
(2009) 03 SC CK 0130

In the Supreme Court Of India

Case No : Civil Appeal No. 5901 of 2006

Commissioner of Central Excise, Noida

APPELLANT

Vs

Accurate Meters Ltd.

RESPONDENT

Date of Decision : 03-03-2009

Acts Referred:

Central Excise (No. 2) Rules, 2001 — Rule 25
Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 — Rule 4, 5
Central Excises and Salt Act, 1944 — Section 11A, 11AB, 23, 3, 4
Sales

Citation : (2009) 164 ECR 239 : (2009) 235 ELT 581 : (2009) 3 JT 481 : (2009) 4 SCALE 333 : (2009) 6 SCC 52 : (2009) 3 SCR 1146 : (2009) 2 UJ 931

Hon'ble Judges : S. B. Sinha, J;R. M. Lodha, J;Asok Kumar Ganguly, J

Bench : Full Bench

Advocate : Vikas Sharma, Sanjeev K. Bhardwaj, Anil Katiyar and B. Krishna Prasad, for the Appellant; Rajesh Chibber and Rajesh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—Whether 'freight' and 'insurance charges' constitute the value of the goods for the purpose of computation of Excise Duty in terms of Central Excise Act, 1944 (for short, "the Act") and the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (for short, "the Rules") is the question involved in this appeal.

2. Respondent is engaged in the manufacture of 'electric meters' and parts thereof falling under Chapter Sub-heading No. 9028.00 and 9033.00 of First Schedule to the Central Excise Tariff Act, 1985. Its customers, inter alia, are various State Electricity Boards constituted and incorporated under the Electricity (Supply) Act, 1948. Indisputably, the State Electricity Boards in terms of advertisements issued in this behalf called for quotation for supply of electric meters. The value of the electric meters was to be fixed as at the factory gate. Freight and the insurance charges, however, as stipulated therein, were to be charged on an

average basis and not on actuals.

Inter alia on the premise that the manufactured goods were actually delivered to the purchasers at their premises and not at the factory gate, a notice dated 6.2.2003 was issued to the assessee asking it to show cause as to why excise duty amounting to Rs. 9,13,260/- not paid on freight and insurance should not be demanded u/s 11A of the Act along with interest as payable u/s 11AB thereof as also as to why the penalty in terms of Rule 25 of Central Excise (No. 2) Rules, 2001/Central Excise Rules 2002 should not be imposed upon it.

3. Before the Adjudicating Authority, the respondent raised a plea that keeping in view the nature of transaction, freight and insurance charges were not to be included for the purpose of calculation of value of the goods.

In support of the said contention, reliance was placed on Escorts JCB Limited Vs. Commissioner of Central Excise, Delhi-II, . Distinguishing the said decision, the Adjudicating Authority by an order dated 5.11.2003 opined that there were ample reasons to believe that the sale had taken place at the buyer's end. On the said finding, the demand raised in the show cause notice as also the penalty proposed was confirmed.

Respondent preferred an appeal there against before the Commissioner (Appeals), which by an order dated 26.5.2004 was allowed. Appellant preferred an appeal before the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), New Delhi which has been dismissed by reason of the impugned judgment, holding:

2. The only contention of the Revenue in this case is that against the earlier order passed by the Tribunal, the appeal has been filed before Hon'ble High Court. The Revenue had not produced any order passed by the Hon'ble High Court staying the operation of earlier order passed by the Tribunal. In these circumstances, respectfully following the earlier order passed by the Tribunal, the appeal is dismissed.

4. Mr. Vikas Sharma, learned Counsel appearing on behalf of the appellant would urge that the finding of fact arrived at by the authority in original that the delivery of manufactured goods were made by the assessee at the place of the buyer's end having not been overturned, Rule 5 of the Rules shall apply.

