

**Action Construction Equipments Vs. Cce**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** May-17-2002

**Reported in :** (2002)(82)ECC575

**Judge :** A T V.K., K Kumar

**Appellant :** Action Construction Equipments

**Respondent :** Cce

**Judgement :**

1. The issue involved in these nine Appeals, three appeals filed by M/s. Action Construction Equipments (P) Ltd. and six appeals filed by the Revenue, arising out of a common Order-in-Appeal No. 474-479/2001 dated 30.4.2001, passed by the Commissioner (Appeals), New Delhi, is whether the freight and insurance charges are to be included in the assessable value of mobile cranes.

2. Shri K.L. Handa, learned Consultant, mentioned that the Appellants manufacture hydraulic mobile cranes; that the Dy. Commissioner is six Adjudication Orders confirmed the demand and imposed penalty on the ground that they had taken insurance policy in their names for delivery of mobile cranes at the destination of buyers' place and as such place of removal of the excisable goods would be the place where the property in the goods was passed to the buyer following the decision in the case of CCE, Meerut-II v.Prabhat Zarda Factory Ltd. (Appeals) set aside the three Adjudication Orders out of the six on the ground that the Deputy Commissioner was not empowered to adjudicate the cases

involving suppression of facts etc., relying upon the decision in CCE v. O.N.G.C. Ltd. ; that in respect of remaining three Adjudication Orders, the Commissioner (Appeals) confirmed the finding that the buyer's place was the place of removal of the goods and cost of freight and insurance was includible in the assessable value for the purpose of charging the duty of excise; that, however, he allowed the abatement from that cost of freight and insurance on account of Central Excise duty payable.

3. The learned Consultant now submitted that the words used in the show cause notices were "mis-declaration" and "suppression of the facts" and as such it is clear that the action has been initiated by the Dy.

Commissioner on the said basis and the proviso to Section 11A(1) was attracted; that accordingly the Deputy Commissioner did not have jurisdiction in terms of Board's Circular No. 328/44/97-CX. Dated 13.8.97; that Board's instructions are binding on the officers as held by the Tribunal in Calcutta Steel Industries v. CCE ; that narration of facts in the show cause notice cannot be for any purpose other than for demand of duty and, therefore, the mention of the words and phrases like "mis-declaring" and "suppressed the facts" are sufficient to bring the issue of show cause notice within the jurisdiction of an officer other than a Deputy Commissioner; in terms of Board's instruction dated 27.2.97 as amended by Instruction dated 13.8.97; that the Adjudicating Authority had also given his findings as to why penalty under Section 11-AC of the Act could not be imposed and interest under Section 11 -AB could not be demanded which goes to show that according to him, the ingredients of proviso to Section 11A(1) of the Act were present. He relied upon the decision in the case of CCE, Ahmedabad v. Omkar Textile Mills (P) Ltd. 4. The learned Consultant, further, submitted that the decision in the case of Escorts JCB is not applicable as the facts are entirely different inasmuch as, their invoices clearly indicate that insurance is done only on behalf of Customers; that the insurance policy declaration certificate also mentions only the name and address of the customers', that it has been certified by M/s. New India Assurance Co.

that in a transit policy such as theirs, in case of loss of goods in transit, the benefit will go only to the customers and not to the manufacturers; that no demand is maintainable against them and consequently no penalty is also imposable on them.

5. Countering the arguments, Mrs. Neeta Lal Butalia, learned SDR, submitted that under the provisions of Section 11-A(1), the Dy.

Commissioner is competent to adjudicate the matters; that in all the show-cause notices, the demand of duty is within the normal period of limitation, that is within 6 months and as such no benefit has accrued to the Revenue by invoking suppression and mis-declaration; that in the case of ONGC Ltd., the demand of duty was made for the extended period; that, further, the exercise of power of Superintendent for issuing the show cause notice at the relevant time can be traced to a legitimate source under the Act and Rules; that quoting of Section 11-AB and 11-AC does not vitiate his legitimate exercise of power of issuing show cause notice; that the Appellate Tribunal in the case of CCE v. Jaipur Poly Spin Ltd. has held that exceeding the powers mentioned in Board's Circulars will at best be an administrative irregularity and cannot be treated as legal infirmity. The learned SDR, further, submitted that on merit, the freight and insurance charges are to be included in the assessable value as the facts are at par with the facts in the case of Escorts JCB Ltd.; that the premium has been paid for the insurance by the Appellants themselves; that when the goods are insured by the manufacturer up to the buyer's premises, buyer's place and not the factory gate is the place of removal and the price at the buyer's place will be relevant for determining the assessable value of the goods. She relied upon the decision of the Larger Bench of the Tribunal in the case of CCE v. Prabhat Zarda Factory Ltd. . She also submitted that the letter dated 17.6.2001 of the New India Assurance Co. Ltd., relied upon by the Appellants, was not before the Adjudicating Authority and as such no reliance can be made on the same. Finally she reiterated the grounds contained in Revenue's Memorandum of Appeal to the effect that expenditure incurred on freight and insurance is identifiable and as such these need not be reduced to some notional value by giving abatement of duty which had not been paid and the entire amount incurred as freight and insurance should form the part

of the assessable value. In reply the learned Consultant submitted that the invoices were in the name of their customers and not "self" which goes to prove that the property in the excisable goods has been transferred to the customers at the factory gate itself. He also relied upon the decision of the Larger Bench of the Tribunal in the case of Srichakra Tyres Ltd. v. CCE .

