
(2023) 08 CESTAT CK 0014

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No.71484 Of 2013

M/S. Satya Megha Ispat Private Limited

APPELLANT

Vs

Commissioner Of Central Excise, Shillong

RESPONDENT

Date of Decision : 04-08-2023

Acts Referred:

Central Excise Valuation (Determination Of Price Of Excisable Goods) Rules, 2000 —
Rule 5, 7, 11
Central Excise Act, 1944 — Section 2(h), 11A

Citation : (2023) 08 CESTAT CK 0014

Hon'ble Judges : Ashok Jindal, Member (J); K. Anpazhakan, Member (T)

Bench : Division Bench

Advocate : Devraj Sahu, K.Chowdhury

Final Decision : Allowed

Judgement

Ashok Jindal, Member (J)

1. This appeal is directed against the impugned order wherein demand of Rs.36,18,110/- was confirmed along with interest and equivalent amount of penalty was also imposed.

2. The facts of the case are that the appellant is located in the state of Meghalaya and engaged in the manufacture of Ferro Silicon, MS Ingot and Runner & Risers. The appellant unit was located in the notified area declared under Notification No.32/99-CE dated 08.07.1999 and was eligible for grant of exemption by way of refund of duty paid out of Account Current for a period not exceeding 10 years from the date of its commercial production. The appellant was availing the said benefit. The appellant used to sell their finished goods to their customers at FOR price which is inclusive of all expenses upto the place of delivery for which the appellant has valued the price of the finished goods including the freight element in the selling price. The time and place of removal of the goods was at the factory gate and the finished goods are cleared and sold at factory gate and is assessed at the time of removal at factory gate. The buyer

is not paying the freight separately and the price fixed by the appellant is sole consideration for determination of the assessable value of the finished goods. The appellant paid the duty and claimed refund during the period September 2005 to June 2010. All duty was paid in cash. A show cause notice was issued to the appellant alleging that the appellant has erroneously taken the refund of Rs.36,18,110/- by way of over-valuation of the goods by including freight charges in the assessable value in violation of Rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. The show cause notice was adjudicated and demand on account of erroneous refund was confirmed along with interest and penalty was also imposed. On appeal the Ld.Commissioner(Appeals) also confirmed the adjudication order, therefore, the appellant is before us.

3. The Ld.Counsel for the appellant submits that as the freight charges are not shown separately in the invoice and the appellant is selling goods to their buyers on FOR basis and freight charges are inclusive in the agreed price with the buyers, in that circumstances, the appellant has correctly valued the goods and paid duty thereon and whatever duty they have paid in cash have sought refund thereof. In that circumstances the impugned order is to be set aside. He also relied on the decision of this Tribunal in the case of RNB Carbides & Ferro Alloys Pvt.Ltd. v. Commr. of C.Ex., Shillong [2021 (378) ELT 474 (Tri.-Kolkata)].

4. On the other hand, the Ld.AR for the department opposed the contention of the Ld.Counsel and submits that in the case of CCE, Shillong v. Guwahati Carbon Ltd. [2009 (243) ELT 307 (Tri.-Kolkata)], this Tribunal has held that the price of transportation beyond the place of factory cannot be included in the assessable value of the goods in question. Therefore the appeal is to be dismissed.

5. Heard the parties, considered the submissions.

6. The facts are not in dispute that the appellant is selling goods to their buyers on FOR basis and cost of freight is not shown separately in the invoice which means the selling price is inclusive of freight charges. Both sides are relying on the decision of this Tribunal on the said issue. On going through the decision of this Tribunal in the case of Guwahati Carbon Ltd. (supra) we find that the said decision was passed by this

