REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 637 OF 2007

COMMISSIONER OF CUSTOMS AND CENTRAL EXCISE, NAGPUR …APPELLANT

VERSUS

M/S. ISPAT INDUSTRIES LTD. …RESPONDENT

J U D G M E N T

R.F. Nariman, J.

1. The issue involved in the present appeal is whether, by virtue of a transit insurance policy in the name of the manufacturer, excise duty is liable to be recovered on freight charges incurred for transportation of goods from the factory gate to the buyer's premises, treating the buyer's premises as the place of removal.

2. M/s Ispat Industries Limited, the respondent herein, is engaged in the manufacture of H.R. sheets/coils, C.R.

sheets/coils, and Galvanized/colour coated/sheets, falling under Chapter 72 of the First Schedule to the Central Excise Tariff Act, 1985. Intelligence revealed that M/s Ispat were indulging in evasion of central excise duty by a mis-declaration that their factory gate was the place of removal, and not the buyer's premises, consequent to which freight charges recovered from their buyers was sought to be added in determining the amount of central excise duty payable by them. The period involved in the present appeal is from 28.9.1996 to 31.3.2003. Five show cause notices were issued to the respondents stating that the property in goods manufactured by them remained with Ispat while the goods were in transit as Ispat had taken out an insurance policy to cover the risk of loss or damage to the goods while in transit. Purchase orders as well as agreements with transporters did not suggest that the transporters were taking delivery on behalf of the buyers. All this was corroborated by a statement made by Shri S.P. Dahiwade, Deputy General Manager, stating that the ownership of the goods in transit remained with Ispat. It was thus stated that the buyer's place or the place of delivery should be treated as the

place of removal of the goods for the purpose of Section 4 of the Central Excise Act, and this being so, the necessary consequence would be that the freight charges paid by the buyers to Ispat ought to be included in the excise duty payable by Ispat.

3. In reply to the five show cause notices, M/s. Ispat stated that all their prices were ex-works, and that the goods were cleared from the factory on payment of central or local sales tax. Most of their sales were against Letters of Credit opened by the customer or through Bank discounting facilities. Invoices were prepared at the factory directly in the name of the customers, and the name of the Insurance Company as well as the number of Transit Insurance Policy were both mentioned. Based on the details mentioned in the invoice, the lorry receipt was prepared by the transporter and was in the buyer's name. This receipt carried a caution notice as well a notice to the effect that deliveries were to be made to the buyer alone, and to nobody else.

4. M/s. Ispat further stated that these transactions were entered in their sales register and were booked as sales, the

stock or inventory of finished goods being reduced by such sales. In the event that there was an insurance claim, recovery was credited to the customer's ledger account against the recovery due from the customer in respect of the sale of the said goods. Excise invoices were prepared at the time that the goods left the factory in the name and address of the customers, and once the goods were handed over to the transporter, the respondent did not reserve any right of disposal of the goods in any manner. It had no right to divert the goods so handed over to the transporter and meant for a particular customer to anybody else.

5. The learned Commissioner, by his order dated 3.10.2003, held that as the insurance agreement with the transporter was entered into by Ispat who had taken out an Insurance Policy to cover risk to the loss or damage of the goods while in transit, the property in goods remained with Ispat and was not transferred to the buyer at the factory gate. It was also held that in the order acceptance form, it was mentioned that the transport would be by Ispat. Thus, Ispat had assumed responsibility of transportation of the goods up to the door of

the customers. Further, that the purchase orders as well as the agreement with the transporters did not suggest that the transporters were taking delivery on behalf of the buyer. Above all, Shri S.P. Dahiwade, Deputy General Manager, Excise, had clearly admitted in his statement dated 5.2.2001, that till the material is delivered to the customer, ownership of the goods remains with Ispat. Further, since payment terms were 30 days after the receipt of the material and not 30 days after dispatch of the material, it is clear that property in the goods remained in Ispat until payment was made. The Commissioner, therefore, held:

> "In the facts and circumstances of the case as discussed above, the charges framed under the said Show Cause Notices remain substantiated.
>
> (i) I hold Customers premises as actual place of removal instead of factory gate of M/s. Ispat of terms of sub clause (iii) of Section 4(4) (b) of Central Excise Act, 1944 and in term of Sub Clause (3) (c) of Section 4 of the Central Excise Act, 1944 for the period from 28.09.96 to 30.06.2000 and from 01.07.2000 onwards respectively.
>
> (ii) I confirm demand of Central Excise duty amounting to Rs. 2,43,31,003/- (Rs. Two Crores Forty Three Lakhs Thirty One Thousand Three only), (Rs.2,16,09,006.00/- + Rs.1,77,828/- + Rs.8,97,780/- + Rs.12,91,700/-) and I order

recovery of the same from them under Rule 9(2) of the Central Excise Rules, 1944 read with Section 38A of the Central Act, 1944 and the first proviso to Section 11A of the Central Excise Act, 1944 by invoking extended period of limitation of five years.

(iii) I impose Penalty of Rs.2,43,31,003/- (Rs. Two Crores Forty Three Lakhs Thirty One Thousand Three only), upon them under Rule 173Q and 9(2) of the erstwhile Central Excise Rules, 1944 read with Section 11AC of the Central Excise Act, 1944.

(iv) I order recovery of appropriate interest from them under Section 11AB of the Central Excise Act, 1944."

6. On appeal by the respondents herein, CESTAT, by its judgment dated 24.7.2006, reversed the order of the Commissioner holding that, on the facts of the case, this Court's judgment in **Escorts JCB Ltd. v. CCE,** (2003) 1 SCC 281 concluded the issue in favour of Ispat. CESTAT also relied upon a Board's circular dated 3.3.2003 which acknowledged that the question of ownership of goods in transit cannot be determined solely with reference to an Insurance Policy taken out by the manufacturer. As regards the statement of Shri Dahiwade, according to CESTAT, such statement would not carry the revenue much further as whether the property in the goods passed at the factory gate to the buyer was a question

of law which was determined in favour of Ispat by the aforesaid judgment of this Court in **Escorts JCB's** case. It was further held that at least two of the Commissioner's grounds, namely, that the payment terms were 30 days after receipt of the materials and that the order acceptance form shows that it was the obligation of Ispat to arrange transportation of goods to the buyer's premises, were beyond the show cause notices issued as no such charge was leveled against Ispat in any of the five show cause notices mentioned hereinabove.

7. Shri A.K. Panda, learned senior counsel appearing on behalf of the revenue, extensively read from the order of the learned Commissioner and stated that the facts in the present case being different from the facts in **Escorts JCB's** case, the Tribunal was in error in relying on **Escorts JCB's** case. According to learned counsel, the circular dated 3.3.2003 which referred to both the **Escorts JCB**'s case and to **Prabhat Zarda Factory Ltd. v. Commissioner of Central Excise,** 2002 (146) ELT 497 (S.C.), clearly laid down that for the period in question Section 4 of the Central Excise and Salt Act, 1944 made it clear that since the buyer's place was in fact the place of removal of

Ispat's goods, freight payments being payments made prior to the goods being sold to the buyers are liable to be included in the central excise duty payable by M/s. Ispat. He relied on two recent judgments delivered by this Court to buttress his submissions.

8. Shri S.K. Bagaria, learned senior counsel appearing on behalf of Ispat, painstakingly took this Court through Section 4 of the Central Excise and Salt Act as originally enacted together with all the amendments made thereto, up to date. According to learned counsel, the period involved in the present case divides itself into two periods – the period from 28.9.1996 to 30.6.2000 and the period 1.7.2000 to 31.3.2003. According to learned counsel, on a correct construction of Section 4 as it stood at the relevant time in both periods and on a reading of Rule 5 of the Central Excise Rules, it is clear that the buyer's premises can never in law be the place of removal of excisable goods. So far as the first period is concerned, the place of removal can extend only up to a manufacturer's depot or other premises from which the manufacturer is to sell his goods, and no further. So far as the second period is concerned, after Section 4 was

