CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

EXCISE APPEAL NO. 50371 OF 2019

(Arising out of Order-in-Appeal No. 446-447(SM)/CE/JPR/2018 dated October 26, 2018 passed by the Commissioner (Appeals), Central Excise & CGST, Jaipur)

M/S RAJASTHAN PRIME STEEL PROCESSING CENTER PVT. LTD. ....APPELLANT
SPL-1(A), RIICO Industrial Area
Tapukara, Khushkhera
ALWAR – 301 707

Versus

COMMISSIONER CENTRAL EXCISE AND CGST ....RESPONDENT
"A' Block, Surya Nagar
ALWAR – 301 001

APPEARANCE:

Shri B.L. Narasimhan, Advocate for the Appellant
Shri Ravi Kapoor, Authorised Representative of the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: July 14, 2021
Date of Decision: October 13, 2021

FINAL ORDER NO. 51868/2021

JUSTICE DILIP GUPTA:

This appeal has been filed by M/s. Rajasthan Prime Steel Processing Center Pvt. Ltd.[1] to assail the order dated 24.10.2018 passed by the Commissioner (Appeals). The appeal was filed before the Commissioner (Appeals) against the order dated 29.12.2017 passed by the Additional Commissioner confirming the demand of central excise duty (CENVAT credit of Rs. 58,98,765/- + cess) and for recovery of the same from the appellant with

1. **the appellant**

interest and penalty. The Commissioner (Appeals) held that central excise duty was payable on the amount received by the appellant from M/s. Honda Siel Car India Ltd.[2], for the loss suffered by the appellant on account of the cancellation of the contract for supply of auto parts used in the manufacture of vehicles. Further, though penalty under section 11AC (1)(c) of the Central Excise Act, 1944[3] was confirmed, but it was not imposed under rule 26(2) of the Central Excise Rules, 2002[4]. The Commissioner (Appeals) also observed that the demand had not been correctly calculated as the amount should have been treated as cum-duty price in terms of section 4(1) of the Excise Act and, accordingly, the matter was remitted to the Assistant/Deputy Commissioner to quantify the amount of duty recoverable from the appellant with a further direction that the appellant could produce the relevant records for this purpose. The appeal was, therefore, partly allowed by the Commissioner (Appeals).

2. The appellant claims that it is engaged in the manufacture of auto parts falling under Chapter 87 of the First Schedule to the Central Excise Tariff Act, 1985[5]. It availed and utilized CENVAT credit on inputs, capital goods and input services for discharging its output duty liability, in terms of the provisions of the CENVAT Credit Rules, 2004.[6] Such auto parts manufactured by the appellant were sold to several buyers spread throughout the country. One such buyer of the appellant was Honda India, with

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2. Honda India
3. the Excise Act
4. the Excise Rules
5. the Tariff Act
6. the Credit Rules

whom the appellant entered into a contract dated 14.01.2009 for supply of auto parts and other products used in the manufacture of motor vehicles.

3. The appellant further asserts that it imported raw material like Flat Rolled products of Chapter Heading 7225 of the Tariff Act in open vessels from various countries to save on transportation cost. However, in view of urgent requirement of Honda India, inasmuch as its foreign counterpart located in Thailand[7] was seriously affected in the year 2011-12 due to heavy floods, the appellant air lifted the raw material in full container load for manufacture of auto parts for Honda, Thailand. This resulted in extra cost of transportation to the appellant. It has also been stated that out of the raw material air-lifted by the appellant, some quantity was also used for manufacture of parts for the 2CV model for Honda India but due to discontinuation of the said model in 2012, Honda India cancelled the order and did not take delivery of the parts. According to the appellant, this resulted in accumulation of the finished goods which were sold as scrap, resulting in loss to the appellant but part quantity of the unutilized raw material, which could not be used in manufacture of auto parts, was cleared at a lesser value on reversal of credit. The appellant also raised two debit notes, each dated 31.03.2012, for Rs. 1,96,59,271/- and Rs. 2,94,97,104/- on Honda India to cover the loss suffered by the appellant due to cancellation of the order.