Tribunal way back on 1st April 2009, wherein this Tribunal relied upon the decision of Hon'ble Apex Court in the case of Escorts JCB Ltd. v. Commissioner [2002 (146) ELT 31 (SC)] and Commissioner v. Accurate Meters Ltd. [2009 (235) ELT 581 (SC)] to hold that the insurance and transportation charges cannot be included in the assessable value even though the goods were transported by the assessee from factory gate to the place of State Electricity Board as per the contract. Thereafter a lot of water flown on the issue and the Hon'ble Apex Court had occasion to look into the matter and whereas circulars have been issued on the said issue whether the transportation charges which were not shown separately in the invoice and goods have been sold on FOR basis up to the place

of buyer can the transportation charges be included in the assessable value or not? The said issue has been examined by this Tribunal in the case of RNB Carbides & Ferro Alloys Pvt.Ltd. (supra), wherein this Tribunal has observed as under :-

"11. We have carefully gone through the appeal records and submissions made by both sides including the written submissions. We find that the present dispute falls within a narrow compass as to whether the assessee had correctly availed the benefit of Notification No. 32/99-C.E., dated 8-7-1999 and if not, then whether the Revenue was entitled to recover the refunds already granted claiming it to be a case of "erroneous refund".

12. It has not been disputed that the contracts executed by the assessee were FOR contracts. We note that the contracts/purchase orders specified 'door delivery' at all-inclusive prices. The purchasers reserved the right to inspection and to not accept the goods, in case the goods supplied were found to be sub-par. The assessee bore the risk of loss or damage to the goods during transit to the destination, as evident from the transit insurance policies and the documents relating to rejection of goods by certain buyers. Neither did the invoices reflect the transportation costs separately nor were such charges recovered separately from the buyers. The buyers were not concerned with the goods unless and until the same were delivered in an acceptable condition at their premises and, in fact, bought by them after inspection. The invoices issued by the assessee incorporated details of the relevant purchase orders issued by the buyers and as the agreed upon price was as per FOR destination, there was no reason to charge any freight component separately.

13. Sale has been defined under Section 2(h) of the said Act as follows :

"sale" and "purchase", with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration;

Thus, under the Act sale takes place only upon transfer of the possession of the goods by the manufacturer to the buyer, which occurred in the present cases at the buyers' premises.

14. The parties intended that the sale of goods would take place at the premises of the buyers and that such premises would be considered to the Point of Sale, where the title and property in the goods were actually transferred.

15. We are of the view that the invocation of Rule 5 of the Valuation Rules, 2000 by the Revenue was misplaced. The said Rule applied to cases only where goods were sold at the place of removal but were to be delivered elsewhere, which condition could not have applied in the given facts and circumstances. The assessee's case fell within the purview of the exception to the aforesaid Rule 5. On the other hand, at the time of clearance of goods from the assessee's factory,

no sale took place and the risk and ownership of the goods remained with the assessee. The possession of the goods was transferred to the buyers and the sale took place at the buyers' premises only upon the buyers accepting the goods after due inspection. In view of Rule 7 of the Valuation Rules, 2000 read with Rule 11, the assessable value of the goods was the price charged by the assessee at the place of sale. The spirit of the said Rule 7 read with Rule 11 of the Valuation Rules indicates that all charges upto the place of sale are includible, including freight, etc.

16. The Ld. Senior Counsel further contended that even if it be assumed that the assessee had paid higher Central Excise duty than was leviable, the Department was not at liberty to retain any part of such excess amount collected as duty. It is pertinent to note that the basic purpose and object of the notification in question was to promote industrialization in the north-eastern part of the country. We observe that the Revenue can retain only those sums which represent the actual duty leviable under a statute and therefore, any excess amount collected as duty ought to be refunded.

17. The assessee has further placed reliance on Board's Circular No. 59/1/2003-CX, dated 3-3-2003 and Circular No. 988/12/2014-CX, dated 20-10-2014.

18. The aforesaid circulars state that place of removal/assessable value was ascertainable with reference to the place where the sale took place or where the property in the goods passed from the seller to the buyer in terms of the Sale of Goods Act, 1930. Therefore, where the terms and conditions of sale in the relevant contracts/purchase orders unambiguously stipulated that the act of sale would be completed upon on-door delivery at the buyer's premises, as is the case of the assessee before us, the transportation costs would be included.