substituted completely by the Amendment Act which came into force on 1.7.2000, even a depot or other premises could not be considered to be a place of removal, the only place of removal being the factory premises of the manufacturer. This being so, learned counsel argued that he ought to succeed on first principle as all the show cause notices and the findings of the Commissioner are based on the fact that in the present case the buyer's premises is the place of removal of goods. He argued that this would involve conceptual confusion inasmuch as the place of removal can never be equated with the place of delivery and the place of removal alone is relevant for the purpose of Section 4 throughout its chequered history. He further argued that on facts his case came within the ratio of **Escorts JCB** and not within the ratio of two other judgments of this Court, namely, **Commissioner Central Excise, Mumbai-III v. M/s. Emco Ltd.,** dated July 31, 2015 in Civil Appeal 3418 of 2004 and Civil Appeal 8966 of 2011, and **CCE & Customs v. Roofit Industries Ltd.,** (2015) 319 E.L.T. 221 (S.C.). He also argued that the learned Commissioner was in error because he had ignored altogether the reply made by

the assessee which would show that the assessee's facts are in *pari materia* with the facts in **Escorts JCB** and not the facts in either **Emco** or **Roofit Industries**, supra. He further supported the Tribunal's judgment by stating that not only did the Commissioner not give any heed to Ispat's reply, but that it also entered into areas which were no part of the show cause notices, and thus several findings of the Commissioner were rightly held by the Tribunal to be beyond the show cause notices issued in the present case.

9. As this case involves the correct interpretation of Section 4 as it stood at the relevant time, it is necessary to recapitulate the history of the said provision insofar as it relates to freight charges being part of excise duty.

10. Section 4, as it stood before the 1973 amendment made to the Central Excise and Salt Act, provided as follows:-

> "Section 4. Where under this Act, any article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be—
> (*a*) the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other

premises of manufacture or production for delivery at the place of manufacture or production, or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists, or

(*b*) where such price is not ascertainable, the price at which an article of the like kind and quality is sold or is capable of being sold by the manufacturer or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or other premises for delivery at the place of manufacture or production, or if such article is not sold or is not capable of being sold at such place, at any other place nearest thereto.

Explanation.—In determining the price of any article under this section, no abatement or deduction shall be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other "premises aforesaid."

11. It will be seen that the value of an article chargeable with excise duty is deemed to be the wholesale cash price for which an article of the like kind and quality is sold or capable of being sold at the premises of manufacture or production. In **A.K. Roy v. Voltas Ltd.,** (1973) 3 SCC 503, this Court had occasion to deal with the said provision and in para 22 thereof stated:-

"… The section postulates that the wholesale price should be taken on the basis of cash payment thus eliminating the interest involved in wholesale price

which gives credit to the wholesale buyer for a period of time and that the price has to be fixed for delivery at the factory gate thereby eliminating freight, octroi and other charges involved in the transport of the articles." [at para 22]

12. By an amendment Act of 1973, which came into force on 1.10.1975, Section 4 was substituted as follows:-

"**Section 4. Valuation of excisable goods for purposes of charging of duty of excise. –** (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value, shall, subject to the other provisions of this section, be deemed to be –

(a) The normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale:

Provided that –

(i) Where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;

(ii) Where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;

(iii) Where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons), who sell such goods in retail;

(b) Where the normal price of such goods is not ascertainable for the reason, that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.

(2) Where, in relation to any excisable goods the price thereof for delivery at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price.

(3) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.

(4) For the purposes of this section, -

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) "place of removal" means –

(i) a factory or any other place or premises of production or manufacture of the excisable goods; or

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty,

from where such goods are removed."

