Commissioner of C. Ex. Vs. Prabhat Zarda Factory Ltd.

Commissioner of C. Ex. Vs. Prabhat Zarda Factory Ltd.

SooperKanoon Citation : sooperkanoon.com/18282

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-16-2000

Reported in : (2000)(70)ECC794

Appellant : Commissioner of C. Ex.

Respondent : Prabhat Zarda Factory Ltd.

Judgement :

1. In this reference to the Larger Bench, the issue for consideration is that in a case where the ownership of the excisable goods remained with the manufacturer upto the place of the buyer from where the said goods were delivered to the buyer, what would be the "place of removal" for the purpose of Clause (iii) of Section 4(4)(b) of the Central Excises Act, 1944 (hereinafter referred to as the 'Act').In Escorts J.C.B. Ltd. v. Commissioner of Central Excise, New Delhi -1999 (35) RLT 9 (CEGAT), a bench of this Tribunal had taken a view that when the manufacturer continued to remain the owner of the goods till the goods reached the buyer's destination, the place of removal for the purpose of Section 4(4)(b)(iii) of the Act will be the buyer's premises.

It was an admitted position that M/s. Escorts had insured the goods on their account when they were transported to the place of their buyers.

Insurance policy was in their name. In case of loss in transit, the Insurance Company was to re-imburse them. M/s. Escorts continued to have the property in the goods when the same were in transit. They continued to remain the owner of

the said goods. The sale took place when the goods reached the buyer's destination.

When the two appeals - one filed by M/s. Prabhat Zarda Factory Ltd. and the other filed by the Revenue came before the Tribunal for hearing, on the argument that the law stated by the Tribunal in the case of Escorts J.C.B. Ltd., required re-consideration, the matter was referred to the Larger Bench.

It was argued on behalf of M/s. Prabhat that the Tribunal while taking a view in the case of Escorts had not noticed the expression "from where such goods are removed" occurring at the end of Clause (b)(iii) of Section 4 (4) of the Act.

3. The matter was heard on 1-5-2000 when Shri K. Narasimhan, Advocate appearing for M/s. Prabhat pleaded that M/s. Prabhat had no factory gate sales. The goods were removed to their depots in Delhi and Noida, and from there they were transported to the place of buyers through transport godowns at the place of destination. It was his submission that the transport godowns at the destination were only the place of delivery and could not be considered as place of removal for the purpose of Section 4 (4)(b) (iii) of the Act.

Shri Sanjeev Srivastava, JDR appearing for the Revenue submitted that M/s. Prabhat had control over the goods upto the transporters' godown at destination and that the control over the goods vested with them till the point of sale to the customers from the transporters godown at the place of buyers. He submitted that a correct law has been laid down by the Tribunal in the case of Escorts J.C.B. Ltd. Intervening, Shri V. Lakshmi Kumaran, Advocate expressed the view that the ownership was not relevant for interpreting the expression "place of removal". He referred to Section 4 (2) of the Act and submitted that even after the definition of "place of removal", the main Section 4 has not undergone any change.

4. We have carefully considered the matter. As a part of Finance (No.2) Act, 1996 (Act 33 of 1996), enacted on 28-9-1996, in Section 4 of the Act, in Sub-section (4), after Sub-clause (ii), the following Sub-clause was inserted with regard to the place of removal by Section 74 of the said Act.

"(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." In the same Section 4 in Sub-section (4) after Clause (b), the following Clause was inserted with regard to time of removal.

"(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 such goods are cleared from the factory." After such amendment, Section 4 (4) (b) read as under:-(b) "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 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 5. The expression "from where such goods are removed" is just to complete the meaning of the "place of removal". This expression was there in Sub-section (4)(b) of Section 4 even before the insertion of Clause (iii) by Section 74 of the Finance (No. 2) Act, 1996 (33 of 1996). While specifying the various places, premises, etc. this expression only clarifies that these places, premises, etc. are the "place of removal" for the above provisions of law, from where the excisable goods are removed.

6. The Board's Circular No. 251 /85/96-CX., dated 14-10-1996 appearing at page T 48 in 1996 (87) E.L.T. with reference to the amendment in the definition of "place of removal" vide Finance (No. 2) Act, 1996 clarifies that the sale price at any of the specified places of removal will be the normal price for levy of excise duty, and there can be different assessable values for the same excisable goods depending upon the place of removal. In the context of the insertion of Clause (ba) in Section 4 (4), relating to the "time of removal" the above circular further clarified that the duty was required to be paid at the time of clearance of the goods from the factory for those goods which are sold by the manufacturer at depot, consignment agent or any other place, etc., at a sale price of the place of removal i.e. depot, consignment agents, etc. It is obvious from this clarification that the final

assessments in this regard could be resorted to only when there were declared depot, consignment agents, etc. from where in the usual course of business, the goods were being regularly sold by or on behalf of the manufacturer at declared prices. Where the prevailing prices at such places of removal were not known on the particular date when subsequent goods are to be transported from the factory to similar outside place of removal, then these instructions provided that the provisional assessments be resorted and the assessments finalised at the earliest.

It is also made clear in these clarifications that Section 4(2) was applicable only in cases when sale price is not known at the place of removal. When there was a sale at the outside place of removal, it could not be said that the price was not known at such place.

