

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3418 OF 2004

COMMISSIONER CENTRAL EXCISE,
MUMBAI-III

.....APPELLANT

NT(S)

VERSUS

M/S. EMCO LTD.

.....RESPONDENT

S)

WITH

CIVIL APPEAL NO. 8966 OF 2011

JUDGMENT

A.K. SIKRI, J.

es

The respondent/assessee herein manufactures

t,

transformers. The supply of these transformers by the assessee is primarily to the State Electricity Boards. The assessee is exigible to the levy of Central Excise under Central Excise Act,

e

1944 (hereinafter referred to as the 'Act'). Goods, namely, the

o

transformers which are cleared by the assessee were supplied to

Signature Not Verified

the State Electricity Boards. These are subject to excise duty

Digitally signed by
Suman Wadhwa
Date: 2015.07.31

which the assessee has been paying to the appellant herein

16:55:35 IST
Reason:

(hereinafter referred to as the 'Revenue'). The dispute in the

Civil Appeal No. 3418 of 2004

Page 1

of 19

present case, however, is about the 'transaction value' on which the excise duty is payable under Section 4 of the Act. The assessee is paying the duty on the price at which the said transformers are sold to the Electricity Boards. However, the Revenue wants that while arriving at the price of the said goods,

transportation cost and transit insurance cost be also included to arrive at the correct transaction value in terms of Section 4(3)(d) of the Act.

- 2) Since the assessee was not including the transportation and transit insurance cost, a show cause notice was issued on 24.07.2001 proposing to recover a sum of Rs. 1,17,36,766/- on account of short excise duty paid for the period 28.09.1996 to 31.12.2000. In this show cause notice, it was, inter alia, alleged that the transit insurance policies reveal that the assessee had been keeping the custody of the goods with it during the transit. Further, the agreement with various customers nowhere suggested that the transporter was to take the delivery of goods on behalf of the customers. The transit insurance from the assessee's works upto the stores sites where the goods were to be delivered at the buyer's premises under the contract, was on assessee's account. On that basis, the show cause notice

Civil Appeal No. 3418 of 2004

Page 2 of 19

contended that the transaction value would include the amount charged on account of transportation and transit insurance as it was covered by the definition of 'transaction value' contained in Section 4(3)(d) of the Act. The assessee refuted the aforesaid averments in the show cause notice with the plea that sale of goods to the customers took place at the factory gate of the assessee which was the 'place of removal' of the goods. Merely because the assessee arranged for transportation as well as transit insurance at the request and instance of the customers, there was no reason to include the cost thereof as transaction value had to be calculated upto the 'place of removal' and the expenses incurred thereafter were not to be included.

- 3) The aforesaid defence of the assessee did not cut any ice with the adjudicating authority and repelling the contention of the assessee, demand in the show cause notice was confirmed by the Commissioner, Central Excise vide his Order-in-Original dated

18.08.2002. This order was challenged by the assessee in the form of appeal before the Customs Excise and Gold (Control) Appellate Tribunal (for short, 'CEGAT'). CEGAT has allowed the appeal simply by mentioning that the issue stands settled in favour of the assessee by the decision of the Tribunal which has

Civil Appeal No. 3418 of 2004
been approved by the Supreme Court.

Page 3 of 19

4) The argument of the Revenue in the present appeals, preferred against the aforesaid order, is that the matter was not so simple which could be covered within the four corners of the judgment of this Court in Escorts JCB Ltd. v. Collector of Central Excise¹, relied upon by the Tribunal. He submitted that there have been various nuances, intricacies and features of the present case which were required to be discussed before the conclusion could be arrived at that the case is covered by the said judgment. His submission was that there were many distinguishing features which are not taken note of and, obviously, not discussed and a non-reasoned cryptic order is passed by the Tribunal.

5) Learned counsel for the respondent, on the other hand, made persistent effort to justify the order of the Tribunal with the submission that the case was squarely covered by the judgment of this Court in Escorts JCB Ltd. case.

6) We have considered the submissions of both the sides. Indubitably, the duty of excise is chargeable on excisable goods with reference to the value of those goods. Section 4 of the Act deals with the valuation of such goods for the purpose of levying

¹ 2002 (146) ELT 31 (SC)

Civil Appeal No. 3418 of 2004
excise duty as the excise duty is to be levied on the 'transaction value' that has to be arrived at in the manner prescribed in the said provision as well as the rules framed thereunder.

