

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.2

Excise Appeal No.187 of 2010

(Arising out of Order-in-Appeal No.29/SH/CE(A)/GHY/09 dated 18.12.2009 passed by Commissioner, Customs & Central Excise (Appeals), Guwahati.)

M/s. RNB Carbides & Ferro Alloys Private Limited

(Barapani Industrial Area, District Ri-Bhoi, Meghalaya
and/or
G.S.Road, Bara Bazar, Shillong-793002.)

...Appellant

VERSUS

Commissioner of Central Excise, Shillong

.....Respondent

(Morello Compound, M.G.Road, Shillong-793001.)

WITH

(i) Excise Appeal No.188 of 2010 (M/s.RNB Carbides & Ferro Alloys Private Limited Vs. Commissioner of Central Excise, Shillong); (ii) Excise Appeal No.700 of 2011 (Commissioner of Central Excise, Shillong Vs. M/s.RNB Carbides & Ferro Alloys Private Limited); (iii) Excise Appeal No.776 of 2011 (Commissioner of Central Excise, Shillong Vs. M/s.RNB Carbides & Ferro Alloys Private Limited); (iv) Excise Appeal No.75148 of 2015 (Commissioner of Central Excise & Service Tax, Shillong Vs. M/s.RNB Carbides & Ferro Alloys Private Limited (Unit-II)); (v) Excise Appeal No.75149 of 2015 (Commissioner of Central Excise & Service Tax, Shillong Vs. M/s.RNB Carbides & Ferro Alloys Private Limited (Unit-II)); (vi) Excise Appeal No.75150 of 2015 (Commissioner of Central Excise & Service Tax, Shillong Vs. M/s.RNB Carbides & Ferro Alloys Private Limited (Unit-I)); (vii) Excise Appeal No.190 of 2010 (M/s.Meghalaya Carbide & Chemicals Private Limited Vs. Commissioner of Central Excise, Shillong); (viii) Excise Appeal No.777 of 2011 (Commissioner of Central Excise, Shillong Vs. M/s.Meghalaya Carbide & Chemicals Private Limited); (ix) Excise Appeal No.779 of 2011 & Excise Cross Objection No.124 of 2011 (Commissioner of Central Excise, Shillong Vs. M/s.Adhunik Meghalaya Steel Private Limited); (x) Excise Appeal No.185 of 2010 (M/s.Nezone Alloys Limited Vs. Commissioner of Central Excise, Shillong); (xi) Excise Appeal No.778 of 2011 (Commissioner of Central Excise, Shillong Vs. M/s.Nezone Alloys Private Limited);

*Excise Appeal Nos. 187, 188 of 2010, 700, 776 of 2011, 75148, 75149, 75150 of 2015,
190 of 2010, 777, 779 of 2011, 185 of 2010, 778 of 2011*

- (i) (Arising out of Order-in-Appeal No.29/SH/CE(A)/GHY/09 dated 18.12.2009 passed by Commissioner, Customs & Central Excise (Appeals), Guwahati.)
- (ii) & (iii) (Arising out of Order-in-Appeal No.19/SH/CE(A)/GHY/11 dated 27.04.2011 passed by Commissioner, Customs & Central Excise (Appeals), Guwahati.)
- (iv) (Arising out of Order-in-Appeal No.22/SH/CE(A)/GHY/2014 dated 29.10.2014 passed by Commissioner, Customs & Central Excise & Service Tax (Appeals), Guwahati.)
- (v) (Arising out of Order-in-Appeal No.21/SH/CE(A)/GHY/2014 dated 29.10.2014 passed by Commissioner, Customs & Central Excise & Service Tax (Appeals), Guwahati.)
- (vi) (Arising out of Order-in-Appeal No.23/SH/CE(A)/GHY/2014 dated 29.10.2014 passed by Commissioner, Customs & Central Excise & Service Tax (Appeals), Guwahati.)
- (vii) (Arising out of Order-in-Appeal No.29/SH/CE(A)/GHY/09 dated 18.12.2009 passed by Commissioner, Customs & Central Excise (Appeals), Guwahati.)
- (viii, ix) (Arising out of Order-in-Appeal No.19/SH/CE(A)/GHY/11 dated 27.04.2011 passed by Commissioner, Customs & Central Excise (Appeals), Guwahati.)
- (x) (Arising out of Order-in-Appeal No.29/SH/CE(A)/GHY/09 dated 18.12.2009 passed by Commissioner, Customs & Central Excise (Appeals), Guwahati.)
- (xi) (Arising out of Order-in-Appeal No.19/SH/CE(A)/GHY/11 dated 27.04.2011 passed by Commissioner, Customs & Central Excise (Appeals), Guwahati.)