Whether transport cost from factory gate to the other places of removal such as depot, etc. will form part of the assessable value, particularly when no amendment has been made in Section 4(2) of CEA. In view of the change in definition of place of removal, sale price at the place of removal such as depot, etc. has to be taken as normal sale price for determination of assessable value. A sale price at any place of removal other than factory gate has to take into account all the expenses incurred towards transport including freight, insurance, etc. from factory gate to such place of removal and other expenses incurred in maintaining and running the said place of removal and thus all these expenses will form part of the sale price for determination of assessable value.

After amendment of Section 4, depots, etc. have been declared as "places of removal" and as such sale price prevailing at such depots etc. which will include transport charges, etc.will be known at the "place of removal" i.e. the storage depots, etc. and as ' such Section 4(2) will not be applicable in such cases. Section 4(2) is applicable only in cases when sale price is not known at the place of removal." 7. It is clear from the Commissioner of Central Excise, Mumbai-I Trade Notice No.72/96, dated 29-10-1996 appearing at page T-5 of 1996 (88) E.L.T. that where the removal of goods from a factory did not involve the sale, the assessee was required to file a revised declaration.

Thus, it is the sale that is material for deciding as what is the place of removal for the purpose of Clause (iii) of Section 4 (4)(b) of the Act.

According to Section 2(h), sale and purchase with their grammatical variations and Cognat expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration.

Thus, the transfer of the possession of the goods is the essence of sale. Accordingly, the place of removal for the above purpose will be the place from where the transfer of the possession of the goods is effected by the manufacturer to his buyer.

It was an admitted position that there was no factory gate sale in these cases. We are also not concerned with the transactions referred to as 'ready stock' in the invoices where the buyers took the delivery of the goods at the duty paid godown (sale depot), after making the payment and arranged for the transport of the goods alongwith insurance thereof, on his own account. We are concerned with the goods which were transported on account of M/s. Prabhat Zarda Factory Ltd. to the destination of the buyers through the transport agency. The goods were stored on their behalf in the godown of the transport agency at the destination of the buyers. The goods were insured in the name and on the account of M/s. Prabhat Zarda for covering the risk of loss/damage during transportation of the goods, to the godowns of the transport agency at the destination of the buyers. If the damage occurred during transit, then it was the loss of the manufacturer. The ownership of the goods remained with them. They were both the consignor and the consignee. The goods were delivered to the buyers by the transport agency only when so instructed by M/s. Prabhat Zarda. Till then no documents were given to the buyer and no legal title in the goods was passed on to him. Thus the goods were actually sold at such places from where delivery was effected to the buyers.

In para-11 of the adjudication order passed by the Addl. Commissioner of Central Excise, Noida, the following findings had been recorded :- (i) that the goods despatched remained the property of the party till the same are delivered to the buyers.

(ii) that the possession of the goods is transferred to the customer when the goods are actually delivered to them.

(iii) that the transporter's godowns are the place of removal in the instant case in view of amended provisions of Section 4(4)(iii) of the Act, from where the goods are actually sold by the party.

(iv) that the price charged by the party from their customers at the place of removal i.e. transporter's godown shall be the normal sale price of goods at the factory gate for determination of the assessable value of goods.

(v) that the deductions claimed by the party towards freight and insurance from the price are not admissible to them from the date of enactment of Finance Bill 1996.

9. The Circular No.255/89/96-CX., dated 29-10-1996 appearing at page T-8 of 1996 (88) E.L.T. related to the determination of assessable value in respect of the excisable goods lying in stock outside the factory in various depots, etc. as on 28-9-1996. We are not concerned with such a situation.

Similarly, Circular No. 287/3/87-CX., dated 14-1-1997 appearing at page T-13 of 1997 (90) E.L.T., referred to on behalf of the manufacturers, dealt with a situation where the place of removal was different from the place of delivery. The place of removal is the place where the possession of the goods had been transferred from the manufacturer to his buyer. It could so happen that while the possession of the goods had been transferred at place A, the buyer takes delivery of the goods at place B. Such a situation alone is covered by Section 4(2) of the Act. Ministry's instructions dated 14-1-1997 makes this position clear when it is mentioned that the deduction of equalized freight/averaged freight from the price prevalent at other place of removal as defined under Clause (iii) to Section 4 (4)(b) would not arise on and after 28-09-1996.

10. In the fact and circumstances of the case, the case law referred to on behalf of the manufacturers is not relevant.

11. On careful consideration of the matter, we are of the view that in a case where the ownership of the excisable goods remained with the manufacturer upto the

place of the buyer from where the said goods were delivered to the buyer, the place of removal for the purpose of Clause (iii) of Section 4 (4)(b) of the Act would be the said place of delivery.Escorts J.C.B. Ltd. v.Commissioner of Central Excise 1999 (35) RLT 9 CEGAT) has laid down the correct law in this regard.

In the appeal filed by the Revenue, a penalty of Rs 4,72,979/- had been imposed by the Addl. Commissioner of Central Excise, Noida, who had adjudicated the matter. Similarly in the appeal filed by M/s. Prabhat Zarda Factory Ltd., a penalty of Rs 39,53,024/- had been imposed by the Commissioner of Central Excise, Delhi-I.13. It would be in the interest of justice, if the issue regarding penalty is reconsidered by the Commissioner of Central Excise (Appeal), Ghaziabad, and Commissioner of Central Excise, Delhi-I respectively, in both the cases. Thus, on this limited issue, both the appeals one filed by the Revenue and the other filed by M/s Prabhat Zarda Factory Ltd. are remanded to the Commissioner of Central Excise (Appeals), Ghaziabad and Commissioner of Central Excise, Delhi-I respectively.