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7. Honda, Thailand

4. However, a show cause notice dated 29.03.2017, followed by a corrigendum dated 07.11.2017, was issued to the appellant proposing to demand central excise duty amounting to Rs. 60,75,728/-, alleging that the consideration received by the appellant from Honda India under the guise of compensation was liable to be included in the transaction value of goods. The extended period of limitation under section 11A(4) of the Central Excise Act, 1944 was also invoked.

5. The appellant filed a reply dated 06.06.2017 to the show cause notice. The Additional Commissioner, by order dated 29.12.2017, confirmed the demand with interest and also imposed equal penalty upon the appellant. This order was challenged by the appellant before the Commissioner (Appeals) who, by order dated 26.10.2018, partially allowed the appeal by confirming the proposed demand but extended the benefit of cum-duty price and also directed the adjudicating authority to examine whether the air freight was taken into consideration while calculating the Free on Board value of export goods.

6. This Appeal has been filed to assail the order dated 24.10.2018 passed by the Commissioner (Appeals) to the extent it has confirmed the demand.

7. Shri B.L. Narasimhan, learned Counsel for the appellant, made the following submissions:

(i) The amount received by the appellant from Honda India to compensate for the loss incurred by the

appellant, is in the nature of liquidated damages and not in connection with the sale of goods to independent buyers. Thus, such amount is not includible in the transaction value, since there is no supply of goods to Honda India;

(ii) In terms of the definition of 'transaction value' under section 4(3)(d) of the Excise Act, the consideration must flow from the buyer to the seller of the goods. The definition does not bring within its purview any amount recovered from a person other than the buyer. Therefore, the compensation received from Honda India cannot be included in the transaction value of the goods sold to independent buyers (other than Honda India);

(iii) In view of the provisions of rule 5 of the Central Excise (Valuation) Rules, 1975[8]**,** the additional consideration (compensation received from Honda India) is not flowing from independent buyers to the appellant and so the same is not liable to be added for the purpose of valuation.

(iv) The extended period of limitation could not have been invoked; and

(v) Penalty and interest were not imposable.

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8 the 1975 Valuation Rules

8. Shri Ravi Kapoor, learned Authorised Representative of the Department, supported the order passed by the Commissioner (Appeals) and made the following submissions :

(i) The appellant had received an amount from Honda India in respect of the goods sold to a third party at a lesser value and such amount has been paid to compensate the loss occurred due to non-lifting of the said goods by Honda India. Thus, central excise duty is chargeable on this amount, in addition to the amount charged by the appellant for selling the goods, as the amount received is directly relatable to the goods sold at a lesser price; and

(ii) The amount received by the appellant is required to be considered to arrive at the price of the goods for the purpose of payment of excise duty since the same is in connection with the sale of goods which were not lifted by Honda India;

9. The submissions advanced by the learned Counsel for the appellant and the learned Authorized Representative appearing for the Department have been considered.

10. Section 4(1) of the Excise Act deals with valuation of excisable goods for purposes of charging of duty of excise. It provides that where 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 be, if the assessee and the buyer of goods are not related and the price is the sole

consideration for the sale, be the transaction value. Transaction value has been defined under section 4(1)(d) of the Excise Act to mean the price actually paid or payable for the goods. The relevant portion of section 4 of the Excise Act is reproduced below:

> **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—**
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> (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 goods are not related and the price is the sole consideration for the sale, **be the transaction value;**
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> (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.
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> **(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.
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> **(emphasis supplied)**

11. As noticed above, the appellant is engaged in the manufacture of auto parts which the appellant sells to many buyers. The appellant had entered into a contract with Honda India for supply of auto parts used in the manufacture of motor

vehicles. For the purpose of manufacture of auto parts, the appellant had imported raw material and in view of the urgent requirement of Honda India, it air-lifted the raw material which resulted in extra cost of transportation. However, Honda India cancelled the purchase order. The appellant claims that the auto parts which it had manufactured for delivery to Honda India, on cancellation of the contract, were sold by the appellant as scrap. The appellant paid excise duty on the amount received from the buyers of scrap, which of course was much less than what the appellant would have received had the auto parts been sold as auto parts and not as scrap. What also transpires is that even though under the contract Honda India was not required to pay any amount to the appellant if the contract was cancelled, but still the appellant raised two debit notes for Rs. 1,96,59,271/- and Rs. 2,94,97,104/- on Honda India to cover the loss suffered by the appellant due to cancellation of the order and this amount was received by the appellant.