6. We have considered the submissions of both the sides. Under Section 4(1) of the Central Excise Act at the relevant time value of the excisable goods shall be deemed to be the normal price, thereof, that is to say, the price at which the goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at thy time and place of removal. Place of removal, as per Section 4(4)(b)of the Act 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, 7. The Larger Bench of the Tribunal in Prabhat Zarda Factory has interpreted the phrase "Place of removal: wherein in has been held that 'it is the sale that is material for deciding as what is the place of removal for the purpose of Clause (iii) of Section4(4)(b) of the Act...the place of removal for the above purpose will be the place from where the transfer of the possession of goods is effected by the manufacturer to his buyer." ...where the ownership of the excisable goods remained with the manufacturer up to 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.

8. In the present matters, the Revenue has treated the buyers' premises as the place of removal on the ground that the Appellant Company had taken an open policy for transit risks in the name of the Company itself for insurance of their mobile cranes from factory to buyer's destination. There is no other evidence brought on record by the Revenue to show that the ownership of the goods remained with the assessee which is the pre-requisite for arriving at the conclusion that the place of removal was not the factory gate but the buyer's destination. On

the other hand it has been found by the Commissioner (Appeals), after going through the copies of the insurance policy, that "The policy mentions that the same has been issued on behalf of different customers whose names/addresses are to be mentioned in the declaration paras and the insurance notes issued in respect of the individual consignments mention "on behalf of consignee." This, in our view, clearly goes to show that the insurance was taken on behalf of the customers. If the property in the mobile crane was not transferred to the buyers, the need to mention in insurance notes "on behalf of consignee" could not be there. The facts in the case of Prabhat Zarda were different since the goods therein were transported on account of PrabhatZarda Factory Ltd. to the destination of the buyers through the transport agency. The goods were stored on Prabhat Zarda's behalf in the godown of the transport agency at the destination of the buyers. It is clearly mentioned in the decision that Prabhat Zarda were both 'the Consignor and the Consignee". It was duly observed by the Larger Bench that "the goods were delivered to the buyers by the transport agency only when so instructed by M/s. Prabhat Zarda." On the basis of such facts, which are not brought on record in the present matters, that the Larger Bench reached the conclusion that the goods were actually sold at such places from where delivery was effected to the buyers. On the other hand the invoices under which the cranes were removed from the factory carried the names of the customers which has not been rebutted by the Revenue. The Appellants have contended that in case of loss of goods in transit, the benefit would go to the customers. Further, it is mentioned in the invoices clearly that the insurance is on behalf of consignee. In Escorts JCB case also, it was conceded by the Appellants therein that "insurance company was to reimburse the appellant." In view of these facts it cannot be claimed that the ownership of the impugned goods remained with the assessee up to the place of buyer merely on the ground that they had taken an open policy for transit loss. Accordingly we allow the appeals filed by M/s. Action Construction Equipments (P) Ltd. As no differential duty is to be demanded from them, we are not considering the issue of abatement of duty as raised in the appeals preferred by the Revenue.

9. We, however, agree with the Revenue that there was no infirmity in the issuance of the show-cause notice or in the Dy. Commissioner's adjudicating the matters. Firstly all the Adjudication Orders were passed in 1999 and 2000 when

the Deputy Commissioners were empowered by the Board under Circular dated 13.8.1997 to adjudicate cases in which duty involved is up to Rs. 10 lakhs. Moreover the provisions of Section 11-A(1) provides clearly that a Central Excise Officer may serve notice on the person chargeable with the duty. The decisions in the cases of ONGC Ltd. and Omkar Textiles Ltd. pertained to the period when proviso to Section 11-A(1) of the Act clearly provided that notices have to be issued by the Collector of Central Excise. This is apparent from the Section 11-A(1) extracted in the case of ONGC Ltd. Accordingly we hold that there was no infirmity either in the show-cause notice or in the Adjudication Order. However, as on merit we have held in favour of the Assessee, there is no need to remand the three appeals to Commissioner (Appeals) for deciding these appeals on merits. The Assessee is, therefore, not liable to pay any duty and penalty.

All the appeals and Cross objections are disposed of in the above terms.

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