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SC in Ispat - A combat on GTA outward cenvat credit?

Author: G. Natarajan

"Cenvat Credit" is always a mine of litigation. With effect from 01.04.2008, Rule 2 (l) of the Cenvat Credit Rules, 2004 (CCR, 2004) defining the term "input service" inter alia "includes outward transportation upto the place of removal". So it becomes necessary to decide as to what is the "place of removal" in each case, to decide on the eligibility of cenvat credit for the service tax paid on freight (Goods Transport Agency - GTA service) for transporting the excisable final products. "Place of removal" is also significant for valuation of excisable goods under section 4 of the Central Excise Act, 1944 and the rules made thereunder. As per Rule 5 of the Central Excise Valuation (Determination of Price of excisable goods) Rules, 2000, where the place of removal and place of delivery of goods are different, the cost of transportation from the place of removal to the place of delivery is excludible from the transaction value.

The term "place of removal" is defined in Section 4 (3) (c)

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 goodshave been permitted to be deposited without payment of duty;

(iii) a depot, premises of a consignment agent or any other place or premisesfrom where the excisable goods are to be sold after their clearance from the factory;

from where such goods are removed.

Later, the same definition has also been incorporated under Rule 2 (qa) of the CCR, 2004, vide Notification 21/2014 CE NT Dt. 11.07.2014.

From the above, it is clear that cenvat credit of service tax paid on GTA service would be entitled for cenvat credit, if it relates to transportation upto the "place of removal".

The following clarification has been issued vide the Master Circular, bearing No. 97/8/2007 Dt. 23.08.2007

> *(b)* ***Issue :*** *Whether a consignee can take credit of the amount paid as service tax either by himself (as consignee) or by the consignor or by the Goods Transport Agency?*
>
> ***Comments :*** *As per Rule 3 of the Cenvat Rules, 2004, Cenvatcredit of, inter alia, service tax leviable and paid on any „input*

services" can be taken. The rule does not distinguish as to who (i.e. the GTA, the consignor or the consignee himself) has paid the aforesaid tax. The only condition required to be satisfied is that the consignee must be a manufacturer of excisable goods or a provider of taxable service and the service must be in the nature of „input service" for such activity. In case of inward transportation of inputs or capital goods, such service (being specifically mentioned under the definition of „input service") would qualify to be called as „input service" and, thus, the service tax paid (by any of the persons mentioned above) on it would be eligible as credit to the receiver if he is either a manufacturer of excisable goods or a provider of taxable service.

(c) ***Issue :*** *Up to what stage a manufacturer/consignor can takecredit on the service tax paid on goods transport by road?*

Comments : *This issue has been examined in great detail by the CESTAT in the case of M/s Gujarat Ambuja Cements Ltd. v. CCE, Ludhiana [2007 (6) S.T.R. 249 (Tri-D)]. In this case, CESTAT has made the following observations :-*

"the post sale transport of manufactured goods is not an input for the manufacturer/consignor. The two clauses in the definition of „input services" take care to circumscribe input credit by stating that service used in relation to the clearance from the place of removal and service used for outward transportation upto the place of removal are to be treated as input service. The first clause does not mention transport service in particular. The second clause restricts transport service credit upto the place of removal. When these two clauses are read together, it becomes clear that transport service credit cannot go beyond transport upto the place of removal. The two clauses, the one dealing with general provision and other dealing with a specific item, are not to be read disjunctively so as to bring about conflict to defeat the laws" scheme. The purpose of interpretation is to find harmonyand reconciliation among the various provisions".

Similarly, in the case of M/s. Ultratech Cements Ltd v. CCE., Bhavnagar - 2007 (6) S.T.R. 364 (Tri.) = 2007-TOIL-429-CESTAT-
AHM, it was held that after the final products are cleared from the place of removal, there will be no scope of subsequent use of service to be treated as input. The above observations and views explain the scope of the relevant provisions clearly, correctly and in accordance with the legal provisions. In conclusion, a manufacturer/consignor can take credit on the service tax paid on outward transport of goods up to the place of removal and not beyond that.

8.2 In this connection, the phrase „place of removal" needs determination taking into account the facts of an individual case and the applicable provisions. The phrase „place of removal" has not been defined in Cenvat Credit Rules. In terms of sub-rule (t) of Rule 2 of the said rules, if any words or expressions are used in the Cenvat

Credit Rules, 2004 and are not defined therein but are defined in the

Central Excise Act, 1944 or the Finance Act, 1994, they shall have the same meaning for the Cenvat Credit Rules as assigned to them in those Acts. The phrase „place of removal" is defined under section 4 ofthe Central Excise Act, 1944. It states that, -

"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."

It is, therefore, clear that for a manufacturer/consignor, the eligibility to avail credit of the service tax paid on the transportation during removal of excisable goods would depend upon the place of removal as per the definition. In case of a factory gate sale, 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 in 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. In such cases, the credit of the service tax paid on the transportation up to such place of sale would be admissible if it can be established by the claimant of such credit that the sale and the transfer of property in goods (in terms of the definition as under Section 2 of the Central Excise Act, 1944 as also in terms of the provisions under the Sale of Goods Act, 1930) occurred at the said place.

Thus, if the following three conditions are satisfied, cenvat credit of service tax paid on outward transportation can be availed as cenvat credit, as per this circular.

(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 thedestination; and

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

Since the above clarification has not overcome the practical difficulties in determining the eligibility of cenvat credit of service tax paid on outward transportation, the CBEC came out with another circular No. 988/12/2014 Dt. 20.10.2014. This circular, after dealing with various caselaws and previous circulars, has concluded as below.

> *It is reiterated that the place of removal needs to be ascertained in term of provisions of Central Excise Act, 1944 read with provisions of the Sale of Goods Act, 1930. Payment of transport, inclusion of transport charges in value , payment of insurance or who bears the risk are not the relevant considerations to ascertain the place of removal. The place where sale has taken place or when the property in goods passes from the seller to the buyer is the relevant consideration to determine the place of removal.*

The crux of the above discussions is to the effect that if the transfer of property over the goods happens at the buyers' place, in terms of the provisions of the Sale of Goods Act, 1930, then such buyers' place would be the place of removal and hence any service tax paid on GTA services availed for transporting the goods till the buyers' premises would be entitled to cenvat credit. As a corollary, since the buyers' place is the place of removal, the transportation cost incurred till the buyers' place would be includible in the assessable value (If freight is charged separately over and above the price, it has to be included for computing excise duty or if the price is an all inclusive price, no deduction towards freight can be claimed).

So far so good. Now comes the recent decision of the Hon'ble Supreme Court in the case of CCE Vs Ispat Industries Ltd (2015-TIOL-238-SC-CX).

This decision was in the context of inclusion of freight in the assessable value and interpretation of the term "place of removal" for this purpose. By noting the phrase "are to be sold" in the definition of "place of removal", the Hon'ble Supreme Court has osberved that place of removal could only be the places of the manufacturer and it can never be the buyers' place. The Hon'ble Supreme Court has also observed that while deciding the same issue in Roofit case (off course on different set of facts), this aspect was not brought before the knowledge of the Court (para 32 of the judgement). The Court has also noted various other aspects like raising of invoice in the name of the buyer at the factory gate, receipt of advance against sale, reserving no right of diversion of goods, payment of sales tax at the time of removal, etc. and concluded that it is only the factory, which is the place of removal. Though the previous decision in Roofit case has also been distinguished on the peculiar facts of that case (property in goods remained with the seller, entire price would be paid only after acceptance of the goods, etc), the emphatic observations in para 33 of the

judgement, would make it difficult to consider the buyers' place as the place of removal, even if the property in goods passes to the buyers only at the buyers' place, as per the Sale of Goods Act.