5. Mr. Rajesh Chibber, learned Counsel appearing on behalf of the respondent, however, supported the impugned judgment.

6. Indisputably, goods were supplied by the assessee to the State Electricity Boards in terms of the stipulations contained in the advertisements issued by them. Two separate contracts have been entered into by and between the respondent and State Electricity Boards there for; one in respect of the supply of the electric meters and another for transportation and transit insurance there of.

7. Section 3 of the Act provides for levy and collection of duty in the manner as

prescribed therein. Section 4 provides for valuation of excisable goods for purposes of charging of duty of excise. Section 4(1)(a) of the Act reads as under:

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;"

"Place of removal" has been defined in Section 4(3)(c) to mean:

"(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 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;

8. Indisputably, a place where excisable goods are sold can be a place of removal. The question, therefore, what would constitute a place of removal will depend upon the fact of each case.

In the demand-cum-show cause notice issued by the Assessing Officer itself, it has been noted:

In the invoices raised to Government buyers, mainly to Electric Boards, amount of freight and insurance, which is to be recovered from such buyers is shown separately. It is at a fixed rate i.e. equalized freight. It indicates that if the goods are cleared to government buyers, the 'freight and insurance' amounts are borne by the supplier party but it is recovered from the buyer at a fixed rate irrespective of freight amount, which has been incurred by the supplier party on sending the goods to the buyers.

9. It was accepted that in the orders placed for supply of meters, contracted prices pre-determined by the Electric Board have inter alia been shown as under:

i) Computed prices or Ex-factory have been quoted.

ii) Prices have been quoted as firm are on F.O.R. destination.

iii) The Ex-Factory are quoted without the element of the Excise duty, sales Tax/ Trade Tax and packing, Forwarding, average Freight and Insurance charges, which are paid separately.

iv) Packing, Forwarding, average Freight and Insurance charges covered by supplementary orders wherein average charges as per meter are shown.

Purchase orders provided for ex-factory prices as Firm on F.O.R., destinations which are inclusive of excise duty, sales tax, packing, forwarding, freight and insurance charges. In the price and delivery schedule, average price was to be paid per meter as shown separately including freight charges. It was opined that the freight amount being collected was not on actual basis. The Authority in original also noticed the said fact in his order dated 5.11.2003, stating:

At the outset, I observe that the issue raised in the S.C.N. is whether the element of freight and insurance is includible in the value of the goods after its clearance from payment of excise duty. The issue pertains to the sale of goods after its clearance from the factory gate. As per the Central Excise Act, the valuation of the goods is governed by the provisions of Section 4 of the Central Excise Act, 1944, wherein it has been laid down that the value of the goods shall be price at which the goods are not sold by the assessee, for delivery, at the time and place of removal. In case the goods are not sold at the time and place of removal, the value of such goods is to be determined as per the provisions of Central Excise Valuation Rules, 2000. Further, as per Rule 5 of the Valuation Rules, 2000, where any excisable goods are sold in the circumstances specified in clause (a) of sub section (1) of Section 4 of the Act except in circumstance 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 actual cost of transportation from the place of removal upto the place of delivery of such excisable goods provided the cost of transportation is charged to the buyer in addition to the price for the goods and shown separately in the invoice for such excisable goods. If the assessee has a system, of pricing and sale at uniform prices inclusive of equated freight for delivery at factory gate or elsewhere, no deductions for freight element will be permissible.

Despite the same, however, it arrived at a conclusion that the sale had taken place at the end of the buyer on the premise that the legal ownership of the goods would pass to the buyer at the latter's place.

10. Indisputably, the authority in appeal reversed the said decision following the judgment of the CESTAT in the case of the assessee itself, holding:

2. The appellants sell the goods manufactured by them on ex-factory price basis. They also arrange the transport and transit insurance of the goods. Because the goods are insured in the appellants names during transit revenue contends that place of delivery of the goods should be taken as place of removal and Central Excise duty levied on a value including freight and insurance charges.

3. We have carefully perused the case records and considered the submissions made by both sides. This issue remains settled in favour of the assessee by the decision of this Tribunal in the case of Associated Strips 2002 (49) RLT 506. The

appeals are allowed following our previous decision.