APPEARANCE

S/Shri J.P.Khaitan, Senior Advocate, Soumya Kejriwal, Indranil Banerjee, Ms.Poulami Sikdar, Nihar Dasgupta, N.K.Chowdhury, Advocates for the Appellant (s)/Assessee (s)

NONE appeared for Sl.No (ix) above.

Shri K.Chowdhury, Authorized Representative for the Respondent (s)/ Revenue

**CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI RAJU, MEMBER(TECHNICAL)**

FINAL ORDER NO. 75502-75513 / 2021

DATE OF HEARING : 27 July 2021
DATE OF DECISION : 27 August 2021

P.K. CHOUDHARY :

1. The present appeals involving identical questions of law are taken up together for disposal for the sake of convenience, out of which, four appeals have been filed by the assessees, namely, (i) M/s RNB Carbides & Ferro Alloys Pvt. Ltd., (ii) Nezone Alloys Ltd & (iii) Meghalaya Carbide & Chemicals Pvt. Ltd., while the remaining eight appeals have been filed by the Revenue. Out of the total eight appeals filed by the Revenue, the eight appeals being Ex.Appeal Nos.E/700/2011, E/776-779/2011 & E/75148-75150/2015, are filed for withdrawal as prayed by the Revenue in terms of litigation policy vide Board's instruction being F.No.390/Misc./116/2017-JC dated 22.08.2019

2. Accordingly, the prayer for withdrawal of the appeals by the Revenue, is granted and the Ex.Appeal Nos.E/700/2011, E/776-779/2011 & E/75148-75150/2015, are dismissed as withdrawn under National Litigation Policy. Cross Objection No.124/2011 in Excise Appeal No.779 of 2011 also gets disposed off.

3. Now, we take up the four appeals filed by the assesses for final disposal.

4. Briefly stated, the facts of the case are that the assessees were engaged in the manufacture and sale of Ferro Alloys, Ferro Silicon and Ferro Slag classifiable under Chapter 72 of the Central Excise Tariff Act, 1985. The assessee's units were located within the State of Meghalaya and enjoyed the benefit of Central Excise duty exemption under Notification No. 32/99-CE dated 08.07.1999, as amended. The said notification operated by way of refund, where under the assessee first paid the Central Excise duty leviable on the clearances of its final

products and, thereafter, received refund of the amount of duty paid from its account current.

5. The dispute before us pertains to the refunds obtained by the assessee from time to time in terms of the aforesaid exemption notification. The assessee had self-assessed the duty on clearances, paid the same and then filed the refund claims for amounts paid from its account current. The said refund claims were processed and the refunds were granted. Subsequent to such grant of periodical refunds, the assessee's Books of Accounts were scrutinized. The Revenue objected to the inclusion of freight charges in the assessable value of goods. It was the revenue's case that the assessee had overvalued its products by including freight charges which ought not to have been included under Section 4(1) of the Central Excise Act, 1944 read with Rule 5 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Several Show Cause Notices were issued against the assessee for recovering the alleged excess refunds, details whereof are as under:

Sl. No.	Particulars of Show Cause Notice	Period involved	Amount refunded / demanded
1.	C. No.V-CH-72/3/ADJ/2008 dated 15.05.2008 (in respect of assessee's Unit I)	April, 2006 to August, 2007	Rs. 7,29,752/-
2.	C. No.V-CH-72/4/ADJ/2008 dated 15.05.2008 (in respect of assessee's Unit II)	April, 2006 to August, 2007	Rs. 26,20,403/-
3.	C. No.V-CH-72/15/ADJ/2013 dated 12.09.2013 (in respect of assessee's Unit II)	January, 2012 to December, 2012	Rs. 5,54,219/-

4.	C. No.V-CH-72/9/ADJ/2011 dated 17.02.2012 (in respect of assessee's Unit I)	September, 2007 to March, 2008 and April, 2008 to March, 2009	Rs. 7,28,666/-
5.	C. No.V-CH-72/10/ADJ/2011 dated 17.02.2012 (in respect of assessee's Unit II)	September, 2007 to March, 2011	Rs.38,06,432/-

The larger period of limitation was invoked on the ground that the assessee had suppressed the fact that outward freight was included in the assessable value and that they had mis-declared the Place of Removal leading to over valuation of assessable value for claiming excess refund.

