REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2562 OF 2008

COMMISSIONER OF CENTRAL EXCISE,
RAIGAD ....APPELLANT

VERSUS

M/S. ISPAT METALLICS INDUSTRIES
LTD. & ORS. ….RESPONDENTS

WITH

CIVIL APPEAL NO.8557 OF 2015

J U D G M E N T

R.F. Nariman, J.

1. Two appeals have been filed from a common decision of CESTAT dated 11.10.2005, whereby the Tribunal has upset the order of the Commissioner, confirming various duty demands, penalty and interest.

2. The brief facts necessary in order to appreciate the controversy at hand, taken from C.A. No.2562 of 2008, are as follows.

3. M/s. Ispat Industries Limited (hereinafter referred to as the "IIL") is engaged in the manufacture of HR coils, sheets, plates, etc., which are cleared on payment of duty of excise. In the manufacture of such goods, it avails credit on inputs such as iron ore pellets. Adjacent to its plant, another group company, namely, M/s. Ispat Metallics Industries Ltd. (hereinafter referred to as the "IMIL") also has a factory in which pig iron and molten metal are manufactured. The principal raw material for manufacture for both these companies is iron ore pellets. The said pellets were purchased from Mandovi Pellets and Essar Steel Limited. These were carried to the factory of IIL. Credit was availed by IIL of the duty paid on the entire quantity so procured. As and when required by the sister company IMIL, pellets were transferred through a conveyor from IIL's plant to IMIL's premises under cover of an invoice and on reversing an amount equal to the Cenvat credit availed

on inputs that were so transferred. In addition to such invoices, IIL also raised debit notes on IMIL for recovering actual expenditure incurred by it in relation to the procuring of such iron ore pellets, such as bank commission, interest, etc.

4. The aforesaid two companies were issued show cause notices dated 29.9.2003 and 14.10.2003 respectively. It was alleged that iron ore pellets were sold by IIL to IMIL and that the amounts recovered by IIL in the form of debit notes towards bank charges, interest, etc. were includible in the assessable value of such inputs that were cleared. The notice alleged that the reversal of credit equal to the amount paid to the supplier which was being followed by IIL was not in compliance with law.

5. The learned Commissioner upheld the show cause notices stating that the transaction between IIL and IMIL was one of sale and not transfer. Since the goods were reassessed to duty in terms of Rule 57AB(1C) of the Central Excise Rules, 1944 and Rule 3(4) of the Cenvat Credit Rules, 2001, the assessable value in terms of Section 4(1)(a) of the Central

Excise Act i.e., the transaction value at the time of clearance plus any additional consideration paid by the buyer at a later stage is to be added and, therefore, the amounts mentioned in the debit note from IIL to IMIL were also includible in the assessable duty valuation as additional consideration. The extended period for limitation was also found to be available on the facts of the present case.

6. The Tribunal reversed the aforesaid decision on the ground that the transfer of iron ore pellets by IIL to IMIL was not a sale of goods but was transfer of raw materials, jointly procured, under a joint procurement policy which was followed by the two sister companies and this becomes clear on a reading of the tripartite agreement between the supplier of the pellets, IIL, and IMIL. This being so, the Tribunal applied a circular dated 1.7.2002 by which, where no sale is involved but only a transfer by one sister unit to another, the value shown in the invoice on the basis of which Cenvat credit was taken by the assessee would be the value for the purpose of Rule 57AB and Rule 3(4). It was further held that additional consideration

could not be added inasmuch as the amount spoken of in the Rule 57AB and Rule 3(4) is an amount equal to the duty of excise which is leviable on such goods. Post manufacturing expenses cannot possibly amount to a duty of excise leviable on such goods and therefore all amounts paid under the debit notes between IIL and IMIL could not be added to the value of those goods. Further, the invoice value of the supplier alone was to be taken into account and, consequently, the judgment of the learned Commissioner was set aside, not only on merits, but also on limitation, following the judgments of the Tribunal itself and of this Court.

7. Shri Radhakrishnan has read to us in detail the show cause notices and the Commissioner's judgment dated 24.12.2004, which is strongly relied upon by him in support of his case. It is his case that a proper reading of the relevant rules would make it clear that what has to be seen is transaction value under Section 4(1)(a) of the Central Excise Act and not invoice value of the supplier of the iron ore pellets. This being so, according to him, the learned Commissioner is

right in his reasoning and the Tribunal's judgment should be reversed.

8. Shri V. Lakshmikumaran, the learned counsel, on the other hand supported the decision of the Tribunal and argued that on a reading of the Rules the rate applicable to such goods would be as on the date of removal but value would necessarily be that determined for such goods under Section 4 or 4A of the Central Excise Act which would be the invoice value of the iron ore pellets cleared by the supplier of those pellets. He relied strongly on the circular dated 1.7.2002, which was also relied upon by the Tribunal, and further went on to argue that there was no suppression of facts in this case and, hence, the extended period of limitation could not possibly have been applied to the facts of this case.

