Commnr.,Customs & Cent.Excise ... vs M/S. Roofit Industries Ltd on 23 April, 2015

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Bench: Rohinton Fali Nariman, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5541 OF 2004

COMMISSIONER, CUSTOMS AND CENTRAL EXCISE, AURANGABAD	.....APPELLANT(S)	
VERSUS		
M/S ROOFIT INDUSTRIES LTD.	.....RESPONDENT(S)	

J U D G M E N T

A.K. SIKRI, J.

Respondent is the holder of Central Excise Registration for manufacture of RCC and PSC pipes falling under Chapter Heading 6804/6807 for the first schedule to the Central Excise Tariff Act, 1985. The respondent entered into four agreements for designing, manufacturing, providing at site, laying, jointing and testing of PSC pipes of specified sizes. These are agreements dated 24.06.1996, 01.09.1997, 25.09.1997 and 25.05.1999.

2) It is the case of the Revenue that on the basis of general intelligence collected, respondent/assessee was indulging in evasion of central excise duty by not computing the assessable value of finished goods properly to the extent that it was deducting the amount of freight, insurance and unloading charges from the price excisable goods though the place of removal of finished goods was different from the factory gate. The preventive party visited the factory premises of the assessee on 25.03.2000, conducted enquiries and resumed the records for further scrutiny. After scrutiny of various records and documents, it was revealed that the assessee had received work orders from various Government authorities and private contractors and the agreements entered into by the assessee with the above mentioned parties were for designing, manufacturing, providing at site, laying, jointing and testing of PSC pipes of specified sizes. The agreement entered, therefore, entailed upon the assessee, for delivery of the finished goods and not at the factory gate. It was found that no sale took place till the goods reached the test of the projects.

3) A show cause notice dated 02.11.2011 was issued as to why the differential central excise duty amounting to Rs.43,56,318/- for the period of 01.01.1996 to 30.06.2000 should not be recovered from them under proviso to Section 11A(1) of the Central Excise Act read with Rule 9(1) of the Central Excise Rules, 1994 and why penalty under Section 11AC and interest under Section 11AB should not be imposed. The assessee replied and was given personal hearing. Learned Adjudicating authority vide its order in original confirmed the demand to extent of Rs.36,16,318/- on account of under valuation and on the ground that place of removal finished goods was the buyer's premises and not at the factory gate.

4) Aggrieved by the said order, the respondent filed an appeal before CESTAT. Learned Tribunal vide its impugned judgment and final order dated 30.03.2002 has allowed the appeal on the reasoning that the issue is settled in Escorts JCB Ltd. v. Commissioner of Central Excise, Delhi-II[1].

5) Feeling aggrieved by the aforesaid order of the CESTAT, present appeal is preferred by the Revenue under Section 35L(b) of the Act.

6) The respondent has been duly served in the appeal. However, nobody has entered appearance on behalf of the respondent. Matter came up for final arguments on 10.04.2015. On that day, we heard learned counsel for the appellant for some time as the argument remained inconclusive. For remaining arguments, matter was adjourned to 13.04.2015. However, nobody appeared on behalf of the respondent on 10.04.2015 and 13.04.2015. In these circumstances, we had no option but to reserve the matter for judgment after hearing Mr. Kaul, learned ASG, who appeared for the Revenue.

7) Insofar as the legal position is concerned, there cannot be any dispute about the same. Section 4 of the Act is the relevant statutory provision which deals with valuation of excisable goods for the purpsose of charging of duty of excise. Relevant portion thereof, as it existed during the period with which we are concerned, 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 value, such value shall, subject to the other provisions of this section, be deemed to be-
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> (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, where the buyer is not a related person and the price is the sole consideration for the sale:
>
> Provided that-
>
> (i) * * *
>
> (i-a) * * *

(ii) * * *

(iii) * * *

(b) * * *

(2)-(3) * * *

(4) For the purpose of this section,-

(a) * * *

(b) 'place of removal' means:

(i) * * *

(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) A contextual examination of the aforesaid provision, for the purpose of the present case, would bring out the following the pertinent aspects:

(i) The duty of excise is chargeable on excisable goods with reference to the value of those goods.

(ii) The value of the goods is deemed to be 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.

(iii) The said normal price is to be seen at the time of delivery and place of removal.

(iv) 'Place of removal' is specifically defined and for our purposes, it is to be a 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, become determinative factor for the purpose of valuation.

9) 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 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 career/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 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 Spcial 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 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 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 incuding 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".

10) The underlying factor that normal price has to be the price at the time of delivery and at the place of removal, in terms of Section 4, has been succintly brought out and amplified in VIP Industries Ltd. v.

Commissioner of Customs and Central Excise, Aurangabad[2] in the following words:

"6. We have heard the parties at length. In our view, Section 4 has to be read as a whole. Under Section 4(1)(a), the normal price is the price at which 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, where the buyer is not a related person and price is the sole consideration for sale. Therefore, the normal price is the price at the "time of delivery" and "at the place of removal". Before the amendment, the place of removal was only the factory or any other place or premises where the excisable goods were produced or manufactured or a warehouse or any other place or premises where any excisable goods have been permitted to be deposited without payment of duty. Thus, the price would be the price at that place. By the amendment proviso (i-a) to Section 4(1)(a) has been added. Under Section 4(1)(a)(i-a) where the price of the goods is different for different places of removal, each such price was deemed to be the normal price of such goods in relation to "such place of removal". Thus, if the place of removal was the factory, then the price would be the normal price at the factory. If the place of removal was some other place like a depot or the premises of a consignment agent and the price was different then that different price would be the price. It is because the newly added proviso (i-a) to Section 4(1)(a) was now providing for different prices at different places of removal that the definition of the term "place of removal" had to be enlarged. Thus the amendment was not negativing the judgments of this Court. If that had been the intention it would have been specifically provided that even where price was the same/uniform all over the country, the cost of transportation was to be added."

11) In Commissioner of Central Excise, Noida v. Accurate Meters Ltd.[3], the Court took note of few decisions including in the case of Escorts JCB Ltd. and reiterated the aforesaid principles by emphasising that the place of removal depends on the facts of each case.

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.

13) 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 24.06.1996 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.

14) The clear intent of the aforesaid purchase order was to transfer the property in goods to the buyer at the premises of the buyer when the goods are delivered and by virtue of Section 19 of Sale of Goods Act, the property in goods was transferred at that time only. Section 19 reads as under:

“19. Property passed when intended to pass.-(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.”

15) These are clear finding of facts on the aforesaid lines recorded by the Adjudicating authority. However, the CESTAT did not take into consideration all these aspects and

allowed the appeal of the assessee by merely referring to the judgment in the case of Escorts JCB Ltd. Obviously the exact principle laid down in the judgment has not been appreciated by the CESTAT.

16) As a result, order of the CESTAT is set aside and present appeal is allowed restoring the order passed by the Adjudicating authority.

.....J. (A.K. SIKRI) .....J. (ROHINTON FALI NARIMAN) NEW DELHI;

APRIL 23, 2015.

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[1] 2002 (146) ELT 31 (SC) = (2003) 1 SCC 281 [2] (2003) 5 SCC 507 [3] (2009) 6 SCC 52