As a consequence, availment of cenvat credit of the service tax paid on GTA services for transporting the goods upto the buyers' premises would be in jeopardy, as such credit is admissible only upto place of removal. Most of the assessees now follow a consolidated price and do not charge freight separately, which also includes cost of transportation upto the customer's place and excise duty is paid on such price including cost of transportation. Though the above decision of the Hon'ble Supreme Court would enable them to exclude the cost of transportation upto buyers' place from the assessable value, practically it would be very difficult. On the other hand, though duty of excise is paid on a value which includes cost of transportation also, availing cenvat credit of the service tax paid on such transportation could be disputed, as the buyers' place cannot be considered as the place of removal and cenvat credit for transportation is allowed only upto place of removal. Will the emphasis on where the property in goods is transferred vis-a-vis the Sale of Goods Act would still be relevant to decide credit entitlement in view of the categorical finding of the Apex Court that the buyers' place can never be the place of removal?

What will be the position for commodities attracting duty of excise on MRP basis? Though section 4 is not applicable for such commodities, in as much as the term "place of removal" is now defined in the CCR, 2004 itself, would impact credit availment for transportation upto buyers' premises for Section 4 A commodities also?

Will the Government make the issue rather simple by amending the definition of input service to the effect, outward transportation upto the place of delivery of goods, if cost of transportation upto such place of delivery is not excluded from the assessable value?

Valuation (Central Excise) — Includibility of freight and insurance charges — Clarifications

37B Order No. 59/1/2003-CX., dated 3-3-2003

F. No. 6/6/2003-CX.1

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New

Delhi

Subject : Inclusion of freight and insurance charges in the assessable value.

In exercise of the powers conferred under Section 37B of the Central Excise Act, 1944, Central Board of Excise and Customs considers it necessary, for the purpose of uniformity in connection with valuation of excisable goods to issue the following instructions.

2. Attention is invited to CBEC‟s Circular No. 533/29/2000-CX., dated 24-5-2000 [2000 (118) E.L.T. T52]regarding Central Excise Valuation - amended definition of „place of removal‟ decision of CEGAT.

3. The said Circular had been issued with reference to CEGAT‟s Order No. 1222/99-A, dated 24-8-99 in case of *M/s. Escorts JCB Limited* v. *CCE, New Delhi*. The said judgment of Tribunal was appealed against (CA No. 7230/1999) by the assessee before the Hon‟ble Supreme Court. Supreme Court have, vide its Order in Civil Appeal No. 7230 of 1999 and C.A. No. 1163 of 2000 reported in 2002 (146) E.L.T. 31 (S.C.) decided the issue on 24-10-2002 setting aside the order of Tribunal.

4. While giving the judgment the Hon‟ble Bench of Supreme Court have observed (in para 13 of the saidjudgment) that

> “in view of the discussions held above in our view the Commissioner of Central Excise and CEGAT erred in drawing an inference that the ownership in the property continued to be retained by the assessee till it was delivered to the buyer for the reason that the assessee had arranged for the transport and transit insurance. Such a conclusion is not sustainable”.

In this judgment Hon‟ble Supreme Court also quoted Section 39 of „Sales of Goods Act, 1930‟ and held that the machinery, handed-over to the carrier/transporter is as good as **delivery** to the buyer in term of section 39 of the Sales of Goods Act, apart from terms and conditions of sale .

5. Similarly in Civil Appeal Nos. 4808-4809 of 2000 with C.A. Nos. 1858-1859 of 2001, 7898 of 2001 and 4221 of 2002 against the order of Tribunal in case of *Prabhat Zarda Factory Limited* v. *Commissioner of Central Excise* reported vide 2000 (119) E.L.T. 191 (T-LB), the Hon‟ble Supreme Court have in their order reported vide 2002 (146) E.L.T. 497 (S.C.) held, on 14-11-2002, that :

> “In these matters, the question is whether freight and insurance charges are to be included in the assessable value for the purposes of excise. This question is covered by the judgment of this Court in the case of *Escort JCB Ltd.* v. *Commissioner of Central Excise, Delhi* - 2002 (146) E.L.T. 31 (S.C.). The only difference which has been pointed out is that in the case of *Escorts* case (supra) the sale was at the factory gate whereas in this case the sale was from the depot. Learned Counsel for the appellants admit that the freight and insurance charges up to the Depot would be includible in the assessable value for the purposes of excise. However, the sale being at the Depot, the freight and insurance for delivery to the customers from the Depot would not be so includible as per the said judgment.”

6. The Central Board of Excise and Customs have in consultation with Additional Solicitor General, decided not to file review petition against the said Supreme Court judgments.

7. “Assessable value” is to be determined at the “place of removal”. Prior to 1-7-2000, “place of removal” [section 4(4)(b), sub-clauses (i), (ii) and (iii)], was the factory gate, warehouse or the depot or any other premises from where the goods were to be sold. Though the definition of “place of removal” was amended with effect from 1-7-2000, the point of determination of the assessable value under section 4 remained substantially the same. Section 4(3)(c)(i) [as on 1-7-2000] was identical to the earlier provision contained in section 4(4)(b)(i), section 4 (3)(c)(ii) was identical to the earlier provision in section 4(4)(b)(ii) and rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, took care of the situation covered by the earlier section 4(4)(b)(iii). In the Finance Bill, 2003 (clause 128), the definition “place of removal” is proposed to be restored, through amendment of section 4 to the position as it existed just prior to 1-7-2000.

8. Thus, it would be essential in each case of removal of excisable goods to determine the point of “sale”. As per the above two Apex Court decisions this will depend on the terms (or conditions of contract) of the sale. The „insurance‟ of the goods during transit will, however, not be the sole consideration to decide the ownership or the point of sale of the goods.

9. Based on the above clarifications, pending cases may be disposed off. Past instructions, circulars and orders of the Board on the issue may be considered as suitably modified.

10. Suitable trade notice may be issued for the information and guidance of the trade.

11. Receipt of this order may please be acknowledged.

12. Hindi version will follow.

Cenvat Credit Rules, 2004 — Determination of Place of Removal

Circular No. 988/12/2014-CX, dated 20-10-2014

F.No.267/49/2013-CX. 8

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New
Delhi

Subject : Determination of place of removal - Regarding.

Attention is invited to Notification No. 21/2014-C.E. (N.T.), dated 11-7-2014 vide which the definition of "place of removal" has been inserted in the CENVAT Credit Rules, 2004 (CCR). Under these rules there are provisions that the credit of input services is available upto the place of removal. As the definition is now provided in the CCR, wherever Cenvat credit is available upto the place of removal, this definition of place of removal would apply, irrespective of the nature of assessment of duty.

(2) The second associated issue is regarding ascertainment of place of removal. In this regard there are two circulars of the Board namely 37B order no 59/1/2003, dated 3-3-2003 [2003 (153) E.L.T. T7] and Circular No. 97/8/2007, dated 23-8-2007 [2007 (7) S.T.R. C88]. The relevant paragraphs of these two circulars are reproduced below for ease of reference -

(i) **Circular dated 3-3-2003 :** "*8. Thus, it would be essential in each case of removal of excisable goods to determine the point of "sale". As per the above two Apex Court decisions this will depend on the terms (or conditions of contract) of the sale.* The „insurance" of the goods during transit will, however, not be the sole consideration to decide the ownership or the point of sale of the goods."

