

Superpack Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-12-2002

Reported in : (2002)(83)ECC26

Judge : S T G.R., P Bajaj

Appellant : Superpack

Respondent : Cce

Judgement :

1. Arguing the stay petition for the applicants Shri B.L. Narshiman, Ld. Counsel submits that the applicants are manufacturing HDPE bags and sacks. They supplied these bags to various manufacturers of fertilisers. He submits that the applicants arranged for the transport of goods from the factory to the buyer's premises. For this purpose, freight charges are separately indicated in the invoices. No excise duty was required to be paid on the freight charges since the sale of the goods took place at the factory gate. He submits that the applicants took out insurance for the goods in transit from the factory to the buyer's premises. He submits that the Department has sought to charge Central Excise Duty on freight element and for this purpose, they have invoked proviso to Section 11A for demanding duty beyond a period of six months. Ld. Counsel submits that there are a number judgments of the Tribunal in favour of the assessee. Ld. Counsel submits that property in the goods passed on to the buyer at the factory gate and therefore, freight and insurance charges for the goods for transportation from the factory gate to the buyer's premises are not includible. He submits that this view

was taken by the Tribunal in the case of Frexton Cables India Ltd. v. CCE 2002 (49) RLT 501. He also refers to the decision of this Tribunal in the case of JBM Industries Ltd. v. CCE contained in Tribunal's Final order No. 171-174/2002-A dt.

14.5.02. He submits that in this case the Tribunal held: 4.2. In the present matter, it has not been disputed by the Revenue that the LPG Cylinders have been sold by the Appellants in terms of the contracts entered into with the different oil companies and the cylinders in question were cleared from the factory premises under the invoices bearing the name of the purchasers i.e. oil company. It has also not been controverted by the Revenue that the cylinders were despatched in terms of the contract which provided that "a seller shall despatch the cylinders preferably by 'Rail Freight Prepaid' in accordance with the despatch instructions issued by the Corpn. from time to time". The contract also provided for despatching the cylinders by road whenever permitted by the Corpn.

in writing to do so. It is thus evident that the LPG Cylinders were supplied to the specific oil company as per the terms of the contract from the factory gate itself. In view of this clear and specific contract, it cannot be claimed by the Revenue that the place of removal was any place other than the factory premise of the appellants merely on the basis that the open Insurance Policy was taken by them. In the case of Prabhat Zarda Factory Ltd. the facts were entirely different which is evident from para 8 of the said decision wherein it is mentioned that there was no factory gate sale in this case. The goods were transported on account of M/s. Prabhat Zarda Ltd. to the destination of the buyers from the transport agency. The goods were stored on their behalf in the godown of the transporters at the destination of the buyers. The goods were insured on account of Prabhat Zarda for covering the loss or damage during the transportation of the goods to the godown of transport agency at the destination of the buyers. The ownership of the goods also remained with the Prabhat Zarda. They were both the consigner and consignee. The goods were delivered to the buyers by the transport agency only when so instructed by M/s. Prabhat Zarda. All these facts are not available in the present matter. As observed earlier, the LPG cylinders were cleared by the appellants in the name of purchaser and these were delivered at the specific bottling plant of the oil company. It is neither the case of the Revenue nor any

evidence has been brought on record that the cylinder were cleared by the Appellants on their own account and on or after reaching the destination the instructions were given to the transporter to deliver to a particular Oil Company. The Ld.

Consultant has placed reliance on a decision of the Tribunal in the case of Associated Strips Ltd. wherein the facts were similar to the facts in the present matter. The Appellate Tribunal, after referring to both the decisions in the case of Escorts JCB and Prabhat Zarda distinguished the same by observing that in Escorts JCB there was no reference to the terms of the contract between the parties, and the Tribunal applied the general rule that risk follows the property.

Decision in Prabhat Zarda was distinguished by observing that there is no comparison with the facts of the case of the Appellant before the Tribunal inasmuch as 'when the goods are transported the seller was shown as consignor and the buyer the consignee, whereas in Prabhat Zarda both the consignor and the consignee was the seller The goods are not transported to the godown of the transport agency and seller has not retained any right to give any further instructions to the transport agency for giving delivery of the goods to the buyers from the godown of the transport agency". The Tribunal thereafter referring to the Authorities on sale of Goods Act, came to the conclusion that in the light of the terms of the condition of the contract, the sale of the goods has taken place at the factory gate and therefore, 'even by applying the dictum of Escort JCB and Prabhat Zarda, 'the place of removal' is not the premises of the buyer as contended by the Revenuer". We find that the earlier decision dt. 22.5.2001 by which the Appeal filed by the Appellants was rejected, followed the decisions in the case of Escorts JCB and Prabhat Zarda. As in the present matter the decisions in both these cases have been distinguished and further another bench of this Tribunal on the similar facts after considering the law has held that the place of removal in these facts is the factory of the Appellants. We, following the ratio of the said decision, allow all the appeals of the Appellants.

2. Ld. Counsel submits that even in other cases, the Tribunal has consistently been taking this view. He submits that the facts of their case are identical to the

facts of the cases cited above. He, therefore, prays that since the applicants have a very strong case in their favour, pre-deposit of duty and penalty may be waived.

3. Ms. K.A. Mishra, Ld. DR opposes the request and reiterates the findings of the authorities below.

4. We have heard the rival submissions. We have also perused the case law cited. Prima facie, It appears that the ratio of the judgment of the cases cited and relied upon by the applicant covers the facts of the present case also. We, therefore, are of the view that the applicants have been able to make out a case for waiver of pre-deposit of duty and penalty. Accordingly, pre-deposit of duty and penalty is waived.

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