

Frexton Cables (India) Vs. Commissioner of Central Excise,

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-13-2002

Reported in : (2002)(81)ECC372

Judge : K Usha, N T C.N.B.

Appellant : Frexton Cables (India)

Respondent : Commissioner of Central Excise,

Judgement :

1. These appeals at the instance of assessee M/s. Frexton Cables (India) and the Revenue respectively arise out of Order-in-Appeal No.458-CE/DLH/2001, dated 24-4-2001 passed by the Commissioner of Central Excise (Appeals), New Delhi. The main issue arising in the appeal filed by the assessee is about the 'place of removal' of goods. The appeal by the Revenue is directed against a portion of the order of the Commissioner (Appeals) where he has reduced the quantum of penalty from what had been imposed by the original authority.

Officers of Anti-Evasion branch of the Delhi Commissionerate visited the factory of the assessee on 1-11-99. On scrutiny of the invoices in respect of the contract sale, it was revealed that the assessee was deducting expenses on account of freight and insurance from the assessable value for payment of central excise duty. The declaration filed by the party shows their place of removal as factory gate.

Taking the view that, in fact, the place of removal is place of destination, show cause notice was issued calling upon the assessee to show cause why central excise duty amounting to Rs. 11,74,859/- not paid should not be demanded and recovered from them under Rule 9(2) of the Central Excise Rules, 1944 read with Section 11A of the Act invoking the extended period of 5 years; interest as payable under Section 11AB of the Central Excise Act, 1944 be not recovered; and penalty should not be imposed under Rule 173Q of the Central Excise Rules, 1944 read with Section 11AC of the Act for contravention of Rules 9(2), 173C, 173F and 173G of the Central Excise Rules, 1944. In reply the assessee contended that they are manufacturers of Wires and Cables falling under Chapter Heading 8544 of the Schedule to the Central Excise Tariff Act, 1985 and certain Government Departments are the buyers to whom the goods are being supplied on DGS&D Rate Contracts as per terms mentioned therein. One of the terms is that the goods were to be delivered FOR station of despatch. Generally the consignees (Govt. Departments) do not carry cash for freight and to avoid delay and demurrages, as a gesture of goodwill, the assessee offers to deposit the freight with transport (Railways) and claim reimbursement of actual freight paid. No central excise duty on this freight amount is being paid since cost of transportation has to be excluded from the assessable value. The assessee contended that the property in the goods was transferred to the buyer the moment they were inspected, passed and stamped by the buyer and it is only normal practice to ensure safe delivery of the goods and the assessee acts as a custodian till the goods reach the buyer's place. The assessee also contended that there are no circumstances available in the case which would justify application of the extended period of limitation.

3. The original authority did not accept the contentions raised by the assessee. The original authority took the view that since the assessee has declared in his declaration, filed under Rule 173C(3A), that their sales are at factory gate whereas the goods were actually being sold at the place of destination, there is no merit in the contention that the assessee had not suppressed any material fact. It was therefore held that the proviso to Section 11A has been correctly invoked for demanding duty beyond the period of six months. The original authority further held that the ownership of the excisable goods remained with the assessee up to the place of the buyer and, therefore, by applying the principles laid down in the

decisions of this Tribunal, namely, Prabhat Zarda Factory Ltd. v. CCE - 2000 (119) E.L.T. 191 (Tribunal-LB) = 2000 (38) RLT 637 and Escorts JCB Ltd. v. CCE, New Delhi - 2000 (118) E.L.T. 650 (Tribunal) = 1999 (35) RLT 9, the place of removal for the purpose of clause (iii) of Section 4(4)(b) of the Act would be the place of such delivery and, therefore, expenses such as freight and insurance charges incurred by the manufacturer has to form part of the assessable value. The original authority therefore confirmed the demand of duty and imposed penalty of an equivalent amount under Section 11AC of the Central Excise Act read with Rule 173Q of the Central Excise Rules. The assessee was also held liable to pay interest at the appropriate rate under Section 11AB of the Central Excise Act.

4. The assessee took up the matter in appeal. Commissioner (Appeals) took the view that the case in hand is covered by the two decisions of this Tribunal relied on by the original authority. It was observed that no documentary evidence was produced before the appellate authority by the assessee in support of its contention that in order to claim insurance from the insurance company, the title of the goods had to be transferred back by the buyer to the assessee. Since the demand of duty has been confirmed jointly under Rule 9(2) of the Central Excise Rules and Section 11A of the Central Excise Act, 1944, there is no merit in the complaint of the appellant that the demand is unsustainable since Rule 9(2) had been deleted vide Notification No. 38/2000-C.E. (N.T.) dated 13-5-2000. On the question of invocation of the extended period of 5 years the appellate authority also found that it was justified on the facts of the case. The Commissioner (Appeals) upheld the confirmation of demand of duty but reduced the amount of penalty to Rs. 4,00,000 lakhs.

5. It is contended on behalf of the appellant that the Commissioner (Appeals) as well as the adjudicating authority had wrongly applied the principles evolved by this Tribunal in Prabhat Zarda Factory Ltd. v. CCE - 2000 (119) E.L.T. 191 (Tribunal-LB) = 2000 (38) RLT 637 and Escorts JCB Ltd. v. CCE, New Delhi - 2000 (118) E.L.T. 650 (Tribunal) 1999 (35) RLT 9 in the appellant's case. The contention is that the facts in the appellant's case are entirely different and therefore the abovementioned decisions have no application here. According to the appellant the goods were delivered to the buyer at Delhi/New Delhi and the

ownership in the goods was also passed on to the buyer at Delhi/New Delhi. The place of removal in terms of Section 4 of the Central Excise Act, 1944 has to be taken as Delhi/New Delhi. Therefore, the freight charges for transportation of the goods from Delhi/New Delhi to the buyer's premises cannot be included in the assessable value of the goods by applying the dictum laid down in M/s. Prabhat Zarda Factory Ltd. case or Escorts JCB Ltd. case.