12. The dispute in the present appeal relates to the amount which the appellant received from Honda India due to cancellation of the contract. This amount obviously was to make up for the reduced price which the appellant received from the sale of auto parts manufactured by the appellant. The Department alleges that this was infact the balance consideration received by the appellant from Honda India under the guise of compensation and, therefore, should be included in the transaction value.

13. It clearly transpires from the business arrangement that the appellant had received a substantial amount from Honda India, even though the terms of the contract did not provide for payment of any amount to the appellant if the contract of supply of auto parts was cancelled by Honda India. What is also important to notice is that even for the subsequent year the appellant also claimed that it had to sell the auto parts as scrap since the contract was cancelled.

14. The contention advanced by the appellant was not accepted by the Commissioner (Appeals) and the relevant portion of the order passed by the Commissioner (Appeals) is reproduced below:

> "8. **It is observed that the appellant has stated that HSCIL did not lift the goods manufactured by the appellant under an agreement for 2CV model and accordingly, they had to sell the goods manufactured for 2CV model to other customers as scarp. HSCIL paid the compensation for non-lifting of such material, which was mutually decided between them. In this regard it is observed that the agreement between the appellant and HSCIL do not bear any condition for payment of compensation for non-lifting of goods manufactured by the appellant for 2CV model**. It is difficult to digest that when the appellant made goods for HSCIL for 2CV model i.e. the goods manufactured were tailor made, how it can be used by other persons and where such goods can be used except 2CV model. It has also not been brought on records as to who gave direction / permission (on behalf of HSCIL) to sell the goods tailor made for their 2CV model to the persons to whom the appellant has sold the goods. **The appellant has contested that they had to sell goods as scrap, but from perusal of sample invoices it is observed that the buyers are not scrap dealers. It has not been brought on record that in what manner compensation was decided**. The debit note submitted by the appellant donot reveal the manner in which compensation was calculated. In this case goods are manufactured as per the requirement of HSCIL for use in 2CV model and as per submissions of the appellant this model was discontinued in 2012. **Since the said model was discontinued, it is not understood what the buyer will do with the tailor made parts. It appears to be business arrangement between the appellant, HSCIL and the buyer of goods to evade payment of excise duty on the so called amount of compensation, that is why goods were sold to these buyers and HSCIL has paid the amount to HSCIL in the name of compensation to the appellant.**
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> 8.1. It is further observed that CE duty is chargeable on

> the manufacturing activity but duty liability is deferred till the time of clearance and duty is charged on the transaction value. In the case goods were manufactured and the appellant received part amount from the buyer of goods and part amount in the name of compensation from HSCIL against the goods manufactured by it for HSCIL, therefore, the amount received against the goods manufactured was sum total of the amount received as sale of goods and amount received in the name of compensation. **In other words the appellant received amount in respect very same manufactured goods from the buyer (under an invoice) as well as from HSCIL in the name of compensation. Accordingly, CE duty is chargeable on the compensation amount in addition to the amount charged by the appellant for selling impugned goods**. The Hon'ble Tribunal in the case of PRAXAIR INDIA PVT. LTD. Vs CĆE, Belgaum reported that "It is for the Revenue to establish at the final stage that the compensation received by the appellants in the form of liquidated damages was relatable to the supplies made and not for non-supplies made." In the instant case liquidated damages i.e. compensation has been paid in respect of goods sold at a lesser value and the compensation charges have been paid to compensate the loss occurred due to non-lift of goods by HSCIL and selling it at lower price to other buyers.
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> 8.3 In view of the above it is held that CE duty is payable on the amount of compensation received by the appellant stated to be for non-lifting of goods.
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> **(emphasis supplied)**

15. Both the adjudicating authority and the Commissioner (Appeals) have recorded a categorical finding that the amount received by the appellant from Honda India should be included in the transaction value since the amount received was for those very auto parts which were to be sold to Honda India but were ultimately sold by the appellant to buyers since the contract was cancelled. The Commissioner (Appeals) also observed that this was actually a business arrangement between the appellant, Honda India and the buyers of scrap to evade payment of excise duty on the amount called as ‘compensation’ and infact Honda India actually paid some amount to the appellant for the goods sold to buyers.