13. It will be seen that three important changes have been made in the amended Section 4 so far as the present case is concerned. First, the value of excisable goods is deemed to be the "normal price" thereof that is the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade. Where the goods are sold at different prices to different classes of buyers, each such price shall be deemed to be the normal price. "Place of removal" has been defined for the first time to mean not only the premises of production or

manufacture of excisable goods but also a warehouse or any other place or premises wherein such goods have been permitted to be deposited without payment of duty and from where such goods are ultimately removed. Interestingly, in Section 4(2), which is introduced for the first time, where in relation to excisable goods the price thereof for delivery at the place of removal is not known, and the value is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery is statutorily excluded. As the law stood thus, this Court in **Union of India v. Bombay Tyre International Ltd.**, (1984) 1 SCC 467, after extracting the substituted Section 4 by the Amendment Act of 1973, held:-

> "Where the excisable article or an article of the like kind and quality is not sold in wholesale trade at the place of removal, that is, at the factory gate, but is sold in the wholesale trade at a place outside the factory gate, the value should be determined as the price at which the excisable article is sold in the wholesale trade at such place, after deducting therefrom the cost of transportation of the excisable article from the factory gate to such place. The claim to other deductions will be dealt with later." [at para 27]

The Court further went on to say:

> "Where the sale in the course of wholesale trade is effected by the assessee through its sales organisation at a place or places outside the factory gate, the expenses incurred by the assessee upto the date of delivery under the aforesaid heads cannot, on the same grounds, be deducted. But the assessee will be entitled to a deduction on account of the cost of transportation of the excisable article from the factory gate to the place or places where it is sold. The cost of transportation will include the cost of insurance on the freight for transportation of the goods from the factory gate to the place or places of delivery." [at para 50]

14. This view of the law was reiterated in **Government of India v. Madras Rubber Factory Ltd**., (1995) 4 SCC 349. Interestingly, in paragraph 39 of the judgment, cost of transportation from the factory gate to the place of removal not forming part of excise duty was conceded by the revenue.

15. Section 4 as substituted by the 1973 Amendment Act suffered a further amendment in 1996. The amendments carried out were to have effect from 28.9.1996, which is also the starting point on facts in the present case. Three important changes were made to Section 4. First a new sub-section (ia) was added to Section 4(1) which reads as follows:-

"(ia) Where the price at which such goods are ordinarily sold by the assessee is different for different places of removal, each such price shall, subject to the existence of other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such place of removal;"

Also, for the first time, "the place of removal" had one more category added to it. Section 4(4)(b)(iii) and 4(4)(ba) state as follows:-

"(4)(b)(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,

"(4)(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;"

16. It will thus be seen that where the price at which goods are ordinarily sold by the assessee is different for different places of removal, then each such price shall be deemed to be the normal value thereof. Sub-clause (b)(iii) is very important and makes it clear that a depot, the 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 are all places of removal. What is important to note is that each of these premises is referable only to the manufacturer and not to the buyer of excisable goods. The depot, or the premises of a consignment agent of the manufacturer are obviously places which are referable only to the manufacturer. Even the expression "any other place or premises" refers only to a manufacturer's place or premises because such place or premises is stated to be where excisable goods "are to be sold". These are the key words of the sub-section. The place or premises from where excisable goods are to be sold can only be the manufacturer's premises or premises referable to the manufacturer. If we are to accept the contention of the revenue, then these words will have to be substituted by the words "have been sold" which would then possibly have reference to the buyer's premises.

17. It is clear, therefore, that as a matter of law with effect from the Amendment Act of 28.9.1996, the place of removal only has reference to places from which the manufacturer is to sell goods manufactured by him, and can, in no circumstances,

have reference to the place of delivery which may, on facts, be the buyer's premises.

18. By an Amendment Act which came into effect on 1.7.2000, Section 4 was substituted yet again as follows:-

> "**Section 4. Valuation of excisable goods for purposes of charging of duty of excise. –** (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall –
>
> (a) In a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, by the transaction value;
>
> (b) In any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.
>
> (2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.
>
> (3) For the purpose of this section,-
> (a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;
>
> (b) Person shall be deemed to be "related" if –
> (i) they are inter-connected undertakings;

(ii) they are relatives;
(iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or
(iv) they are so associated that they have interest, directly or indirectly in the business of each other.

Explanation. – In this clause –

(i) "inter-connected undertakings" shall have the meaning assigned to it in clause (g) of section 2 of the Monopolies and Restrictive Trade Practices Act, 1969 (64 of 1969); and
(ii) "relative" shall have the meaning assigned to it in clause (41) of section 2 of the Companies Act, 1956 (1 of 1956);

(c) "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,

from where such goods are removed;

(d) "transaction value" means the price actually paid or payable for the 'goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty,

> commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods."