6. After referring to the provisions contained under Section 2(h) and clause (iii) to Section 4(4)(b) of the Central Excise Act, it was held in Prabhat Zarda that the transfer of the possession of the goods is the essence of sale and accordingly the place of removal will be the place from where the transfer of the possession of the goods is effected by the manufacturer to his buyers. In the above case it was the admitted position that there was no factory gate sale. The goods 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. Prabhat Zarda was both consignor and consignee. Therefore, during the transport the ownership of the goods remained with them. The goods were delivered to the buyers by the transport agency only when so instructed by M/s. Prabhat Zarda.

Till then no legal title in the goods was passed on to the buyer.

Therefore it was held that the goods were actually sold at such places from where delivery was effected to the buyers. The place of removal being the place from where the possession of the goods had been transferred from the manufacturer to his buyer, in the facts of the case, it was held that the deduction claimed by the party towards freight and insurance from the price was not admissible. In *Escorts JCB Ltd. v. CCE, New Delhi - 2000 (118) E.L.T. 650 (Tribunal) = 1999 (35) RLT 9* it was an admitted position that Escorts JCB got the goods insured when it was sent to the purchaser. Policy was taken in the name of the appellant. It was conceded that if the goods are lost in the course of transit the insurance company

was to reimburse the appellant. On the above facts it was held that though the goods were in transit Escorts JCB continued to be the owner of the goods. In this case Tribunal applied the general rule that risk follows property as there was no contract to the contrary as contemplated by Section 26 of the Sale of Goods Act, 1930. No sale took place till it reached buyer's destination and, therefore, the place of removal was buyer's premises where the sale took place.

8. In the present case, a reference to the rate contract would show that the prices are for delivery FOR station of despatch and free delivery within Delhi/New Delhi and not FOR destination. The invoices showed the assessable value as the price FOR station of despatch Delhi/New Delhi and the freight actually paid was separately shown. It is submitted that even though for the sake of convenience booking was done by the appellant and the freight was also paid by it, it was being recovered separately from the buyer. It is not a case where the manufacturer is the consignee as in the case of Prabhat Zarda. Here the buyer is the consignee. Even in the Railway Receipt the buyer's name and address are shown as that of the consignee. We find that the facts in this case are entirely different from those available in Prabhat Zarda and Escorts JCB.⁹ In our Final order in Appeal Nos. E/1124, 2001-A (M/s. Associated Strips Ltd.) and E/1565-68/2001-A (M/s. Mauria Udyog Ltd.) wherein the facts are similar to those obtained in this appeal, we have considered in detail as to when the property in the goods passes to the buyer, when does the delivery to the buyer take place and what will be effect of seller insuring the goods on transit in discharge of his obligation under the terms of the contract with reference to provisions of the Sale of Goods Act, 1930, Commentary in authoritative text books and decided cases. We are inclined to apply those principles in this appeal also. The goods are appropriated to the contract when these were inspected by the buyer's representative in the factory premises of the manufacturer followed by its approval, marking and delivery to the carrier. Property in the goods then passes to the buyer in terms of the provisions contained in Section 23 of the Sale of Goods Act. When the goods are handed over to the carrier for being transported to the buyer delivery of the goods to the buyer takes place as provided under Section 39(1) of the Sale of Goods Act. Such delivery namely transfer of possession to the buyer would satisfy the definition of the term 'sale' under Section 2(h) of the Central Excise Act, 1944.

10. Coming to the arguments of the Revenue that since insurance is taken on the goods in transit by the seller it should be taken that the seller retained the property in goods till it reached the buyer's place, we hold following our decision in M/s. Mauria Udyog Ltd. and M/s. Associated Strips Ltd. referred above that in the light of the terms of the contract the general rule that risk follows property cannot be applied here. As envisaged in Section 26 of the Sale of Goods Act in terms of the agreement between the parties the seller can retain a risk which would entitle him to have an insurable interest in the goods even when property in the goods are passed on to the buyer. We have arrived at this conclusion after referring in detail to authoritative text books and decisions. We do not propose to refer to all those materials in this order to avoid repetition.

11. The purchase order would show that the goods are to be despatched by goods/passenger train at firm's risk. The above condition by itself would not establish that the ownership of the goods continued with the appellant. In the light of the terms of contract between the parties as detailed above, it cannot be taken that the appellant continued to be the owner of the goods for the reason that it had made arrangements for insuring the goods in transit. It is a case where parties have entered into a contract containing terms which would go against the general ruling 'risk follows the property' as contemplated by Section 26 of the Sale of Goods Act, 1930.

12. Property in the goods was passed on to the buyer at Delhi/New Delhi which is the place of removal in terms of Section 4 of the Central Excise Act- Therefore, freight and insurance charges for transportation of the goods from Delhi/New Delhi to the buyer's premises are not includible in the assessable value. Since we are taking a view that the appellant is not liable for any short levy it is not necessary for us to go into the other issues raised in this appeal regarding the applicability of the extended period of limitation. It is also not necessary for us to consider the adequacy of the quantum of penalty imposed which is the issue raised in the appeal by the Revenue.

13. In the result, Appeal No. E/1633/2001-A filed by the assessee is allowed while Appeal No. E/1632/2001-A filed by the Revenue is dismissed.