16. To us also it transpires from the business arrangement between the appellant, Honda India and the buyers that the appellant received some amount from the buyers of scrap and some amount from Honda India for the value of the auto parts and there is no good reason as to why this amount received by the appellant from Honda India should not be included in the transaction value of the goods.

17. The contention of the appellant that the amount cannot be included in the transaction value since the consideration must flow only from the buyer to the seller of goods, in view of the business arrangement arrived at in the present case, cannot be accepted.

18. The decision of the Tribunal in **Haryana Drinks Pvt. Ltd.** vs. **Commissioner of C. Ex., New Delhi**[9] will not come to the aid of the appellant as that was a case on entirely different facts. The issue that arose was regarding reimbursement of expenditure for advertising, marketing and sales promotions. This amount was sought to be added to the assessable value of soft drinks for the purpose of excise duty. The Tribunal held that this was not a consideration flowing directly or indirectly from the buyer of soft drinks.

19. The decision of the Tribunal in **Commissioner of C. Ex., Meerut-I** vs. **Bisleri International Pvt. Ltd.**[10] will also not come to the aid of the appellant. The relevant paragraph on which reliance has been placed by the learned Counsel for the appellant is reproduced below:

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9 2000 (121) E.L.T. 718 (Tribunal)
10 2005 (186) E.L.T. 257 (S.C.)

> "13. The short question which arises for determination in the present case is - whether the department has been able to show that the intrinsic price of aerated water was more than the price actually charged to the buyer? According to the department, the actual price was lower on account of incentives given by M/s. Britco, the supplier of concentrates to the assessee. As found by the adjudicating authority as well as by the Tribunal, the prices had to be reduced by the assessee on account of competition in the market. Further, the prices stood reduced on account of concession given by M/s. Britco, supplier of concentrates (raw material), to the assessee. There is no evidence of flow back of any additional consideration from the buyers of aerated water (beverage) to the assessee. On account of cut throat competition from Pepsi, M/s. Britco had to provide incentive to the assessee. But for the incentive from the supplier of concentrates (raw material), the assessee was not in a position to face acute competition from Pepsi. On the other hand, the evidence on record indicates that price uniformity was maintained. No favour for extra commercial reasons were shown to any of the buyers of aerated water. There is no evidence of any concession to any of the buyers. There is no evidence of existence of any favoured buyers. In the circumstances, Rule 5 is not applicable."

20. It is clear from the aforesaid paragraph that the price has been reduced by the assessee on account of competition in the market and there was no evidence of flow back of any additional consideration from the buyer of aerated water to the assessee.

21. Learned Counsel for the appellant has also placed reliance upon rule 5 of the Central Excise (Valuation) Rules, 1975. It would, therefore, be appropriate to reproduce the same and it is:

> "**Rule 5.** Where the excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of Section 4 of the Act except that the price is not the sole consideration, the value of such goods shall be based on the aggregate of such price and the amount of the money value of any additional consideration flowing directly or indirectly from the buyer to the assessee."

22. This rule also talks of additional consideration flowing directly or indirectly from the buyer to the assessee. In view of the peculiar nature of the business arrangement between the appellant, Honda India and the buyers of auto parts, it is clear that the amount received by the appellant from Honda India has flown indirectly from the buyers.

23. There is, therefore, no error in the order passed by the Commissioner (Appeals). This appeal is, therefore, liable to be dismissed and is dismissed.

(Pronounced on **13.10.2021**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Golay/JB/Shreya