6. The assessee contested the aforesaid Show Cause Notices by submitting replies to such notices. It appears from the replies that the principal stand of the assessee was that the relevant contracts/ purchase orders for sale of finished products stipulated FOR destination prices. The ownership and possession of the goods remained with the assessee (sellers) until the goods were delivered at the premises of their buyers (purchasers) and the same were accepted. The assessee had contended that the act of sale occurred at the buyers' premises and therefore, duty had been paid correctly considering the value of goods inclusive of transportation charges upto the buyers' premises. There was nothing in the Valuation Rules, 2000 which stated the contrary. The assessee also contended that even if the transportation charges were not includible for the purpose of Central Excise valuation, the Department was bound to refund the duty element paid thereon. The demands were also contested on the ground of limitation.

7. After adjudication of the aforesaid Show Cause Notices, the matters went upto the Commissioner (Appeals), Guwahati, who disposed of the appeals by separate Orders-In-Appeal. In certain cases, the Commissioner (Appeals) held in favour of the assessee, which orders have been challenged by the revenue while in the other proceedings, the Commissioner (Appeals) held in favour of the revenue, which have been challenged by the assessee. It is pertinent to mention here that as far as the Departmental appeals bearing Nos. E/700/2011 and E/776/2011 are concerned, the same are repetitive and their subject matters relate to the assessee's appeals bearing Ex. Appeal Nos. 187 of 2010 and 188 of 2010. The said Departmental appeals had been preferred against the relevant Orders-In-Appeal on a technical ground that the Commissioner (Appeals) had failed to confirm or modify the demands although the said orders had been passed in favour of the revenue. This is the background of the present appeals before us.

8. The learned Senior Counsel on behalf of the assessee made the following submissions:

(a) Place of removal as defined under Section 4 of the said Act had to be determined with reference to the Point of Sale, which in the assessee's case was always the buyer's premises. Sri Khaitan invited the attention of the Bench to the relevant contracts/ purchase orders and transit insurance policies. It was contended that the terms of the aforesaid contracts/purchase orders clearly prove that:

- (i) all sales were at FOR destination prices;
- (ii) Ownership of goods and the property in the goods passed onto the buyers upon delivery of the said goods to the respective premises in acceptable condition. The goods were inspected and accepted only upon satisfaction of the buyers;

- (iii) the assessee bore the risk of transit loss or damage during the course of journey to the destination;
- (iv) the assessee was obliged to deliver the goods at the buyer's premises and price was paid only if the goods were accepted.

The attention of the Bench was drawn to the documents relating to rejection of goods by the buyers in the Paper Book to Appeal No. 188 of 2010, which showed that on rejection of goods, the assessee collected the same from the buyer's premises and brought them back to its factory at its own cost upon due intimation to the Central Excise authorities. The buyer not having accepted the goods, no payment was made to the assessee;

- (v) the assessee charged the contract price which was FOR destination price and there was no occasion or reason to indicate separately in the invoices of the cost incurred by it for transportation upto the buyer's premises. After clearance of goods from the assessee's factory, transfer of ownership took place only at the buyer's premises and the instant case was not one involving any ex-factory sale. Accordingly, the 'sales' had taken place at the buyers' premises as per Section 2(h) of the said Act read with the applicable provisions of the Sale of Goods Act, 1930.

- a) Section 4(1)(a) of the said Act was inapplicable since the goods had not been sold by the assessee for delivery, at the time and place of removal. In the instant case, valuation was governed by clause (b), Section 4(1) of the Act read with the Valuation Rules, 2000. The revenue's reliance upon Rule 5 of the said Rules was misplaced in view of the exclusion appearing in the said Rule itself. On the other

hand, the spirit of Rule 7 applied read with Rule 11 of the Valuation Rules, 2000. The transaction value at the place of sale, which was the buyers' premises in the present case, represented the correct value for payment of duty.