19. A cursory reading of the substituted provision makes it clear that the concept of "normal value" has given way to the concept of "transaction value". Thus, no longer is there a normative price for purposes of valuation of excisable goods. The actual price that is paid or payable on each removal of goods becomes the transaction value. Interestingly, it will be noticed that under Section 4(3)(c), the place of removal is defined as it had been defined in the substituted Section 4 (by the 1973 Amendment) before its further amendment in 1996. What is conspicuous by its absence in the present Section is Section 4(2) and sub-section (b)(iii) in the previous Section 4 (after its amendment in 1996). It is clear therefore that for the second period in question in the present case, namely, 1.7.2000 to 31.3.2003, the depot, premises of a consignment agent or any other place from which excisable goods are to be sold after their clearance from the factory are no longer places of removal. Also, the definition of "transaction value" makes it

clear that freight or transportation expenses are not included in calculating the excise duty payable.

20. It is necessary also to refer to Rules 5 and 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 which came into force on the same date as the amendment to Section 4 i.e. 1.7.2000. These Rules read as under:-

> "**Rule 5.**
>
> Where any excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of section 4 of the Act except the circumstances in which the excisable goods are sold for delivery at a place other than the place of removal, then the value of such excisable goods shall be deemed to be the transaction value, excluding the actual cost of transportation from the place of removal upto the place of delivery of such excisable goods provided the cost of transportation is charged to the buyer in addition to the price for the goods and shown separately in the invoice for such excisable goods.
>
> **Rule 7.**
>
> Where the excisable goods are not sold by the assessee at the time and place of removal but are transferred to a depot, premises of a consignment agent or any other place or premises (hereinafter referred to as "such other place") from where the excisable goods are to be sold after their clearance from the place of removal and where the assessee and the buyer of the said goods are not related and the price is the sole consideration for the sale, the

> value shall be the normal transaction value of such goods sold from such other place at or about the same time and, where such goods are not sold at or about the same time, at the time nearest to the time of removal of goods under assessment."

21. The actual cost of transportation from the place of removal up to the place of delivery of excisable goods is excluded from the computation of excise duty provided it is charged to the buyer in addition to the price of goods and shown separately in the invoices for such goods. Interestingly, despite the substituted Section 4 not providing for a depot or other premises as a place of removal, Rule 7 deals with the normal transaction value of goods transferred to a depot or other premises which is said to be at or about the same time or the time nearest to the time of removal of goods under assessment.

22. To complete the picture, by an Amendment Act with effect from 14.5.2003, Section 4 was again amended so as to re-include sub-clause (iii) of old Section 4(3)(b) (pre 2000) as Section 4(3)(c)(iii). This amendment reads as follows:-

"(3)(c)(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;"

Also, Rule 5 of the Central Excise Rules was substituted, with effect from 1.3.2003, to read as follows:

"**Rule 5**. Where any excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of section 4 of the Act except the circumstances in which the excisable goods are sold for delivery at a place other than the place of removal, then the value of such excisable goods shall be deemed to be the transaction value, excluding the cost of transportation from the place of removal upto the place of delivery of such excisable goods.

Explanation 1 – "Cost of transportation" includes –

(i) the actual cost of transportation; and
(ii) in case where freight is averaged, the cost of transportation calculated in accordance with generally accepted principles of costing.

Explanation 2 – For removal of doubts, it is clarified that the cost of transportation from the factory to the place of removal, where the factory is not the place of removal, shall not be excluded for the purposes of determining the value of the excisable goods."

23. It is clear, therefore, that on and after 14.5.2003, the position as it obtained from 28.9.1996 to 1.7.2000 has now been reinstated. Rule 5 as substituted in 2003 also confirms

the position that the cost of transportation from the place of removal to the place of delivery is to be excluded, save and except in a case where the factory is not the place of removal.