(ii) **Circular dated 23-8-2007 :** *"8.2..... It is, therefore, clear that for a manufacturer/consignor, the eligibility to avail credit of the service tax paid on the transportation during removal of excisable goods would depend upon the place of removal as per the definition. In case of a factory gate sale, 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 in 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.* In such cases, the credit of the service tax paid on the transportation up to such place of sale would be admissible if it can be established by the claimant of such credit that *the sale and the transfer of property in goods (in terms of the definition as under Section 2 of the Central Excise Act, 1944 as also in terms of the provisions under the Sale of Goods Act, 1930 occurred at the said place."*

(3) The operative part of the instruction in both the circulars give similar direction and are underlined. They commonly state that the *place where sale takes place is the place of removal. The place where sale has taken place is the place where the transfer in property of goods takes place from the seller to the buyer.* This can be decided as per the provisions of the Sale of Goods Act, 1930 as held by Hon"ble Tribunal in case of *Associated Strips Ltd.* v. *Commissioner of Central Excise , New Delhi* [2002 (143) E.L.T. 131 (Tri.-Del.)]. This principle was upheld by the Hon"ble Supreme Court in case of *M/s. Escorts JCB Limited* v. *CCE, New Delhi* [2002(146) E.L.T. 31 (S.C.)].

(4) Instances have come to notice of the Board, where on the basis of the claims of the manufacturer regarding freight charges or who bore the risk of insurance, the place of removal was decided without ascertaining the place where transfer of property in goods has taken place. This is a deviation from the Board"s circular and is also contrary to the legal position on the subject.

(5) It may be noted that there are very well laid rules regarding the time when property in goods is transferred from the buyer to the seller in the Sale of Goods Act , 1930 which has been referred at paragraph 17of the *Associated Strips* Case (supra) reproduced below for ease of reference -

"17. Now we are to consider the facts of the present case as to find out when did the transfer of possession of the goods to the buyer occur or when did the property in the goods pass from the seller to the buyer. Is it at the factory gate as claimed by the appellant or is it at the place of the buyer as alleged by the Revenue? In this connection it is necessary to refer to certain provisions of the Sale of Goods Act, 1930. Section 19 of the Sale of Goods Act provides that 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. Intention of the parties are to be ascertained with reference to the terms of the contract, the conduct of the parties and the circumstances of the case. Unless a different intention appears; the rules contained in Sections 20 to 24 are provisions for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. Section 23 provides that where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied and may be given either before or after the appropriation is made. Sub-section (2) of Section 23 further provides that where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purposes of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

(6) It is reiterated that the place of removal needs to be ascertained in term of provisions of Central Excise Act, 1944 read with provisions of the Sale of Goods Act, 1930. Payment of transport, inclusion of transport charges in value , payment of insurance or who bears the risk are not the relevant considerations to ascertain the place of removal. *The place where sale has taken place or when the property in goods passes from the seller to the buyer is the relevant consideration to determine the place of removal.*

(7) Difficulty in implementing the circular may be brought to the notice of the Board. Trade may be kept suitably informed. Hindi version will follow.

2015-TIOL-238-SC-CX

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 637 of 2007

COMMISSIONER OF CUSTOMS AND CENTRAL EXCISE, NAGPUR

Vs

M/s ISPAT INDUSTRIES LTD

A K Sikri And R F Nariman, JJ

Dated : October 7, 2015

Appellant Rep. by : Mr. Ashok Kumar Panda, Sr. Adv. Ms. Swarupama Chaturvedi, Adv.Ms. Sunita Rani Singh, Adv. Mr. B. Krishna Prasad, Adv.
Respondent Rep. by : Mr. S. K. Bagaria, Sr. Adv. Ms. Praveena Gautam, Adv. Mr. VipinJain, Adv. Mr. Shiren Khanna, Adv. Mr. Ajeet K. Singh, Adv.

Central Excise - Valuation - whether, by virtue of a transit insurance policy in the name of the manufacturer, excise duty is liable to be recovered on freight charges incurred for transportation of goods from the factory gate to the buyer's premises, treating the buyer's premises as the place of removal. No: in the present case all prices were "ex-works", like the facts in Escorts JCB's case. 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.

Revenue Appeal Dismissed

Case laws cited :

Escorts JCB Ltd. v. CCE - *2002-TIOL-05-SC-CX* ***...Para 6***

Prabhat Zarda Factory Ltd. v. Commissioner of Central Excise- *2002-TIOL-82-SC-CX* ***...Paras 7 & 30***

Commissioner Central Excise, Mumbai-III v. M/s. Emco Ltd. - *2015-TIOL-163-SC-CX* ***Para 8***

Civil Appeal 8966 of 2011, and CCE & Customs v. Roofit Industries Ltd. - *2015-TIOL-87-SC-CX* ***Paras 8 & 31***

A.K. Roy v. Voltas Ltd. - *2002-TIOL-381-SC-CX-LB* ***.....Para 11***

Union of India v. Bombay Tyre International Ltd. - 2002-TIOL-33-SC-CX-LB,... Para 13

Government of India v. Madras Rubber Factory Ltd. - 2002-TIOL-49-SC-CX-LB ..... Para 14

Escorts JCB Ltd. v. CCE - 2002-TIOL-05-SC-CX ... Para 25

VIP Industries Ltd. v. Commissioner of Customs & Central Excise - 2003-TIOL-36-SC-CX Para 28

JUDGEMENT

Per : R F Nariman :

1. The issue involved in the present appeal is whether, by virtue of a transit insurance policy in the name of the manufacturer, excise duty is liable to be recovered on freight charges incurred for transportation of goods from the factory gate to the buyer's premises, treating the buyer's premises as the place of removal.

2. M/s Ispat Industries Limited, the respondent herein, is engaged in the manufacture of H.R. sheets/coils, C.R. sheets/coils, and Galvanized/colour coated/sheets, falling under Chapter 72 of the First Schedule to the Central Excise Tariff Act, 1985. Intelligence revealed that M/s Ispat were indulging in evasion of central excise duty by a mis-declaration that their factory gate was the place of removal, and not the buyer's premises, consequent to which freight charges recovered from their buyers was sought to be added in determining the amount of central excise duty payable by them. The period involved in the present appeal is from 28.9.1996 to 31.3.2003. Five show cause notices were issued to the respondents stating that the property in goods manufactured by them remained with Ispat while the goods were in transit as Ispat had taken out an insurance policy to cover the risk of loss or damage to the goods while in transit. Purchase orders as well as agreements with transporters did not suggest that the transporters were taking delivery on behalf of the buyers. All this was corroborated by a statement made by Shri S.P. Dahiwade, Deputy General Manager, stating that the ownership of the goods in transit remained with Ispat. It was thus 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, and this being so, the necessary consequence would be that the freight charges paid by the buyers to Ispat ought to be included in the excise duty payable by Ispat.

3. In reply to the five show cause notices, M/s. Ispat 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.

4. M/s. Ispat further 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 andmeant for a particular customer to anybody else.

5. The learned Commissioner, by his order dated 3.10.2003, held that as the insurance agreement with the transporter was entered into by Ispat who had taken out an Insurance Policy to cover risk to the loss or damage of the goods while in transit, the property in goods remained with Ispat and was not transferred to the buyer at the factory gate. It was also held that in the order acceptance form, it was mentioned that the transport would be by Ispat. Thus, Ispat had assumed responsibility of transportation of the goods up to the door of the customers. Further, that the purchase orders as well as the agreement with the transporters did not suggest that the transporters were taking delivery on behalf of the buyer. Above all, Shri S.P. Dahiwade, Deputy General Manager, Excise, had clearly admitted in his statement dated 5.2.2001, that till the material is delivered to the customer, ownership of the goods remains with Ispat. Further, since payment terms were 30 days after the receipt of the material and not 30 days after dispatch of the material, it is clear that property in the goods remainedin Ispat until payment was made. The Commissioner, therefore, held:

"In the facts and circumstances of the case as discussed above, the charges framedunder the said Show Cause Notices remain substantiated.