- b) Shri Khaitan submitted that the assessee's case was similar to the facts in the case of ***Commissioner of Customs and Central Excise, Aurangabad – versus – Roofit Industries Limited*** reported in **2015 (319) ELT 221 (SC)**. In the said decision which related to FOR sale contract, the Hon'ble Supreme Court held that the place of removal depended on the facts of each case and that it had to be determined at what point of time the sale was effected. In light of the Sale of Goods Act, 1930, it had to be examined as to when the ownership in the goods stood transferred from the seller to the buyer and that the charges includible in the assessable value were those incurred upto the Point of Sale. After discussing the earlier decisions on the issue of valuation vis-à-vis place of removal and point of sale, the Hon'ble Court observed that in the case where goods were to be delivered at the place of the buyer where acceptance was to be effected and that price was inclusive of cost of Central Excise duty, transportation costs etc. even transit damage/ breakage was on the assessee's account which indicated that till the goods reached the destination ownership remained with the seller-assessee. Sale, thus, took place upon delivery at the buyers' premises. This principle of law has been recognized by and re-iterated in the decision of *Commissioner of Central Excise, Mumbai-III – versus – EMCO Limited* reported in 2015 (322) ELT 394 (SC). The relevant portion of the judgment in case of Roofit Industries (supra) is reproduced below:

“..9. If the goods are cleared at the factory gate, then the Excise duty has to be charged on the valuation of the goods to be arrived at the factory gate as that would be the place of removal of goods. It would mean that the expenses which are incurred after the removal of goods from the factory gate namely

freight, insurance and unloading charges, etc., are not to be included in the valuation of the goods for the purposes of Excise duty. The reason is that the sale of goods to the buyer is at the factory gate when the property passes to the buyer and the aforesaid expenditure are thereafter incurred by the buyer. It is this aspect which was gone into by this Court in the case of Escorts JCB Ltd. (supra). That was a case where question of including insurance charges came up for consideration. It was found as a fact that the goods were cleared at the factory gate. On these facts, this Court held that insurance charges, or for that matter, transport charges would not be included even if the assessee had arranged for the transit insurance. The Court found that the terms and conditions of sale clearly stipulated that it was ex-works at the factory gate of the assessee. The payment was to be made before discharge of the goods from the factory premises. In the opinion of the Court, the machinery which was handed over to the carrier/transporter on receiving the payment was as good as delivery to the buyer in terms of Section 39 of the Sale of Goods Act and, therefore, possession of the sold goods was handed over to the buyer at the factory gate. In this manner, the transaction was full and complete and nothing remained to be done after the goods left the factory premises. On these facts, provisions of Section 4 of the Act, which deals with valuation of excisable goods for the purposes of charging of duty of Excise was taken note of and analysed, holding that the aforesaid charges could not be included for the purpose of arriving at valuation of excisable goods.

.....

12. *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 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”

c) In the case of **Commissioner of Customs and Central Excise, Nagpur – versus – Ispat Industries Limited** reported in **2015 (324) ELT 670 (SC)**, the position of law has been further elucidated, with the decisions of *Roofit Industries* and *EMCO Limited* (supra) being held distinguishable on facts. Sri Khaitan drew our attention to paragraphs 31 to 33 of the said decision of *Ispat Industries Limited*. It was submitted that in view of the clear position of law there remained no doubt that the assessee in the instant case had correctly determined the assessable value by including the disputed transportation cost. In this regard, reliance was placed on **Circular No. 1065/4/2018-CX dated 08.06.2018**, which stated that in case of a contract providing FOR sale, assessable value had to be determined by including all costs upto the point of sale, which was the buyers' premises. The relevant portion of the decision in *Ispat Industries* (supra) is reproduced below:

“ .. 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 E.L.T. 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...”

d) Lastly, the learned Senior Counsel submitted that major parts of the impugned demand were hit by limitation. The relevant refund claims of the assessee had been granted after due verification and, as such, there was no material on record to support a finding of fraud or collusion or wilful mis-statement or mala fide intention on part of the assessee.

9. On the other hand, Learned Authorized Representative for the Respondent Revenue placed reliance on the decisions of this Tribunal in *Montage Enterprises Pvt. Ltd. v. Commissioner of C.Ex & ST, Jammu* reported in 2018 (364) ELT 1003 (Tri-Chan.) and *Aditya Birla Chemicals India Ltd vs. CCE, Ranchi* 2021-TIOL-48-CESTAT-KOL in support of his arguments. He also submitted a written submission and reiterated the findings of the lower authorities.

10. Heard both sides through video conferencing.

11. We have carefully gone through the appeal records and submissions made by both sides including the written submissions. We find that the present dispute falls within a narrow compass as to whether the assessee had correctly availed the benefit of Notification No. 32/99-CE dated 08.07.1999 and if not, then whether the revenue was entitled to recover the refunds already granted claiming it to be a case of “erroneous refund”.