Page 4 of 19

7) As pointed out above, show-cause notice in the instant case

covers the period from 28.09.1996 to 31.12.2000. Section 4 was different prior to 01.07.2000. Section 4 was substituted by new Section 4 with effect from 01.07.2000 by Section 94 of the Finance Act, 2000, whereby the concept of 'transaction value' was introduced. From the same day, the Central Excise (Valuation) Rules, 1975 were also substituted by the Central Excise (Determination of Prices of Excisable Goods) Rules, 2000. Therefore, the period from 28.09.1996 to 30.06.2000 shall be covered by the old provisions and the period of show-cause notice from 01.07.2000 to 31.12.2000 shall be covered by the amended provisions. Section 4, as it stood prior to amendment, reads as under:

"Section 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 value, such value, shall, subject to the other provisions of this section, be deemed to be -

(a) the normal price thereof, that is to say the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal,

Civil Appeal No. 3418 of 2004

Page 5 of 19

where the buyer is not a related person and the price is the sole consideration for the sale.

Provided that -

xx xx xx

(4) For the purposes of this Section -

xx xx xx

(b) "Place of removal" means:

xx xx xx

(ii) a warehouse or any other place or 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 and from where such goods are removed."

8) After the amendment, the new Section 4 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, 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 the goods are not related and the price is the sold 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.

xx xx xx

(3) For the purposes of this section, -

xx xx xx

(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;

xx xx xx

(d) "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and

selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of

duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods."

- 9) It follows from the above that whereas under old Section 4, the basis of value was the normal price at which the goods were ordinarily sold in the course of wholesale trade, under the new provision, the basis of the valuation is the transaction value for each removal. Under the new provision, the duty is chargeable on the excisable goods with reference to their value. Further, such a duty is to be paid on each removal of the goods. Thus, the value is to be calculated at the time of removal of the goods and it has to be on the value of the goods. Further, this value has to be 'transaction value'. Both the expressions, namely, 'place of removal' as well as 'transaction value', are defined under this very Section. These definitions are contained in sub-section 3(c) and 3(d) respectively of Section 4, as already reproduced above.
- 10) It is significant to point out that the definition of 'place of removal' virtually remains the same, except that clause (3) was inserted in the year 2003. The issue as to whether the cost of freight and transit insurance is to be included or not depends upon the place of removal.

- 11) 'Place of removal' is the place or premises from where the excisable goods are to be sold after their clearance from the factory and from where such goods are removed. Thus, 'place of removal', in a given case becomes a crucial determinative factor for the purpose of valuation. In the present context, if it is found that transportation charges and transit insurance charges were incurred after the 'place of removal', then they are not to be included. On the other hand, if these charges are incurred before the 'place of removal' then they are to be included while arriving at the transaction value. Again, in the context of the present case, what is to be determined is as to whether the 'place of removal' was the factory gate of the respondent or it was the premises of the purchaser at the time of delivery of these goods.

12) If the goods are cleared at the factory gate, then the excise duty has to be charged on the valuation of the goods to be arrived at the factory gate as that would be the place of removal of goods. It would mean that the expenses which are incurred after the removal of goods from the factory gate namely freight, insurance and unloading charges etc. are not to be included in the valuation of the goods for the purposes of excise duty. The reason is that the sale of goods to the buyer is at the factory gate when the

Civil Appeal No. 3418 of 2004

Page 9 of 19

property passes to the buyer and the aforesaid expenditure are thereafter incurred by the buyer. It is this aspect which was gone into by this Court in the case of Escorts JCB Ltd. (supra). That was a case where question of including insurance charges came up for consideration. It was found as a fact that the goods were cleared at the factory gate. On these facts, this Court held that insurance charges, or for that matter, transport charges would not be included even if the assessee had arranged for the transit insurance. The Court found that the terms and conditions of sale clearly stipulated that it was ex-works at the factory gate of the assessee. The payment was to be made before discharge of the goods from the factory premises. In the opinion of the Court, the machinery which was handed over to the carrier/transporter on receiving the payment was as good as delivery to the buyer in terms of Section 39 of the Sale of Goods Act and, therefore, possession of the sold goods was handed over to the buyer at the factory gate. In this manner, the transaction was full and complete and nothing remained to be done after the goods left the factory premises. On these facts, provisions of Section 4 of the Act, which deals with valuation of excisable goods for the purposes of charging of duty of excise was taken note of and analysed, holding that the aforesaid charges could not be

Civil Appeal No. 3418 of 2004

Page 10 of 19

included for the purpose of arriving at valuation of excisable goods. The Court found fault with the orders passed by the

authorities as well as CEGAT in the following manner:

"A perusal of the orders passed by the authorities and the CEGAT show that since transit insurance was arranged by the assessee, therefore it was inferred and held that the ownership of the goods was retained by the assessee until it was delivered to the buyer on the reasoning that otherwise there would be no occasion for the seller namely, the assessee to take risk of any kind of damage to the goods during transportation. To us, the whole reasoning seems to be untenable. The two aspects have been mixed up - one relating to the transaction of sale of the goods and the other arranging for the transit insurance for the buyer and charging the amount expended for the purpose from him separately. In connection with the proposition that insurance can be taken by a third person on behalf of another, reliance has been placed by the assessee on "Chitty on Contracts" Twenty-Eight Edition Vol. 2 Special Contracts P.978 Chap. 41 Note 007 under the heading "Insurance of Another's interest". It is indicated that in varied facts and circumstances and subject to the statutory provisions of contract, it is possible to ensure the interest of another. Referring to a decision reported in [1947] K.B. 685 Prudential Staff Union versus Hall, it is observed that a seller in possession of the goods when the property and risks have passed may insure his buyer's interest. Referring to a decision reported in Hepburn versus A. Tomlinson (Hauliers) Ltd. H.L. (E) 1966 451, it has been submitted on behalf of the assessee that a bailee apart from its interest may also insure the interest of the owner of the property. There may be floating insurance policy covering not only the limited interest but the whole interest of the ownership of the customers in the normal course.

To substantiate the point further, a reference to Para 5-012 at Page 184 of Benjamin's Sale of

Civil Appeal No. 3418 of 2004

Page 11 of 19

Goods Fourth Edition has been made which is to the following effect:

"Insurance. The passing of property is rarely of relevance to insurance. A person can insure goods to their full value against any loss on behalf of anyone who may be entitled to an interest in the goods at the time the loss occurs, provided that it appears from the terms of the policy that it was intended to cover their interest. Also a buyer will have an insurable interest in goods if they are at his risk, whether or not the property has passed to him".

From the above passage it is clear that ownership in the property may not have any relevance in so far insurance of goods sold during transit is concerned. It would therefore not be lawful to draw an inference of retention of ownership in the property sold by the seller merely by reason of the fact that the seller had insured such goods during transit to buyer. It is not necessary that insurance of the goods and the ownership of the property insured must always go

together. It may be depending upon various facts and circumstances of a particular transaction and terms and conditions of sale. A reference has also been made to Colinvauz's Law of Insurance, Sixth Edition by Robert Merkin to indicate that there may be insurance to cover the interest of others that is to say not necessarily the person insuring the interest must be the owner of the property.

In one of the cases referred to and reported in 1983 E.L.T. 1896 (S.C.) Union of India and others etc. etc. versus Bombay Tyre International Ltd. etc. etc. the question involved was regarding deduction of transportation charges along with cost of insurance. It was held as follows:

"Therefore, the expenses incurred on account of the several factors which have contributed to its value upto the date of sale, which apparently would be the date of delivery, are liable to be included. Consequently, where the sale is effected at the factory gate, expenses

Civil Appeal No. 3418 of 2004

Page 12 of 19

incurred by the assessee upto the date of delivery on account of storage charges, outward handling charges, interest on inventories (stocks carried by the manufacturer after clearance), charges for other services after delivery to the buyer, namely after-sales service and marketing and selling organization expenses including advertisement expenses cannot be deducted. It will be noted that advertisement expenses, marketing and selling organization expenses and after sale service promote the marketability of the article and enter into its value in the trade. Where the sale in the course of wholesale trade is effected by the assessee through its sales organisation at a place or places outside the factory gate, the expenses incurred by the assessee upto the date 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".

13) We have extensively discussed the judgment in Escorts JCB Ltd. because of the reason that the Tribunal has allowed the appeal of the respondent herein with the observations that case of the respondent is covered by this judgment. We would like to point out at this stage that in Commissioner of Central Excise, Noida v. Accurate Meters Ltd.², the Court took note of few more decisions, including the case of Escorts JCB Ltd., and reiterated

the aforesaid principles but at the same time also emphasising that the place of removal depends on the facts of each case.

- 14) In a recent decision of this Court in Commissioner, Customs and Central Excise, Aurangabad v. M/s. Roofit Industries Ltd.³, the position in law was summarized in the following manner:

"12) 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 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 Valuation Rules."

- 15) Having stated the legal position, we now revert to the facts of the present case.