(i) I hold Customers premises as actual place of removal instead of factory gate of M/s. Ispat of terms of sub clause (iii) of Section 4(4) (b) of Central Excise Act, 1944 and in term of Sub Clause (3) (c) of Section 4 of the Central Excise Act, 1944 for the period from 28.09.96 to 30.06.2000 and from 01.07.2000 onwards respectively.

(ii) I confirm demand of Central Excise duty amounting to Rs. 2,43,31,003/- (Rs. Two Crores Forty Three Lakhs Thirty One Thousand Three only), (Rs.2,16,09,006.00/- + Rs.1,77,828/- + Rs.8,97,780/- + Rs.12,91,700/-) and I order recovery of the same from them under Rule 9(2) of the Central Excise Rules, 1944 read with Section 38A of the Central Act, 1944 and the first proviso to Section 11A of the Central Excise Act, 1944by invoking extended period of limitation of five years.

(iii) I impose Penalty of Rs.2,43,31,003/- (Rs. Two Crores Forty Three Lakhs Thirty One Thousand Three only), upon them under Rule 173Q and 9(2) of the erstwhile Central Excise Rules, 1944 read with Section 11AC of the Central Excise Act, 1944.

(iv) I order recovery of appropriate interest from them under Section 11AB of the Central Excise Act, 1944."

6. On appeal by the respondents herein, CESTAT, by its judgment dated 24.7.2006, reversed the order of the Commissioner holding that, on the facts of the case, this Court's judgment in*Escorts JCB Ltd. v. CCE, (2003) 1 SCC 281* = 2002-TIOL-05-SC-CX concluded the issue in favour of Ispat. CESTAT also relied upon a Board's circular dated 3.3.2003 which acknowledged that the question of ownership of goods in transit cannot be determined solely with reference to an Insurance Policy taken out by the manufacturer. As regards the statement of Shri Dahiwade, according to CESTAT, such statement would not carry the revenue much further as whether the property in the goods passed at the factory gate to the buyer was a question of law which was determined in favour of Ispat by the aforesaid judgment of this Court in Escorts JCB's case. It was further held that at least two of the Commissioner's grounds, namely, that the payment terms were 30 days after receipt of the materials and that the order acceptance form shows that it was the obligation of Ispat to arrange transportation of goods to the buyer's premises, were beyond the show cause notices issued as no such charge was leveled against Ispat in any of the five show cause notices mentioned hereinabove.

7. Shri A.K. Panda, learned senior counsel appearing on behalf of the revenue, extensively read from the order of the learned Commissioner and stated that the facts in the present case being different from the facts in Escorts JCB's case, the Tribunal was in error in relying on Escorts JCB's case. According to learned counsel, the circular dated 3.3.2003 which referred to both the Escorts JCB's case and to *Prabhat Zarda Factory Ltd.*
v. Commissioner of Central Excise, 2002 (146) ELT 497 (S.C.) **=** *2002-TIOL-82-SC-CX*, clearly laid down that for the period in question Section 4 of the Central Excise and Salt Act, 1944 made it clear that since the buyer's place was in fact the place of removal of

Ispat's goods, freight payments being payments made prior to the goods being sold to the buyers are liable to be included in the central excise duty payable by M/s. Ispat. He relied on two recent judgments delivered by this Court to buttress his submissions.

8. Shri S.K. Bagaria, learned senior counsel appearing on behalf of Ispat, painstakingly took this Court through Section 4 of the Central Excise and Salt Act as originally enacted together with all the amendments made thereto, up to date. According to learned counsel, the period involved in the present case divides itself into two periods - the period from 28.9.1996 to 30.6.2000 and the period 1.7.2000 to 31.3.2003. According to learned counsel, on a correct construction of Section 4 as it stood at the relevant time in both periods and on a reading of Rule 5 of the Central Excise Rules, it is clear that the buyer's premises can never in law be the place of removal of excisable goods. So far as the first period is concerned, the place of removal can extend only up to a manufacturer's depot or other premises from which the manufacturer is to sell his goods, and no further. So far as the second period is concerned, after Section 4 was substituted completely by the Amendment Act which came into force on 1.7.2000, even a depot or other premises could not be considered to be a place of removal, the only place of removal being the factory premises of the manufacturer. This being so, learned counsel argued that he ought to succeed on first principle as all the show cause notices and the findings of the Commissioner are based on the fact that in the present case the buyer's premises is the place of removal of goods. He argued that this would involve conceptual confusion inasmuch as the place of removal can never be equated with the place of delivery and the place of removal alone is relevant for the purpose of Section 4 throughout its chequered history. He further argued that on facts his case came within the ratio of Escorts JCB and not within the ratio of two other judgments of this Court, namely,*Commissioner Central Excise, Mumbai-III v. M/s. Emco Ltd., dated July 31, 2015 in Civil Appeal 3418 of 2004* **=** *2015-TIOL-163-SC-CX and Civil Appeal 8966 of 2011, and CCE & Customs v. Roofit Industries Ltd., (2015) 319 E.L.T. 221 (S.C.)* **=** *2015-TIOL-87-SC-CX*. He also argued that the learned Commissioner was in error because he had ignored altogether the reply made by the assessee which would show that the assessee's facts are in pari materia with the facts in Escorts JCB and not the facts in either Emco or Roofit Industries, supra. He further supported the Tribunal's judgment by stating that not only did the Commissioner not give any heed to Ispat's reply, but that it also entered into areas which were no part of the show cause notices, and thus several findings of the Commissioner were rightly held by the Tribunal to be beyond the show cause notices issued in the present case.

9. As this case involves the correct interpretation of Section 4 as it stood at the relevant time, it is necessary to recapitulate the history of the said provision insofar as it relatesto freight charges being part of excise duty.

10. Section 4, as it stood before the 1973 amendment made to the Central Excise and Salt Act, provided as follows:-

"Section 4. Where under this Act, any article is chargeable with duty at a rate dependenton the value of the article, such value shall be deemed to be--

(a) the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other

premises of manufacture or production for delivery at the place of manufacture or production, or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists, or

(b) where such price is not ascertainable, the price at which an article of the like kind and quality is sold or is capable of being sold by the manufacturer or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or other premises for delivery at the place of manufacture or production, or if such article is not sold or is not capable of being sold at such place, at any other place nearest thereto.

Explanation.--In determining the price of any article under this section, no abatement or deduction shall be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory orother "premises aforesaid."

11. It will be seen that the value of an article chargeable with excise duty is deemed to be the wholesale cash price for which an article of the like kind and quality is sold or capable of being sold at the premises of manufacture or production. In *A.K. Roy v. Voltas Ltd., (1973) 3 SCC 503* **=** 2002-TIOL-381-SC-CX-LB, this Court had occasion to deal with the said provision and in para 22 thereof stated:-

"... The section postulates that the wholesale price should be taken on the basis of cash payment thus eliminating the interest involved in wholesale price which gives credit to the wholesale buyer for a period of time and that the price has to be fixed for delivery at the factory gate thereby eliminating freight, octroi and other charges involved in the transport of the articles." [at para 22]

12. By an amendment Act of 1973, which came into force on 1.10.1975, Section 4 was substituted as follows:-

"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, where the buyer is not a related person and the price is the sole consideration for the sale:

Provided that -

(i) Where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods inrelation to each such class of buyers;

(ii) Where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;

(iii) Where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons), who sell such goods in retail;

(b) Where the normal price of such goods is not ascertainable for the reason, that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.

(2) Where, in relation to any excisable goods the price thereof for delivery at the place of removal is not known and the value thereof 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 shall be excluded from such price.

(3) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.

(4) For the purposes of this section, -

(a) "assessee" means the person who is liable to pay the duty of excise under this Actand includes his agent;

(b) "place of removal" means -

(i) a factory or any other place or premises of production or manufacture of the excisablegoods; or

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, from where such goods are removed."