24. It will thus be seen that, in law, it is clear that for the period from 28.9.1996 up to 1.7.2000, the place of removal has reference only to places from which goods are to be sold by the manufacturer, and has no reference to the place of delivery which may be either the buyer's premises or such other premises as the buyer may direct the manufacturer to send his goods. As a matter of law therefore the Commissioner's order and Revenue's argument based on that order that freight charges must be included as the sale in the present facts took place at the buyer's premises is incorrect. Further, for the period 1.7.2000 to 31.3.2003 there will be no extended place of removal, the factory premises or the warehouse (in the circumstances mentioned in the Section), alone being places of removal. Under no circumstances can the buyer's premises, therefore, be the place of removal for the purpose of Section 4 on the facts of the present case.

25. It now remains to deal with some of the judgments cited at the Bar. **Escorts JCB Ltd. v. CCE,** (2003) 1 SCC 281, was strongly relied upon by Shri Bagaria and sought to be distinguished by Shri Panda. The facts of **Escorts JCB's** case are similar to the facts in the present case. The show cause notice in that case alleged that freight and transit insurance were charged from buyers but no central excise duty was paid by mis-declaring the place of removal as the factory gate instead of the buyer's premises. It will be noted that just as in the present case, the price was "ex-works" and exclusive of freight insurance etc. After setting out Section 4 post its amendment in 1996, this Court held:-

> "A perusal of the orders passed by the authorities and CEGAT shows that since transit insurance was arranged by the assessee, therefore it was inferred and held that the ownership of the goods was retained by the assessee until it was delivered to the buyer on the reasoning that otherwise there would be no occasion for the seller, namely, the assessee to take risk of any kind of damage to the goods during transportation. To us, the whole reasoning seems to be untenable. The two aspects have been mixed up — one relating to the transaction of sale of the goods and the other arranging for the transit insurance for the buyer and charging the amount expended for the purpose from him separately." [at para 8]

> "From the above passage it is clear that ownership in the property may not have any relevance insofar as insurance of goods sold during transit is concerned. It would therefore not be lawful to draw an inference of retention of ownership in the property sold by the seller merely by reason of the fact that the seller had insured such goods during transit to the buyer. It is not necessary that insurance of the goods and the ownership of the property insured must always go together. It may be depending upon various facts and circumstances of a particular transaction and terms and conditions of sale. A reference has also been made to *Colinvauz's Law of Insurance*, 6th Edn. by Robert Merkin to indicate that there may be insurance to cover the interest of others, that is to say, not necessarily the person insuring the interest must be the owner of the property." [at para 10]

26. This Court then went on to follow **Bombay Tyre International's** case and ultimately held:-

> "In view of the discussion held above, in our view the Commissioner of Central Excise and CEGAT erred in drawing an inference that the ownership in the property continued to be retained by the assessee till it was delivered to the buyer for the reason that the assessee had arranged for the transport and the transit insurance. Such a conclusion is not sustainable." [at para 12]

27. We are inclined to the opinion that the Tribunal was correct in relying upon this judgment on the facts in the present case and on the circular dated 3.3.2003, which specifically stated, following the said judgment, that insurance of goods during transit cannot possibly be the sole consideration to decide ownership or the point of sale of goods.

28. Similarly in **VIP Industries Ltd. v. Commissioner of Customs & Central Excise,** (2003) 5 SCC 507, this Court was faced with the following question:-

> "The question for consideration in both these appeals is whether in cases where a manufacturer includes equalised freight in the price of the goods and sells the goods all over the country at a uniform price, the Department is entitled to compute value by including the cost of transportation from the factory to the depot. This question was decided by this Court in the case of *Union of India* v. *Bombay Tyre International Ltd.* [(1984) 1 SCC 467 : 1984 SCC (Tax) 17 : 1983 ELT 1896] It was thereafter confirmed in the case of *Govt. of India* v. *Madras Rubber Factory Ltd.*[(1995) 4 SCC 349 : (1995) 77 ELT 433]" [at para 3]

29. Like the **Escorts JCB's** case this judgment was also concerned with Section 4 as it stood after the amendment of 1996 but before the amendment of 2000. This Court held:-

"After the amendment, the Department sought to include in the value the cost of transport from factory to the depot, even in case where the manufacturer sold the goods at a uniform price all over the country by including the element of equalised freight. The Tribunal has upheld the view of the Department on the reasoning that by this amendment the definition of the term "place of removal" has been extended to include the depot. The Tribunal has also held that Section 4(2) which excluded the cost of transportation from the place of removal to the place of delivery was not amended when the definition of the term "place of removal" was extended. According to the Tribunal the result was that only the transport charges from the place of removal to the place of delivery were to be excluded from the value.

