, set aside the impugned Order-in-Appeal. Consequent thereto appeal stands allowed.

(Pronounced in the open Court on 30-11-2022)

(P V SUBBA RAO)
MEMBER (TECHNICAL)

(DR RACHNA GUPTA)
MEMBER (JUDICIAL)

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