13. It will be seen that three important changes have been made in the amended Section 4 so far as the present case is concerned. First, the value of excisable goods is deemed to be the "normal price" thereof that is the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade. Where the goods are sold at different prices to different classes of buyers, each such price shall be deemed to be the normal price. "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. Interestingly, in Section 4(2), which is 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 is statutorily excluded. As the law stood thus, this Court in *Union*

of India v. Bombay Tyre International Ltd., (1984) 1 SCC 467 **=** 2002-TIOL-33-SC-CX-LB, after extracting the substituted Section 4 by the Amendment Act of 1973, held:-

"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." [at para 27]

The Court further went on to say:

"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." [at para 50]

14. This view of the law was reiterated in *Government of India v. Madras Rubber Factory Ltd., (1995) 4 SCC 349* **=** 2002-TIOL-49-SC-CX-LB. Interestingly, in paragraph 39 of the judgment, cost of transportation from the factory gate to the place of removal not forming part of excise duty was conceded by the revenue.

15. Section 4 as substituted by the 1973 Amendment Act suffered a further amendment in 1996. The amendments carried out were to have effect from 28.9.1996, which is also the starting point on facts in the present case. Three important changes were made to Section 4. First a new sub-section (ia) was added to Section 4(1) which reads as follows:-

"(ia) Where the price at which such goods are ordinarily sold by the assessee is different for different places of removal, each such price shall, subject to the existence of other circumstances specified in clause (a), be deemed to be the normal price of such goods inrelation to each such place of removal;"

Also, for the first time, "the place of removal" had one more category added to it. Section 4(4)(b)(iii) and 4(4)(ba) state as follows:-

"(4)(b)(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, "(4)(ba) "time of removal", in respect of goods removed from the place of removal referred to in sub-clause (iii) of clause (b), shall be deemed to be the time at which suchgoods are cleared from the factory;"

16. It will thus be 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. 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.

17. It is clear, therefore, 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.

18. By an Amendment Act which came into effect on 1.7.2000, Section 4 was substitutedyet again as follows:-

"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 their value, then, on each removal of the goods, such value shall*
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(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 sole consideration for the sale, by 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.

(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.

(3) For the purpose of this section,-

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) Person shall be deemed to be "related" if -

(i) they are inter-connected undertakings;

(ii) they are relatives;

(iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or

(iv) they are so associated that they have interest, directly or indirectly in the businessof each other.

Explanation. - In this clause -

(i) "inter-connected undertakings" shall have the meaning assigned to it in clause (g) of section 2 of the Monopolies and Restrictive Trade Practices Act, 1969 (64 of 1969); and

(ii) "relative" shall have the meaning assigned to it in clause (41) of section 2 of the Companies Act, 1956 (1 of 1956);

(c) "place of removal" means -

(i) a factory or any other place or premises of production or manufacture of the excisablegoods;

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, from where such goods are removed;

(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."

19. A cursory reading of the substituted provision makes it clear that the concept of "normal value" has given way to the concept of "transaction value". Thus, no longer is there a normative price for purposes of valuation of excisable goods. The actual price that is paid or payable on each removal of goods becomes the transaction value. Interestingly, it will be noticed 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) before its further amendment in 1996. What is conspicuous by its absence in the present Section is Section 4(2) and sub-section (b)(iii) in the previous Section 4 (after its amendment in 1996). It is clear therefore that for the second period in question in the present case, namely, 1.7.2000 to 31.3.2003, the depot, premises of a consignment agent or any other place from which excisable goods are to be sold after their clearance from the factory are no longer places of removal. Also, the definition of "transaction value" makes it clear that freight or transportation expenses are not included in calculating the excise duty payable.

20. It is necessary also to refer to Rules 5 and 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 which came into force on the same date as the amendment to Section 4 i.e. 1.7.2000. These Rules read as under:-

"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 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.

Rule 7.

Where the excisable goods are not sold by the assessee at the time and place of removal but are transferred to a depot, premises of a consignment agent or any other place or premises (hereinafter referred to as "such other place") from where the excisable goods are to be sold after their clearance from the place of removal and where the assessee and the buyer of the said goods are not related and the price is the sole consideration for the sale, the value shall be the normal transaction value of such goods sold from such

other place at or about the same time and, where such goods are not sold at or about the same time, at the time nearest to the time of removal of goods under assessment."

21. 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. Interestingly, despite the substituted Section 4 not providing for a depot or other premises as a place of removal, 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.

22. To complete the picture, by an Amendment Act with effect from 14.5.2003, Section 4 was again amended so as to re-include sub-clause (iii) of old Section 4(3)(b) (pre 2000) as Section 4(3)(c)(iii). This amendment reads as follows:-

"(3)(c)(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;"

Also, Rule 5 of the Central Excise Rules was substituted, with effect from 1.3.2003, to read 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."

23. It is clear, therefore, that on and after 14.5.2003, the position as it obtained from 28.9.1996 to 1.7.2000 has now been reinstated. Rule 5 as 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.

24. 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. As a matter of law therefore the Commissioner's order and Revenue's argument based on that order that freight charges must be included as the sale in the present facts took place at the buyer's premises is incorrect. Further, for the period 1.7.2000 to 31.3.2003 there will be no extended place of removal, the factory premises or the warehouse (in the circumstances mentioned in the Section), alone being

places of removal. Under no circumstances can the buyer's premises, therefore, be the place of removal for the purpose of Section 4 on the facts of the present case.

25. It now remains to deal with some of the judgments cited at the *Bar. Escorts JCB Ltd. v. CCE, (2003) 1 SCC 281* **=** 2002-TIOL-05-SC-CX, was strongly relied upon by Shri Bagaria and sought to be distinguished by Shri Panda. The facts of Escorts JCB's case are similar to the facts in the present case. The show cause notice in that case alleged that freight and transit insurance were charged from buyers but no central excise duty was paid by mis- declaring the place of removal as the factory gate instead of the buyer's premises. It will be noted that just as in the present case, the price was "ex-works" and exclusive of freight insurance etc. After setting out Section 4 post its amendment in 1996, this Court held:-

"A perusal of the orders passed by the authorities and CEGAT shows 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." [at para 8]

"From the above passage it is clear that ownership in the property may not have any relevance insofar as 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 the 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, 6th Edn. 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." [at para 10]

26. This Court then went on to follow Bombay Tyre International's case and ultimately held:-

"In view of the discussion held above, in our view the Commissioner of Central Excise and CEGAT erred in drawing an inference that the ownership in the property continued to be retained by the assessee till it was delivered to the buyer for the reason that the assessee had arranged for the transport and the transit insurance. Such a conclusion is not sustainable." [at para 12]

27. We are inclined to the opinion that the Tribunal was correct in relying upon this judgment on the facts in the present case and on the circular dated 3.3.2003, which specifically stated, following the said judgment, that insurance of goods during transit cannot possibly be the sole consideration to decide ownership or the point of sale of goods.

28. Similarly in *VIP Industries Ltd. v. Commissioner of Customs & Central Excise, (2003)5 SCC 507* **=** 2003-TIOL-36-SC-CX, this Court was faced with the following question:-

"The question for consideration in both these appeals is whether in cases where a manufacturer includes equalised freight in the price of the goods and sells the goods all over the country at a uniform price, the Department is entitled to compute value by

including the cost of transportation from the factory to the depot. This question was decided by this Court in the case of Union of India v. Bombay Tyre International Ltd. [(1984) 1 SCC 467 : 1984 SCC (Tax) 17 : 1983 ELT 1896] **=** *2002-TIOL-33-SC-CX-LB***.** *It was*
thereafter confirmed in the case of Govt. of India v. Madras Rubber Factory Ltd.[(1995)4 SCC 349 : (1995) 77 ELT 433] **=***2002-TIOL-49-SC-CX-LB" [at para 3]*

29. Like the Escorts JCB's case this judgment was also concerned with Section 4 as it stood after the amendment of 1996 but before the amendment of 2000. This Court held:-

"After the amendment, the Department sought to include in the value the cost of transport from factory to the depot, even in case where the manufacturer sold the goods at a uniform price all over the country by including the element of equalised freight. The Tribunal has upheld the view of the Department on the reasoning that by this amendment the definition of the term "place of removal" has been extended to include the depot. The Tribunal has also held that Section 4(2) which excluded the cost of transportation from the place of removal to the place of delivery was not amended when the definition of the term "place of removal" was extended. According to the Tribunal the result was that only the transport charges from the place of removal to the place of delivery were to be excluded from the value.