We have heard the parties at length. In our view, Section 4 has to be read as a whole. Under Section 4(1)(*a*), the normal price is the price at which goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and price is the sole consideration for sale. Therefore, the normal price is the price at the "time of delivery" and "at the place of removal". Before the amendment, the place of removal was only the factory or any other place or premises where the excisable goods were produced or manufactured or a warehouse or any other place or premises where any excisable goods have been permitted to be deposited without payment of duty. Thus, the price would be the price at that place. By the amendment proviso (*i-a*) to Section 4(1)(*a*) has been added. Under Section 4(1)(*a*)(*i-a*) where the price of the goods is different for different places of removal, each such price was deemed to be the normal price of such goods in relation to "such place of removal". Thus, if the place of removal was the

factory, then the price would be the normal price at the factory. If the place of removal was some other place like a depot or the premises of a consignment agent and the price was different then that different price would be the price. It is because the newly added proviso (*i*-*a*) to Section 4(1)(*a*) was now providing for different prices at different places of removal that the definition of the term "place of removal" had to be enlarged. Thus the amendment was not negativing the judgments of this Court. If that had been the intention it would have been specifically provided that even where price was the same/uniform all over the country, the cost of transportation was to be added.

Thus in cases where the price remains uniform or constant all over the country, it does not follow that value for the purpose of excise changes merely because the definition of the term "place of removal" is extended. The normal price remains the price at the time of delivery and at the place of removal. In cases of equalised freight it remains the same as per the judgments of this Court set out hereinabove.

In our view, the amendments have made no difference to the earlier position as settled by this Court. In this view of the matter, we are unable to uphold the judgments of the Tribunal. They are accordingly set aside. The appeals are allowed with consequential relief. There shall be no order as to costs." [paras 5 to 8]

30. In **Prabhat Zarda Factory Limited v. CCE,** 2002 (146) E.L.T. 497 (S.C.), this Court held:-

"In these matters, the question is whether freight and insurance charges are to be included in the

> assessable value for the purposes of excise. This question is covered by the judgment of this Court in the case of *Escorts JCB Ltd. v. Commissioner of Central Excise, Delhi-II* [2002 (146) E.L.T. 31 (S.C.)]. The only difference which has been pointed out is that in the *Escorts* case (supra) the sale was at the factory gate whereas in these cases, the sale is from the depot. Learned counsel for the appellants admit that the freight and insurance charges up to the depot would be includible in the assessable value for the purposes of excise. However, the sale being at the depot, the freight and insurance for delivery to the customers from the depot would not be so includible as per the said judgment."

This judgment, therefore, also holds that even in a depot sale, freight and insurance for delivery to customers from the depot to their premises cannot possibly be included, and followed the **Escorts JCB** case supra.

31. With this we come to two recent judgments of this Court. In **CCE & Customs v. Roofit Industries Ltd.,** (2015) 319 E.L.T. 221 (S.C.), this Court, after distinguishing the **Escorts JCB's** case, stated:-

> "The principle of law, thus, is crystal clear. It is to be seen as to whether as to at what point of time sale is effected, namely, whether it is on factory gate or at a later point of time i.e. when the delivery of the goods is effected to the buyer at his premises. This

aspect is to be seen in the light of the provisions of the Sale of Goods Act by applying the same to the facts of each case to determine as to when the ownership in the goods is transferred from the seller to the buyer. The charges which are to be added have put up to the stage of the transfer of that ownership inasmuch as once the ownership in goods stands transferred to the buyer, any expenditure incurred thereafter has to be on buyer's account and cannot be a component which would be included while ascertaining the valuation of the goods manufactured by the buyer. That is the plain meaning which has to be assigned to Section 4 read with the Valuation Rules.