12. It has not been disputed that the contracts executed by the assessee were FOR contracts. We note that the contracts/ purchase orders specified ‘door delivery’ at all-inclusive prices. The purchasers

reserved the right to inspection and to not accept the goods, in case the goods supplied were found to be sub-par. The assessee bore the risk of loss or damage to the goods during transit to the destination, as evident from the transit insurance policies and the documents relating to rejection of goods by certain buyers. Neither did the invoices reflect the transportation costs separately nor were such charges recovered separately from the buyers. The buyers were not concerned with the goods unless and until the same were delivered in an acceptable condition at their premises and, in fact, bought by them after inspection. The invoices issued by the assessee incorporated details of the relevant purchase orders issued by the buyers and as the agreed upon price was as per FOR destination, there was no reason to charge any freight component separately.

13. Sale has been defined under Section 2(h) of the said Act as follows :

“sale” and “purchase”, with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration;

Thus, under the Act sale takes place only upon transfer of the possession of the goods by the manufacturer to the buyer, which occurred in the present cases at the buyers' premises.

14. The parties intended that the sale of goods would take place at the premises of the buyers and that such premises would be considered to the Point of Sale, where the title and property in the goods were actually transferred.

15. We are of the view that the invocation of Rule 5 of the Valuation Rules, 2000 by the Revenue was misplaced. The said Rule applied to cases only where goods were sold at the place of removal but were to be delivered elsewhere, which condition could not have applied in the given facts and circumstances. The assessee's case fell within the purview of the exception to the aforesaid Rule 5. On the other hand, at the time of clearance of goods from the assessee's factory, no sale took place and the risk and ownership of the goods remained with the assessee. The possession of the goods was transferred to the buyers and the sale took place at the buyers' premises only upon the buyers accepting the goods after due inspection. In view of Rule 7 of the Valuation Rules, 2000 read with Rule 11, the assessable value of the goods was the price charged by the assessee at the place of sale. The spirit of the said Rule 7 read with Rule 11 of the Valuation Rules indicates that all charges upto the place of sale are includible, including freight, etc.

16. The Id. Senior Counsel further contended that even if it be assumed that the assessee had paid higher Central Excise duty than was leviable, the Department was not at liberty to retain any part of such excess amount collected as duty. It is pertinent to note that the basic purpose and object of the notification in question was to promote industrialization in the north-eastern part of the country. We observe that the revenue can retain only those sums which represent the actual duty leviable under a statute and therefore, any excess amount collected as duty ought to be refunded.

17. The assessee has further placed reliance on Board's Circular No.59/1/2003-CX dated 03.03.2003 and Circular No. 988/12/2014-CX dated 20.10.2014.

18. The aforesaid circulars state that place of removal/ assessable value was ascertainable with reference to the place where the sale took place or where the property in the goods passed from the seller to the buyer in terms of the Sale of Goods Act, 1930. Therefore, where the terms and conditions of sale in the relevant contracts/ purchase orders unambiguously stipulated that the act of sale would be completed upon on-door delivery at the buyer's premises, as is the case of the assessee before us, the transportation costs would be included.

19. We observe that the decision of this Bench in the case of *M/s Nalari Ferro Alloys* (supra) was rendered in the backdrop of similar facts and circumstances. The issue involved was whether the assessee was entitled to include freight charges upto the buyer's premises and claim refund in terms of the very notification in question i.e. Notification No.32/99 dated 08.07.1999. After examining the contract in light of the principles enunciated for determination of place of removal vis-à-vis point of sale and discussing the aforementioned decisions of *Roofit Industries* and *Ispat Industries Ltd.*, supra, this Tribunal had held that the property in the goods was intended to pass at the buyer's premises and, therefore, the assessee therein was not required to deduct the cost of transportation for Central Excise valuation purposes.

20. The decision in the case of *Montage Enterprises* (supra), cited by the revenue, is distinguishable and its ratio is inapplicable to the situation at hand. To begin with, the said decision related to the Notification No.56/2002-CE dated 14.11.2002 and the appellant therein had not established that the buyer's premises was the point of sale. Moreover, it was not brought to the notice of this Tribunal that the decision of *Ispat Industries* (supra) related to an ex-factory sale. The Valuation Rules, 2000 were also not discussed at length. We are of