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.

Thus in cases where the price remains uniform or constant all over the country, it does not follow that value for the purpose of excise changes merely because the definition of the term "place of removal" is extended. The normal price remains the price at the time of delivery and at the place of removal. In cases of equalised freight it remains the sameas per the judgments of this Court set out hereinabove.

In our view, the amendments have made no difference to the earlier position as settled by this Court. In this view of the matter, we are unable to uphold the judgments of the Tribunal. They are accordingly set aside. The appeals are allowed with consequential relief. There shall be no order as to costs." [paras 5 to 8]

30. In *Prabhat Zarda Factory Limited v. CCE, 2002 (146) E.L.T. 497 (S.C.)* **=** *2002-TIOL-82-SC-CX*,this Court held:-

"In these matters, the question is whether freight and insurance charges are to be included in the assessable value for the purposes of excise. This question is covered by the judgment of this Court in the case of Escorts JCB Ltd. v. Commissioner of Central Excise, Delhi-II [2002 (146) E.L.T. 31 (S.C.)] **=** *2002-TIOL-05-SC-CX. The only difference which has been pointed out is that in the Escorts case (supra) the sale was at the factory gate whereas in these cases, the sale is from the depot. Learned counsel for the appellants admit that the freight and insurance charges up to the depot would be includible in the assessable value for the purposes of excise. However, the sale being at the depot, the freight and insurance for delivery to the customers from the depot would not be so includible as per the said judgment."*

This judgment, therefore, also holds that even in a depot sale, freight and insurance for delivery to customers from the depot to their premises cannot possibly be included, and followed the Escorts JCB case supra.

31. With this we come to two recent judgments of this Court. In *CCE & Customs v. Roofit Industries Ltd., (2015) 319 E.L.T. 221 (S.C.)* **=** *2015-TIOL-87-SC-CX*, this Court, after distinguishing the Escorts JCB's case, stated:-

"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.

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.

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 the Sale of Goods Act, the property in goods was transferred at that time only. Section 19 reads as under:

"19. Property passes 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 tobe transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to theterms 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."

These are clear finding of facts on the aforesaid lines recorded by the Adjudicating Authority. However, CESTAT did not take into consideration all these aspects and allowed the appeal of the assessee by merely referring to the judgment in Escorts JCB Ltd. [(2003) 1 SCC 281 : (2002) 146 ELT 31] **=** *2002-TIOL-05-SC-CX Obviously the exact principle laid down in the judgment has not been appreciated by CESTAT." [at paras 12 -15]*

32. It will be seen that this is a decision distinguishing the Escorts JCB's case on facts. It was found that goods were to be delivered only at the place of the buyer and the price of the goods was inclusive of transportation charges. As transit damage on the assessee's account would imply that till the goods reached their destination, ownership in the goods remained with the supplier, namely, the assessee, freight charges would have to be added as a component of excise duty. Further, as per the terms of the payment clause contained in the procurement order, payment was only to be made after receipt of goods at the premises of the buyer. On facts, therefore, it was held that the sale of goods did not take place at the factory gate of the assessee. Also, 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" under the said Section.

33. As has been seen in the present case all prices were "ex-works", like the facts in Escorts JCB's case. 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. On facts, therefore, it is clear that Roofit's judgment is wholly distinguishable. Similarly in Commissioner Central Excise, Mumbai-III v. M/s. Emco Ltd, this Court re-stated its decision in the Roofit Industries' case but remanded the case to the Tribunal to determine whether on facts the factory gate of the assessee was the place of removal of excisable goods. This case again is wholly distinguishable on facts on the same lines as the Roofit Industries case.

34. In the view of the law that we have taken as well as the facts detailed above, the statement made by Shri S.P. Dahiwade pales into insignificance as has been correctly held by the Tribunal. We, therefore, dismiss this appeal with no order as to costs.

2015 (319) E.L.T. 221 (S.C.)

IN THE SUPREME COURT OF INDIA
A.K. Sikri and Rohinton Fali Nariman, JJ.

COMMR. OF CUS. & C. EX., AURANGABAD
Versus
ROOFIT INDUSTRIES LTD.

Civil Appeal No. 5541 of 2004, decided on 23-4-2015

Valuation (Central Excise) - Goods delivered at place of buyer - Price of goods was inclusive of cost of material, Central Excise duty, loading, transportation, transit risk and unloading charges, etc. - 100% payment for the supplies was to be made by the purchaser after the receipt and verification of material - *HELD :* Transit damage/breakage on assessee implied that till goods reached the destination, ownership therein remained with assessee - Intent of purchase order was to transfer property in goods to buyer at premises of buyer when goods were delivered, and by virtue of Section 19 of Sale of Goods Act, 1930 property in goods was transferred at that time - Sale of goods was at place of buyer on delivery of goods, and not at factory gate of assessee - Hence, aforesaid costs were includible in the valuation of the goods. *[paras 12, 13, 14]*

Valuation (Central Excise) - Goods cleared at factory gate - Place of removal is factory gate - Hence, expenses incurred after removal of goods from factory gate viz. freight, insurance and unloading charges, etc., are not to be included in valuation - Property in the goods passes to buyer at factory gate and above expenditure are incurred thereafter by buyer. *[paras 9, 12]*

Appeal allowed

CASES CITED

Commissioner v. Accurate Meters Ltd – 2009 (235) E.L.T. 581 (S.C.) – *Relied on* .....

Escorts Jcb Ltd. v. Commissioner – 2002 (146) E.L.T. 31 (S.C.) – **Explained and Distinguished** .....

VIP Industries Ltd. v. Commissioner – 2003 (155) E.L.T. 8 (S.C.) – *Relied on* .....

REPRESENTED BY : S/Shri N.K. Kaul, ASG, Ms. Nisha Bagchi, Ms. Akanksha Kaul, Ms. S. Srivastava and B. KrishnaPrasad, Advocates with him, for the Appellant.

[Judgment per : 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 24-6-1996, 1-9-1997, 25 9-1997 and 25-5-1999.

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 of 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 25-3-2000, 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 2-11-2011 was issued as to why the differential Central Excise duty amounting to Rs. 43,56,318/- for the period of 1-1-1996 to 30-6-2000 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, 1944 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 undervaluation and on the ground that place of removal of 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 30-3-2002 has allowed the appeal on the reasoning that the issue is settled in *Escorts JCB Ltd.* v. *Commissioner of Central Excise, Delhi-II* - 2002 (146) E.L.T. 31 (S.C.) = (2003) 1 SCC 281.

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 10-4-2015. 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 13-4-2015. However, nobody appeared on behalf of the respondent on 10-4-2015 and 13-4-2015. 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 purpose 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 -
>
> (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 :
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> Provided that -
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> (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 whichsuch 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 suchgoods 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* v. *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* v. *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.
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> 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 :
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> "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.
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> In one of the cases referred to and reported in 1983 E.L.T. 1896 (S.C.) *Union of India and Others etc. etc.* v. *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 :
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> "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 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".