- 16) The Commissioner, Central Excise while deciding that the transportation charges as well as transit insurance charges are to be included for fixing the transaction value. The order reveals that

3 (2015) 5 SCALE 470

the Commissioner had scanned through the agreements entered into between the assessee and with various customers and other documents on the basis of which the Commissioner concluded that the property in goods was passed on to the customers only at the destination. According to him, there was a specific condition in the contracts that the goods will be dispatched from freight pre-paid by road and up to the destination of the customers. It was also stated that material should be dispatched duly insured by the assessee up to the customers' destination and the cost

towards obtaining insurance was included in the price. These contracts further contain a clear stipulation that in case of any damage to the goods during transit, the supplier will lodge the claim and obtain compensation from the insurance company. So much so, one Deputy Manager of the assessee, viz. Shri D.K. Bhattacharya in his statement, recorded under Section 14 of the Act, had specifically stated that "the responsibility of the goods lies on M/s. Emco till the delivery of the said goods to the customer's premises and, therefore, freight incurred and transit insurance charges were recovered from the customers.....for covering the transit risk they had taken out transit insurance policy and whenever there was a loss or damage to goods M/s. Emco claims the same from the insurance company.....the possession of

Civil Appeal No. 3418 of 2004

Page 15 of 19

the goods is transferred only at the premises of the

buyers/customers". The Commissioner also noted that the aforesaid statement was even confirmed by the General Manager of the assessee.

- 17) The Tribunal did not bother to look into any of the aforesaid aspects and/or discussed the same. In a cryptic non-reasoned order, the Tribunal allowed the appeal. To be precise, the following order is passed:

"Appellants were issued a notice proposing to levy duty in the value of amount of freight and transit insurance recovered by them but the same suppressed from the department as it appears from page 10G the show cause notice.

2. It was confirmed after hearing both sides, it is found that the issue is well settled in favouring the assessee by the decision in the case of Associated Strips Ltd. [2002 (143) ELT 131-Trib.] which has been approved by the Apex Court in the case of Escorts JCB Ltd. Vs. Collector of Central Excise [2002 (146) ELT 31 (SC)]. Being bound by the same, this order impugned cannot be restrained and is to be set aside and appeal allowed."

- 18) The perfunctory manner in which the appeal of the assessee is allowed, cannot be countenanced. If the Tribunal was confirming the decision of the Authority below, may be detailed discussion was not required as the reasons given in detail could be found in

the order appealed against, though even in such a case brief reasons are to be given by the Tribunal, in particular, to meet the

arguments which are advanced by the appellant while challenging such an order. However, in the instant case, we find that there is a detailed discussion in the order of the Commissioner on the facts of the case. Those facts are not adverted to or dealt with. The decision of the Commissioner is overruled with single observation that the case is covered by the judgment in Escorts JCB Ltd., without discussing as to how it was so covered. This is notwithstanding the fact that the decision as to which is the 'place of removal' depends upon the facts of each case.

19) The consequence of the aforesaid discussion would be to set aside the order of the Tribunal and remit the case to it for fresh consideration after looking into the facts of the present case, namely, the terms and conditions of the sale with the buyer and determination on that basis as to which was the place of removal, that is whether it was the factory gate of the assessee or the place of delivery. We may record that as per the Commissioner, place of removal was the place of delivery at the buyer's premises. However, since no documents are produced before us, we are not in a position to comment as to whether the aforesaid view taken by the Commissioner is proper or not.

20) Accordingly, the appeals are allowed in the aforesaid terms by remitting the cases to the Tribunal for fresh consideration.

No costs.

.....J.
(A.K. SIKRI)

.....J.
(N. V. RAMANA)

Civil Appeal No. 3418 of 2004
ITEM NO.1A
(For Jt.)

COURT NO.13

SECTION III

Page 18 of 19

S U P R E M E C O U R T O F
RECORD OF PROCEEDINGS

I N D I A

Civil Appeal No(s). 3418/2004

COMMNR. OF CENTRAL EXCISE, MUMBAI

Appellant(s)

VERSUS

M/S. EMCO LTD.

Respondent(s)

WITH
C.A. No. 8966/2011

Date : 31/07/2015 This appeal was called on for judgment today.

For Appellant(s) Mr. Arijit Prasad,Adv.
Ms. Shirin Khajuria,Adv.
Mr. B. Krishna Prasad,Adv.

For Respondent(s) Mr. Jay Savla,Adv.
Ms. Ranuka Sahu,Adv.

Hon'ble Mr. Justice A.K.Sikri pronounced the judgment of
this Court comprising of His Lordship and Hon'ble Mr. Justice
N.V.Ramana.

The appeals are allowed.
No costs.

(SUMAN WADHWA) (SUMAN JAIN)
AR-cum-PS COURT MASTER
Signed Reportable judgment is placed on the file.