19. We observe that the decision of this Bench in the case of M/s. Nalari Ferro Alloys [2016 (337) E.L.T. 113 (Tri. - Kolkata)] (supra) was rendered in the backdrop of similar facts and circumstances. The issue involved was whether the assessee was entitled to include freight charges upto the buyer's premises and claim refund in terms of the very notification in question i.e. Notification No. 32/99, dated 8-7-1999. After examining the contract in light of the principles enunciated for determination of place of removal vis-à-vis point of sale and discussing the aforementioned decisions of Roofit Industries and Ispat Industries Ltd., supra, this Tribunal had held that the property in the goods was intended to pass at the buyer's premises and, therefore, the assessee therein was not required to deduct the cost of transportation for Central Excise valuation purposes.

20. The decision in the case of Montage Enterprises (supra), cited by the Revenue, is distinguishable and its ratio is inapplicable to the situation at hand. To begin with, the said decision related to the Notification No. 56/2002-C.E., dated 14-11-2002 and the appellant therein had not established that the buyer's premises was the point of sale. Moreover, it was not brought to the notice of this

Tribunal that the decision of Ispat Industries (supra) related to an ex-factory sale. The Valuation Rules, 2000 were also not discussed at length. We are of the view that the judgment in the case of Roofit Industries (supra) hold the field and is to be respectfully followed. In so far as the decision of this Tribunal in the case of Aditya Birla Chemicals India (supra) relied by the Revenue is concerned, though the duty demand raised for claiming deduction of the freight amount was dropped by relying the Supreme Court judgment in Ispat Industries (supra), the Tribunal categorically noted therein "In so far as the decision of the Tribunal in the case of Nalari Ferro Alloys Pvt. Ltd. (supra) relied by the Learned Authorized Representative for the department, we note that the said case pertained to demand proceedings initiated after sanctioning of refund by the lower authorities in terms of Notification No. 32/99-C.E. by considering the law and precedents available at that point of time. The facts in that instant case, in essence, were that the assessee had paid the duty by including freight amount. Considering the judgment of the Hon'ble Supreme Court in Ispat Industries case (supra), the duty paid on freight was legally not payable. So the duty amount paid legally as well as the amount legally not payable but paid, both were entitled for refund if the refund claim was filed as per law." Hence, the Tribunal was conscious of the view taken in Nalari Ferro Alloys case, that even if the duty was legally not payable on the portion of freight which was subsequently held not includible, the same was entitled for refund of claim was filed as per law. Therefore, the decision in the case of Aditya Birla Chemicals India (supra) relied by the Revenue do not advance their case.

21. Looking from a perspective altogether different from the case of valuation of excisable goods, the entire proceedings in the instant case mainly relate to the recovery of amount already refunded claiming the same to be a case of "erroneous refund" under Section 11A of the Act. The whole basis of the Revenue that freight amount is not includible in the assessable value, as has subsequently been held by the Supreme Court in Ispat Industries (supra), to state that the buyer's place can never be said to be place of removal. In our view, the refund already sanctioned by relying on the judicial legal precedents holding the field then as well as the clarifications issued by the Board, the same cannot be termed as "erroneous refund". In this regard, it would be worthwhile to take support from the recent decision of the Hon'ble Gauhati High Court in the case of Topcem India v. UOI - 2021 (376) E.L.T. 573. In that case also, refund was sanctioned of the cess amount along with the basic excise duty in terms of the exemption notifications issued in the north-eastern States. The said notifications provided for exemption by way of refund of the duty paid through account current (PLA). By a subsequent decision of the Supreme Court in Unicorn Industries, it was held that the previous decisions of the Supreme Court in S.R.D. Nutrients case which upheld exemption of the cess amount was held to be per incurium. As a result thereof, the Department proceeded to recover the cess amount refund of which was already sanctioned by terming the said refund to be "erroneous".