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 succinctly brought out and amplified in *VIP Industries Ltd.* v. *Commissioner of Customs and Central Excise, Aurangabad* - (2003) 5 SCC 507 = 2003 (155) E.L.T. 8 (S.C.) 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.* - (2009) 6 SCC 52 = 2009 (235) E.L.T. 581 (S.C.), the Court took note of few decisions including in the case of *Escorts JCB Ltd.* and reiteratedthe 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 24-6-1996 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.

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.

2002 (146) E.L.T. 31 (S.C.)

IN THE SUPREME COURT OF INDIA
S.N. Variava and Brijesh Kumar, JJ.

ESCORTS JCB LTD.
Versus
COMMISSIONER OF CENTRAL EXCISE, DELHI-II

Civil Appeal No. 7230 of 1999 with C.A. No. 1163 of 2000, decided on 24-10-2002

Valuation (Central Excise) - Place of Removal - Freight and insurance during transit of goods arranged by the assessee - Goods sold at Ex-factory price for delivery at Ex-works - Transit risk and insurance on buyer of the goods from the time goods are handed over to buyer"s representative or from the time goods leave assessee"s premises - Buyer"s name not shown in the Transit Insurance Policy - Freight and transit insurance charged from the customer - *HELD* : Sales are Ex-factory and "place of removal" is the factory premises - Section 4 of the Central Excises Act, 1944 - Sections 23 and 39 of Sale of Goods Act, 1930. *[paras 7, 8, 12, 13]*

Valuation (Central Excise) - Freight and transit insurance charges in case of Ex-factory sales - Transportation of goods and transit insurance arranged by the assessee but charged from buyer - Some buyers arranging for transportation of goods and transit insurance themselves - Terms and conditions between the assessee and buyer providing for sale at Ex-factory price and delivery at factory gate, transit risk and insurance to be borne by the buyer from the time the goods are handed over to buyer"s representative or from the time goods leave assessee"s premises and sale price to be paid prior to dispatch of goods from factory - Factory premises is "Place of removal" since the transaction of sales, payment of price and delivery of goods to the carriers occurred at factory premises - Ownership of goods have no relevance in so far as transit insurance of goods is concerned - Delivery to the Carrier at factory gate is delivery to the buyer and element of freight and transit insurance not includible in assessable value - 2000 (118) E.L.T. 650 (Tribunal) reversed and 2002 (143) E.L.T. 131 (Tribunal) approved - Section 4 of the Central Excises Act, 1944 - Sections 23 and 39 of Sale of Goods Act, 1930. *[paras 7, 8, 12, 13]*

CASES CITED

Associated Strips Ltd. v. Commissioner – 2002 (143) E.L.T. 131 (Tribunal) – **Approved**
.....
Hepburn v. A. Tomlinson (Hauliers) Ltd. – H.L. (E) 1966 451 – *Referred*
.....
Prudential Staff Union v. Hall – 1947 K.B. 685 – *Referred* .....
U.O.I. v. Bombay Tyre International Ltd.– 1983 (14) E.L.T. 1896 (S.C.) – *Referred* .....

REPRESENTED BY : S/Shri Mukul Rohtagi, Additional Solicitor General, T.R. Andhyarujina, K. Parasaran, Joseph Vellapally, T.L.V. Iyer, Sr. Advocates, Ravinder Narain, Rajan Narain, Ms. Sonu Bhatnagar, Amit Bhagat, Ajay Agarwal, V. Lakshmikumaran, A.R Madhav Rao, Alok Yadav, Vishwanth Shukla, V. Balachandran, Pradeep Ranjan Tiwary, Santosh Kumar, Rakesh K. Sharma, Rajesh Kumar, Y.K. Kumar, N.K. Bajpai,
K.C. Kaushik, Hemant Sharma, B.K. Prasad, Advocates with them, for the appearing parties.

[Judgment per : Brijesh Kumar, J.]. - The appeals indicated above, arise out of judgment and order dated 24-8-1999 passed by the Customs Excise and Gold (Control) Appellate Tribunal (For short „CEGAT"), operative part of which reads as under :

> "In the result we dispose of this appeal by confirming the order of the Commissioner imposing a duty of Rs. 29,65,532/- under Rule 9(2) of the Central Excise Rules, 1944 read with Section 11A of the Act, set aside that part of the order which imposed duty amount to Rs. 98,219/- and reduce the penalty to Rs.10 lakhs under Section 11AC of the Act".

Escorts JCB Ltd., the appellant in Civil Appeal No. 7230/99 and respondent in Civil Appeal No. 1163/2000 (hereinafter to be referred to as „the assessee") is aggrieved by the order confirming imposition of duty and levy of penalty. The Commissioner of Central Excise, appellant in Civil Appeal No. 1163/2000 and

respondent in Civil Appeal No. 7230/99 (hereinafter to be referred to as „The Revenue") is aggrieved by the order reducing the

amount of penalty to Rs.10 lakhs as imposed under Section 11AC of the Central Excise Act.

2. The Central Excise officers of Anti Evasion Branch, Faridabad on visit to the premises of the assessee found that the amount of "transit insurance" charges was not added to the value of the goods sold. Hence issued a show cause notice dated 24-3-98 to the assessee saying that an open policy for transit risks in the name of M/s. Escorts JCB Ltd. and their bankers appear in the column for the name of Assured but there is no mention of the buyer or its name in the column for "insured". Notice also indicates that „freight" and "transit insurance" were charged from the buyers but no central excise duty was paid on these two elements, and by not including above noted elements in the normal price as per Section 4 of the Central Excise Act, 1944 and by mis- declaring the place of removal as factory gate instead of buyer"s place where the goods were to be sold after their clearance from the factory as described. In sub-clause (III) and clause (b) of sub-Section 4 of the Central Excise Act, 1944, the assessee has suppressed the necessary facts. It also said that section 11A of the Act is attracted for extending the period up to 5 years for demanding the central excise duty. The assessee was also noticed as to why penalty under Section 11AC be not imposed upon it.

3. The assessee contested the show cause notice saying that the sale is affected at the factory gate at Ballabgarh in the State of Haryana. The freight and arranging for insurance during transit of goods have no material bearing on the point of place of sale or removal of goods. The Commissioner of Central Excise, Delhi II however confirmed the demand holding that the factum of "transit insurance" by the manufacturer shows that the transaction of sale is complete only on delivery of goods to the buyer otherwise there was no good reason for the manufacturer taking responsibility of the risk involved in transportation of the goods to the buyer"s place. The case of the assessee that sale takes place and it is completed at the factory gate was not found acceptable and contrary to Section 2(h) of the Central Excise Act. The appellate authority namely CEGAT upheld the view taken by the Commissioner, Central Excise in so far it related to completion of the transaction of sale at the buyer"s place which is the main question for consideration in this appeal before us.