the view that the judgment in the case of *Roofit Industries* (supra) hold the field and is to be respectfully followed. In so far as the decision of this Tribunal in the case of *Aditya Birla Chemicals India* (Supra) relied by the Revenue is concerned, though the duty demand raised for claiming deduction of the freight amount was dropped by relying the Supreme Court judgement in *Ispat Industries* (Supra), the Tribunal categorically noted therein *"In so far as the decision of the Tribunal in the case of Nalari Ferro Alloys Pvt. Ltd. (Supra) relied by the Learned Authorized Representative for the department, we note that the said case pertained to demand proceedings initiated after sanctioning of refund by the lower authorities in terms of Notification No. 32/1999-C.E. by considering the law and precedents available at that point of time. The facts in that instant case, in essence, were that the assessee had paid the duty by including freight amount. Considering the judgment of the Hon'ble Supreme Court in Ispat Industries case (supra), the duty paid on freight was legally not payable. So the duty amount paid legally as well as the amount legally not payable but paid, both were entitled for refund if the refund claim was filed as per law."* Hence, the Tribunal was conscious of the view taken in *Nalari Ferro Alloys* case, that even if the duty was legally not payable on the portion of freight which was subsequently held not includible, the same was entitled for refund of claim was filed as per law. Therefore, the decision in the case of *Aditya Birla Chemicals India* (Supra) relied by the Revenue do not advance their case.

21. Looking from a perspective altogether different from the case of valuation of excisable goods, the entire proceedings in the instant case mainly relate to the recovery of amount already refunded claiming the same to be a case of "erroneous refund" under Section 11A of the Act. The whole basis of the Revenue that freight amount is not includible in the assessable value, as has subsequently been held by the Supreme Court in *Ispat Industries* (Supra), to state that the buyer's place can

never be said to be place of removal. In our view, the refund already sanctioned by relying on the judicial legal precedents holding the field then as well as the clarifications issued by the Board, the same cannot be termed as “erroneous refund”. In this regard, it would be worthwhile to take support from the recent decision of the Hon’ble Gauhati High Court in the case of **Topcem India vs. UOI 2021 (376) ELT 573**. In that case also, refund was sanctioned of the cess amount alongwith the basic excise duty in terms of the exemption notifications issued in the north-eastern states. The said notifications provided for exemption by way of refund of the duty paid through account current (PLA). By a subsequent decision of the Supreme Court in Unicorn Industries, it was held that the previous decisions of the Supreme Court in S.R.D. Nutrients case which upheld exemption of the cess amount was held to be per-incurium. As a result thereof, the Department proceeded to recover the cess amount refund of which was already sanctioned by terming the said refund to be “erroneous”. The Gauhati High Court clarified the position that refund already sanctioned by taking the support of the legal precedents holding the field then cannot be termed as erroneous merely because of the change in legal position subsequently. The Court noted as below:-

“46. “Erroneous Refund”

The provisions of Section 11A in the context of the present proceedings have been invoked by the Department by treating the refunds granted earlier to the petitioners to have been granted “erroneously”. A perusal of the provisions of Central Excise Act and the Rules framed thereunder reveals that the term erroneous has not been defined anywhere. In this context, it is relevant to refer to the Judgment of this Court rendered in Rajendra Singh (supra) wherein by referring to the Black’s Law Dictionary, it was held that “erroneous” means involving error; deviating from law. In the said judgment, it is held that an order cannot be term as erroneous unless it is not in accordance with law. It is held that if an officer acting in accordance with law makes certain assessment and determines the turnover of dealer, the same cannot be branded as erroneous. In another matter, the Division Bench of this Court in Victor Cane Industries v. Commissioner of Taxes and Ors., reported in 2001 SCC Online Gau

216 : (2002) 2 GLR 69, held that simply because the law has changed or earlier law laid down has been reversed, it would not entitle the revisional authority to reopen the earlier assessments.....

47. *Another Division Bench Judgment of this Court rendered similar findings in the case of Mahabir Coke Industries, reported in (2007) 4 GLR 515. It was held that even if subsequently the law is changed or reversed, the assessments already completed cannot be allowed to be opened as the law covering the field relating to exemption of tax to a new Industry at the time of passing of the order of assessment to be considered....."*

In the present case also, the Department by relying on the subsequent decision of the Supreme Court in Ispat Industries has proceeded to take a view that freight amount can never be included in the assessable value. In our view, the refund already sanctioned cannot be termed as "erroneous refund" more so in view of the fact that refund has been duly sanctioned by the Department as per the laws prevailing then duly supported by the CBEC clarifications at relevant point of time.

22. In view of the above discussion, the appeals filed by the assessee are allowed and the appeals filed by the Revenue are dismissed as withdrawn under the National Litigation Policy. Since the issue has been decided on merits, we are not examining the plea on limitation.

(Order pronounced in the open court on 27 August 2021.)

Sd/

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/

(RAJU)
MEMBER (TECHNICAL)