The Gauhati High Court clarified the position that refund already sanctioned by

taking the support of the legal precedents holding the field then cannot be termed as erroneous merely because of the change in legal position subsequently. The Court noted as below :-

“Erroneous Refund” “46.

The provisions of Section 11A in the context of the present proceedings have been invoked by the Department by treating the refunds granted earlier to the petitioners to have been granted “erroneously”. A perusal of the provisions of Central Excise Act and the Rules framed thereunder reveals that the term erroneous has not been defined anywhere. In this context, it is relevant to refer to the judgment of this Court rendered in Rajendra Singh (supra) wherein by referring to the Black’s Law Dictionary, it was held that “erroneous” means involving error; deviating from law. In the said judgment, it is held that an order cannot be termed as erroneous unless it is not in accordance with law. It is held that if an officer acting in accordance with law makes certain assessment and determines the turnover of dealer, the same cannot be branded as erroneous. In another matter, the Division Bench of this Court in Victor Cane Industries v. Commissioner of Taxes and Ors., reported in 2001 SCC Online Gau 216 : (2002) 2 GLR 69, held that simply because the law has changed or earlier law laid down has been reversed, it would not entitle the revisional authority to reopen the earlier assessments.....

Another Division Bench judgment of this 47. Court rendered similar findings in the case of Mahabir Coke Industries, reported in (2007) 4 GLR 515. It was held that even if subsequently the law is changed or reversed, the assessments already completed cannot be allowed to be opened as the law covering the field relating to exemption of tax to a new Industry at the time of passing of the order of assessment to be considered.....”

In the present case also, the Department by relying on the subsequent decision of the Supreme Court in Ispat Industries has proceeded to take a view that freight amount can never be included in the assessable value. In our view, the refund already sanctioned cannot be termed as “erroneous refund” more so in view of the fact that refund has been duly sanctioned by the Department as per the laws prevailing then duly supported by the C.B.E. & C. clarifications at relevant point of time.

22. In view of the above discussion, the appeals filed by the assessee are allowed and the appeals filed by the Revenue are dismissed as withdrawn under the National Litigation Policy. Since the issue has been decided on merits, we are not examining the plea on limitation.”

7. Further we take note of the fact that CBEC has issued a Circular No.1065/4/2018-CX dated 08.06.2018, which clarifies the position, which is as under:-

4. Exceptions :

(i) The principle referred to in para 3 above would apply to all situations except where the contract for sale is FOR contract in the circumstances identical to the judgment in the case of CCE, Mumbai-III v. Emco Ltd. - 2015 (322) E.L.T. 394 (S.C.) and CCE v. M/s. Roofit Industries Ltd. 2015 (319) E.L.T. 221 (S.C.). To summarise, in the case of FOR destination sale such as M/s. Emco Ltd. and M/s. Roofit Industries where the ownership, risk in transit, remained with the seller till goods are accepted by buyer on delivery and till such time of delivery, seller alone remained the owner of goods retaining right of disposal, benefit has been extended by the Apex Court on the basis of facts of the cases.

8. As the issue has been clarified by the subsequent Circulars of CBEC, therefore, the decision of this Tribunal in the case of Guwahati Carbon Ltd. (supra) cannot be relied upon in the changing circumstances. Hence, relying on the decision of this Tribunal in the case of RNB Carbide & Ferro Alloys Pvt.Ltd. (supra) and CBEC Circular No.1065/4/2018-CX dated 08.06.2018 we hold that the appellant has correctly assessed their goods and paid duty thereon in cash and rightly taken the refund thereof.

9. In that circumstances, we do not find any merit in the contention of the revenue that appellant has taken erroneous refund. Therefore, the impugned order is set aside and the appeal is allowed with consequential relief, if any.