4. Shri Andhyarujina, learned senior counsel appearing for the assessee submits that the whole basis of the impugned decision that "transit insurance" by the assessee in itself would show that the rights in the property had not passed on to the buyer during transit but only on delivery of goods at the buyer"s place, is unsustainable. It is submitted that the assessees manufacture Excavators Loaders at its factory at Ballabgarh, Faridabad, which are sold to various buyers. All sales are made at the factory gate. Some buyers arrange for the transportation of the goods as well as for transit insurance themselves but some require the appellant to arrange for transportation and transit insurance, in latter case the assessee recovers the freight charges and "insurance charges" from the buyers. Our attention has been drawn to various clauses of the terms and conditions of sale which has been placed on record as Annexure P-1 indicating that the prices are "ex-works" at Ballabgarh exclusive of freight, insurance, octroi etc. The first clause under the heading "Terms of Payment" shows that 30% of the quoted price is payable in advance along with the order and the balance amount against delivery Ex-works Ballabgarh. The next clause under the heading "Delivery" provides that all deliveries are Ex-works Ballabgarh, Haryana. Under the heading „Transit Risk and Insurance" it is indicated that risk of the goods will be that of the buyer from the time Escorts JCB Ltd. hands over the equipment to the buyer"s representative or carrier or from the time goods leave Escorts JCB Ltd. premises. Under the heading „Mode of Transport", delivery by train is indicated or in the alternative if the buyers so desire, by road, and in such an event, it would be necessary for the buyer to make the payment at Ballabgarh prior to despatch of goods. It is submitted that where the customers so desire or request the transit insurance and transport is arranged by the assessee for which they would separately charge the customer. Our attention has also been drawn to some of the copies of the orders placed indicating that a request was made by the customers to the assessee for making arrangement for transport with transit insurance. Such orders also indicate acceptance of general conditions of sale. Some of the Transport receipts show despatch of the goods in the name of the customers as consignee and invoices indicate separate charge towards transit insurance and freight apart from value of the goods.

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 Sale ofGoods 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 to do, and the goods are lost or damaged in course of transit or whilst in the custody of the warfinger, 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.

6. The possession of the sold goods is handed over to the buyer at the factory gate. The transaction is full and complete and nothing remains to be done after the goods leave the factory premises. The relevant provision in this connection is Section 4 of the Act, as it existed then is quoted below :

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

Provided that-

(i) .....

(ia) .....

(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."

7. From the perusal of the provision quoted above, it would be clear in the case in hand the place of removal of goods is factory premises since the transaction of sale, payment of price and handing over possession of the goods to the carrier after clearance is at the factory at Ballabgarh.

8. 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* v. *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* v. *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.

9. 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".

10. 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.

11. In one of the cases referred to and reported in 1983 (14) E.L.T. 1896 (S.C) - *Union of India and others etc. etc.* v. *Bombay Tyre International Ltd. 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 up to 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 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".

12. The assessee also referred to a decision reported in 2002 (49) RLT 506 - *Associated Strips Ltd. & Anr.* v. *CCE, New Delhi.* It is a decision of CEGAT. Considering several decisions of different Courts and the terms of the contract between the parties, it was held that sale of goods had taken place at the factory gate and therefore the place of removal was not the premises of the buyer. In view of the provisions of Section 23 and Section 39 of the Sale of Goods Act 1930 it was found that goods to be treated as delivered to buyer and property and possession of the goods passed on to buyer when the goods were handed over to transporter. In such a case element of freight and transit insurance were not to be included in the normal value of the goods. We approve of the view taken by the CEGAT.

13. In view of the discussion held above in our view the Commissioner of Central Excise and the CEGAT erred in drawing an inference that the ownership in the property continued to be retained by the assessee till it was delivered to the buyer for the reason that the assessee had arranged for the transport and the transit insurance. Such a conclusion is not sustainable.

14. In the result the Civil Appeal No. 7230/1999 is allowed and judgment and order passed by the Commissioner of Central Excise and the CEGAT imposing duty and penalty is set aside. Consequently, Civil Appeal No. 1163/2000 preferred by the Revenue does not survive any more and is rendered infructuous. It is dismissed as such. There would however be no order as to costs.

2015 (322) E.L.T. 394 (S.C.)

IN THE SUPREME COURT OF INDIA
A.K. Sikri and N.V. Ramana, JJ.

COMMISSIONER OF C. EX., MUMBAI-III
Versus
EMCO LTD.

Civil Appeal No. 3418 of 2004 with Civil Appeal No. 8966 of 2011, decided on 31-7-2015

Valuation (Central Excise) - Transportation and transit insurance charges on transformers - Specific condition in contracts with customers that they will be dispatched (i) freight pre-paid by road and up to destination of customers, *(ii)* insured by assessee up to customers" destination, and cost thereof included in price, (iii) in case of any damage during transit, assessee will lodge claim and obtain compensation from insurance company - Responsibility of goods was of assessee till their delivery to customer"s premises - Commissioner had held that as property in goods passed on to customers only at destination, transportation and transit insurance charges were includible in transaction value - However, CESTAT had allowed appeal of assessee by cryptic non- reasoned order - Hence, matter remanded to CESTAT for fresh determination of place of removal after looking into terms and conditions of sale with buyer - Section 4 of Central Excise Act, 1944. *[paras 16, 19]*

Strictures against CESTAT - Cryptic non-reasoned order, allowing appeal of assessee - Even though order of Commissioner had detailed discussion on facts, they were not dealt with by CESTAT, and it was overruled with single observation that case was covered by Apex Court judgment, without discussing as to how it was so covered - Such perfunctory manner dealing with appeal of assessee is not permissible - It was more so as issue was „place of removal", which depends upon facts of each case - Also, it was not case of confirmation of decision of authority below giving detailed reasons, and not requiring same from CESTAT, though even in such case, brief reasons are to be given to meet arguments advanced by appellant. *[para 18]*

Appeals allowed

CASES CITED

Commissioner v. Accurate Meters Ltd. – 2009 (235) E.L.T. 581 (S.C.) – *Relied on* .....
Commissioner v. Roofit Industries Ltd. – 2015 (319) E.L.T. 221 (S.C.) – *Relied on*.....
Escorts JCB Ltd. v. Commissioner – 2002 (146) E.L.T. 31 (S.C.) – **Distinguished** .....

REPRESENTED BY : S/Shri K. Radhakrishnan, Sr. Advocate, Ms. Shirin Khajuria, Arijit Prasad and B. Krishna Prasad, Advocates with him, for the Appellant.

S/Shri V. Lakshmikumaran, Prakash Shah, Jay Savla, Ms. L. Charanya, Vivek Sharma, Hemant Bajaj, Aditya Bhattacharya, Ambarish Pandey, R. Ramchandran, Anandh K. and M.P. Devanath, Advocates, for the Respondent.

[Judgment per : A.K. Sikri, J.]. - The respondent/assessee herein manufactures 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, 1944 (hereinafter referred to as the „Act"). Goods, namely, the transformers which are cleared by the assessee were supplied to the State Electricity Boards. These are subject to excise duty which the assessee has been paying to the appellant herein (hereinafter referred to as the
„Revenue"). The dispute in the 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 termsof 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 24-7-2001 proposing to recover a sum of Rs. 1,17,36,766/- on account of short excise duty paid for the period 28-9-1996 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 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 18-8-2002. 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 been approved by the Supreme Court.

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 Excise* - 2002 (146) E.L.T. 31 (S.C.), 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 JCBLtd.* 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 excise duty as the excise duty is to be levied on the „transaction value‟ thathas to be arrived at in the manner prescribed in the said provision as well as the rules framed thereunder.

7. As pointed out above, show cause notice in the instant case covers the period from 28-9-1996 to 31- 12-2000. Section 4 was different prior to 1-7-2000. Section 4 was substituted by new Section 4 with effect from 1- 7-2000 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 28-9-1996 to 30-6-2000 shall be covered by the old provisions and the period of show cause notice from 1-7-2000 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, 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 excisablegoods;

(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 theexcisable 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 isto 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 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 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* v. *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* v. *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 (14) E.L.T. 1896 (S.C.) - *Union of India and Others etc. etc.* v. *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 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.* - (2009) 6 SCC 52 = 2009 (235) E.L.T. 581 (S.C.), 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.* - (2015) 5 SCALE 470 = 2015 (319) E.L.T. 221 (S.C.), 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 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 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 acryptic 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 10 of 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) E.L.T. 131 (Tri.)] which has been approved by the Apex Court in the case of *Escorts JCB Ltd.* v. *Collector of Central Excise* [2002 (146) E.L.T. 31 (S.C.)]. 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 forfresh consideration.

21. No costs.