9. Having heard the learned counsel for the parties, it is important to first set out the relevant rules. Rule 57AB(1C) of

the Central Excise Rules, 1944 and Rule 3(4) of the Cenvat Credit Rules, 2001 as they read at the relevant time, read as follows:-

> "57(1C) When inputs or capital goods, on which credit has been taken, are removed as such from the factory, the manufacturer of the final products shall pay an amount equal to the duty of excise which is leviable on such goods at the rate applicable to such goods on the date of such removal and on the value determined for such goods under Section 4 of the said Central Excise Act, and such removal shall be made under the cover of an invoice referred to in rule 52A."
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> Rule 3(4) When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, the manufacturer of the final products shall pay an amount equal to the duty of excise which is leviable on such goods at the rate applicable to such goods on the date of such removal and on the value determined for such goods under Section 4 or Section 4A of the Act, as the case may be, and such removal shall be made under the cover of an invoice referred to in rule 7."

10. The Tribunal being the last forum of appreciation of facts has held that transfer of iron ore pellets by IIL to IMIL was not a sale of goods but was only a transfer of raw materials procured under the Tripartite Agreement between the two of them and

the supplier of the said pellets. This is a pure finding of fact and Shri Radhakrishnan has not been able to dislodge this finding of fact. This being the case, the application of the circular of 1.7.2002 becomes important. Paragraph 14 of the said circular reads as under:-

14.	How will valuation be done when inputs or capital goods, on which CENVAT credit has been taken are removed as such from the factory, under the erstwhile sub rule (1C) of rule 57AB of the Central Excise Rules, 1944, or under rule 3(4) of the Cenvat Credit Rules, 2001 or 2002 ?	Where inputs or capital goods, on which credit has been taken, are removed as such on sale, there should be no problem in ascertaining the transaction value by application of sec.4(1)(a) or the Valuation Rules. [Provided tariff values have not been fixed for the inputs or they are not assessed under Section 4A on the basis of MRP] There may be cases where the inputs or capital goods are removed as such to a sister unit of the assessee or to another factory of the same company and where no sale is involved. It may be noticed that sub rule (1C) of Rule 57AB of the erstwhile Central Excise Rules, 1944 and Rule 3(4) of the Cenvat Credit Rules 2001 (now 2002, talk of determination of value for "such goods" and not the "said goods". Thus, if the assessee partly sells the inputs to independent buyers and partly transfers to its sister units, the transaction value of "such goods" would be available in the form of the transaction value of inputs sold to an unrelated buyer (if the sale price to the unrelated buyer varies over a period of time, the value nearest to the time of

		removal should be adopted). Problems will, however, arise where the assessee does not sell the inputs/ capital goods to any independent buyer and the only removal of such input/ capital goods, outside the factory, is in the nature of transfer to a sister unit. In such a case proviso to rule 9 will apply and provisions of rule 8 of the valuation rules would have to be invoked. However, this would require determination of the 'cost of production or manufacture', which would not be possible since the said inputs/ capital goods have been received by the assessee from outside and have not been produced or manufactured in his factory. Recourse will, therefore, have to be taken to the residuary rule 11 of the valuation rules and the value determined using reasonable means consistent with the principles and general provisions of the valuation rules and sub-section (1) of sec. 4 of the Act. In that case it would be reasonable to adopt the value shown in the invoice on the basis of which CENVAT credit was taken by the assessee in the first place. In respect of capital goods adequate depreciation may be given as per the rates fixed in letter F No. 495/16/93-Cus.VI dated 26.5.93, issued on the Customs side.

11. A reading of this circular makes it clear that a distinction is made between inputs on which credit has been taken which are removed on sale, and those which are removed on transfer. If

removed on sale, “transaction value” on the application of Section 4(1)(a) of the valuation rules is to be looked at. However, where the goods are entirely transferred to a sister unit, it is reasonable to adopt the value shown in the invoice on the basis of which Cenvat Credit was taken by the assessee i.e. the invoice of the supplier of the pellets to the assessee.

12. As it is clear that the present is a case of transfer and not sale of pellets, no infirmity can be found with the Tribunal’s judgment, which only follows the circular dated 1.7.2001. In addition, the Tribunal was also correct in holding that post manufacturing expenses cannot be loaded on to the amount equal to the duty of excise leviable on such goods as this amount would, then, cease to be an amount equal to the duty of excise but would be something more. On both these counts therefore, we find that the Tribunal is justified in its finding on law, which is based on its finding of fact that the present is a case of transfer and not sale. This being the case, it is unnecessary to consider any of the other submissions made by

the learned counsel including the point of limitation. The appeals are, accordingly, dismissed.

……J.

(A.K. Sikri)

……J.

(R.F. Nariman)

New Delhi;

May 6, 2016