In the present case, we find that most of the orders placed with the respondent assessee were by the various government authorities. One such order i.e. order dated 24-6-1996 placed by Kerala Water Authority is on record. On going through the terms and conditions of the said order, it becomes clear that the goods were to be delivered at the place of the buyer and it is only at that place where the acceptance of supplies was to be effected. Price of the goods was inclusive of cost of material, Central excise duty, loading, transportation, transit risk and unloading charges, etc. Even transit damage/breakage on the assessee account which would clearly imply that till the goods reach the destination, ownership in the goods remain with the supplier, namely, the assessee. As per the “terms of payment” clause contained in the procurement order, 100% payment for the supplies was to be made by the purchaser after the receipt and verification of material. Thus, there was no money given earlier by the buyer to the assessee and the consideration was to pass on only after the receipt of the goods which was at the premises of the buyer. From the aforesaid, it would be manifest that

the sale of goods did not take place at the factory gate of the assessee but at the place of the buyer on the delivery of the goods in question.

The clear intent of the aforesaid purchase order was to transfer the property in goods to the buyer at the premises of the buyer when the goods are delivered and by virtue of Section 19 of the Sale of Goods Act, the property in goods was transferred at that time only. Section 19 reads as under:

"**19. *Property passes when intended to pass***. —(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in Sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer."

These are clear finding of facts on the aforesaid lines recorded by the Adjudicating Authority. However, CESTAT did not take into consideration all these aspects and allowed the appeal of the assessee by merely referring to the judgment in *Escorts JCB Ltd.* [(2003) 1 SCC 281 : (2002) 146 ELT 31] Obviously the exact principle laid down in the judgment has not been appreciated by CESTAT." [at paras 12 - 15]

32. It will be seen that this is a decision distinguishing the Escorts JCB's case on facts. It was found that goods were to be delivered only at the place of the buyer and the price of the goods was inclusive of transportation charges. As transit damage on the assessee's account would imply that till the goods reached their destination, ownership in the goods remained with the supplier, namely, the assessee, freight charges would have to be added as a component of excise duty. Further, as per the terms of the payment clause contained in the procurement order, payment was only to be made after receipt of goods at the premises of the buyer. On facts, therefore, it was held that the sale of goods did not take place at the factory gate of the assessee. Also, this Court's attention was not drawn to Section 4 as originally enacted and as amended to demonstrate that the buyer's premises cannot, in law, be "a place of removal" under the said Section.

33. As has been seen in the present case all prices were "ex-works", like the facts in **Escorts JCB's** case. Goods were cleared from the factory on payment of the appropriate sales tax by the assessee itself, thereby indicating that it had sold the

goods manufactured by it at the factory gate. Sales were made against Letters of Credit and bank discounting facilities, sometimes in advance. Invoices were prepared only at the factory directly in the name of the customer in which the name of the Insurance Company as well as the number of the transit Insurance Policy were mentioned. Above all, excise invoices were prepared at the time of the goods leaving the factory in the name and address of the customers of the respondent. When the goods were handed over to the transporter, the respondent had no right to the disposal of the goods nor did it reserve such rights inasmuch as title had already passed to its customer. On facts, therefore, it is clear that **Roofit's** judgment is wholly distinguishable. Similarly in **Commissioner Central Excise, Mumbai-III v. M/s. Emco Ltd**, this Court re-stated its decision in the **Roofit Industries'** case but remanded the case to the Tribunal to determine whether on facts the factory gate of the assessee was the place of removal of excisable goods. This case again is wholly distinguishable on facts on the same lines as the **Roofit Industries** case.

34. In the view of the law that we have taken as well as the facts detailed above, the statement made by Shri S.P. Dahiwade pales into insignificance as has been correctly held by the Tribunal. We, therefore, dismiss this appeal with no order as to costs.

……J.
(A.K. Sikri)

……J.
(R.F. Nariman)

New Delhi;
October 7, 2015