11. Before advertng to the decisions of this Court, we may notice Rules 4 and 5 of the `Rules'.

RULE 4. The value of the excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of the removal of goods under assessment, subject, if necessary, to such adjustment on account of the difference in the dates of delivery of such goods and of the excisable goods under assessment, as may appear reasonable.

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.

Rule 5 of the Rules would apply in a case where clause (a) of Sub-section (1) of Section 4 of the Act has no application.

12. We have noticed hereinbefore that there were two separate contracts; one for sale of Electricity Meters which was governed by the provisions of the Sale of Goods Act, and the other governing transportation of the goods. The charges for transportation of the goods were not on actual basis. Respondent was bound to transport the goods from the factory gate to the place of the State Electricity Boards at the rates specified in the tender. Prior thereto, the State Electricity Board Authorities were to make inspection of the goods.

13. In the case of 2002 (81) ECC 404 , the Tribunal distinguishing its earlier decision in 2000 (70) ECC 794 , held:

18. In the case of Associated Strips Ltd. the goods manufactured are inspected by the representative of the buyer (Electricity Board) and thereafter the manufacturer had to mark the name of the buyer on the poles before they are handed over to the transporter. So also in the case of Mauria Udyog Ltd. the LPG cylinders manufactured by the appellant are inspected by the representatives of the oil companies. After getting test certificate from the Bureau of India Standards Cylinders are to be marked with the name of the oil companies before they are handed over to the transporter for the purpose of transmission to the buyer. In the light of the provisions contained in Section 23, it has to be taken that the goods are unconditionally appropriated to the contract when the above procedure was followed and goods handed over to the carrier thus passing on the property in the goods to the buyer.

19. We may also refer to the provision contained u/s 39 of the Sale of goods Act which refers to the legal effect of delivery of the goods to a carrier by the seller. It is provided that where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a

carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is prima facie deemed to be a delivery of the goods to the buyer *Bibhuti Bhusan Bose Vs. National Coal Trading Co.*, , admittedly, in the present case after appropriation of the good to the contract they were delivered to the carrier as per terms of the contract. Therefore, delivery to the carrier has to be taken as delivery to buyer. Revenue has no case that the goods are not sent to the buyer through carrier. On the other hand, as mentioned earlier, the only contention raised is that since the insurance of the goods in transit. At this juncture we may point out that in the case of *Mauria Udyag Ltd.* there is no insurance taken by the seller.

14. The said decision of the Tribunal has been approved by this Court in *M/s Escorts JCB Ltd.* (supra), stating:

5. The contention is that the fact that the assessee arranged for the transit insurance would in no way lead to an inference that the ownership in the goods was retained by the assessee during the period of the transit until the delivery of the goods at the place of the buyer. The terms and conditions of the sale are clear that the sale is Ex- works at Ballabgarh, Haryana. The payment is to be made before despatch of the goods from the factory premises. The machinery, handed over to the carrier/transporter is as good as delivery to the buyer in terms of Section 39 of the Sale of Goods Act apart from terms and conditions of sale. Section 39 of the Sale of Goods Act reads as under:

39. Delivery to carrier or wharfinger:

(1) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to wharfinger for sale custody, is prima facie deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorized by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so do, and the goods are lost or damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails to do, the goods shall be deemed to be at his risk during such sea transit.

The factual matrix involved in this case is squarely applicable to the ratio of the decisions in *Associated Strips Ltd.* (supra) as also *Escorts JCB Ltd.* (supra).

15. In that view of the matter and for the reasons stated hereinbefore, we have no doubt in our mind that the authority in appeal as also the Tribunal were correct in their view that the amount claimed by way of transportation charges and insurance cannot be considered for determining the value of the electric meters supplied.

16. For the reasons aforementioned, there is no merit in this appeal. It is dismissed accordingly with costs. Counsel's fee assessed at Rs. 25,000/-.