आयुक्त(अपील)का कार्यालय,
Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय,अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ीअहमदाबाद३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065 - टेलेफैक्स07926305136

DIN : **20220664SW0000884935**

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/CEXP/534-535/2021 /1658 - 1663

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-003-APP-24 to 25/2022-23**
दिनाँक Date : **14-06-2022** जारी करने की तारीख Date of Issue 15.06.2022

आयुक्त (अपील) द्वारापारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **AHM-CEX-003-ADC-MSC-007-/21-22** दिनाँक: **30.04.2021** passed by Additional Commissioner, CGST& Central Excise, Gandhinagar Commissionerate

घ अपीलकर्ता का नाम एवं पता Name & Address

Appellant

1. **M/s Prem Conductors Pvt Ltd.**
   Block No. 210, Santej-Vasar Road,
   Santej, Kalol, Gandhinagar – 382721

2. **Shri Pradip A. Mehta**
   Block No. 210, Santej-Vasar Road,
   Santej, Kalol, Gandhinagar - 382721

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India:

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानिकार खाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार मे हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतरमूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए।उसके साथ खाता इ.का मुख्य शीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम होतो रूपये 200/–फीस भुगतान की जाए और जहाँ संलग्नरकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद–380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,BahumaliBhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होत हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू.6.50 पैसे कान्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(49) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामले में कर्तव्यमांग(Demand) एवं दंड(Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवाकर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded)-

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है.

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:
(cxxx) amount determined under Section 11 D;
(cxxxi) amount of erroneous Cenvat Credit taken;
(cxxxii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

Two appeals have been filed by the appellants (as per details given in table below) against Order in Original No. AHM-CEX-003-ADC-MSC-007-21-22 dated 30-04-2021 [hereinafter referred to as "*impugned order*"] passed by the Additional Commissioner, CGST, Commissionerate : Gandhinagar [hereinafter referred to as "*adjudicating authority*"].

S.No.	Name and address of the appellant	Appeal No.
1	M/s.Prem Conductors Private Limited, Block No.210, Santej-Vadsar Road, Santej, Taluka : Kalol, Gandhinagar-382 721. **Appellant No.1**	GAPPL/COM/CEXP/534/2021
2	Shri Pradip A. Mehta, Director M/s.Prem Conductors Private Limited, Block No.210, Santej-Vadsar Road, Santej, Taluka : Kalol, Gandhinagar-382 721. **Appellant No.2**	GAPPL/COM/CEXP/535/2021

2. Briefly stated, the facts of the case is that Appellant No.1 are engaged in the manufacturer of AAA Conductors, ACSR Conductors, Aluminum Ingots, Aluminum Wires falling under Chapter 76 of the First Schedule to the Central Excise Tariff Act, 1985 and were holding Central Excise Registration No.AABCP6700AEM003. During the course of audit of the records of the Appellant No.1 by the CERA officers for the period from November, 2011 to F.Y. 2015-16, it was observed that Appellant No.1 were supplying their finished goods mainly to Uttar Gujarat Vij Company Limited (UGVCL), Paschim Gujarat Vij Company Limited (PGVCL), Dakshin Gujarat Vij Company Limited (DGVCL) etc. under agreements/contracts which were almost identical in nature. It was observed by the audit officers that the Appellant No.1 had collected freight charges from various buyers for delivery of goods at their doors. The sales orders received from these buyers were on FOR destination basis, therefore, it appeared that the place of removal for these consignments were the buyers premises at destination. It was further observed that the Appellant No.1 was recovering the cost of transportation by showing them separately in the excise invoice after charging excise duty. It appeared that as the place of removal was the buyer's destination, the freight

charges recovered from the buyers would form part of the assessable value for payment of central excise duty.

2.1 Accordingly, investigation was conducted and statement of Appellant No.2 (Director of the Appellant firm) was recorded from which it appeared that the actual place of removal was the buyer's destination as the agreements indicated that the goods are required to be delivered to their site and the price was inclusive of the transportation charges upto the buyers site. In some cases in the purchase orders it was also indicated that the transit insurance/risk also lies on the appellant firm and as such it appeared that the ownership of the goods was not transferred at the factory gate but at the buyers destination. The terms and conditions of the Purchase Orders also indicated that the prices were on FOR basis. It, therefore, appeared that Appellant No.1 had failed to include the transportation charges in the assessable value and thereby failed to correctly assess the central excise duty payable by them. The Appellant No.1 had during the period from August, 2012 to June, 2017 collected transportation charges amounting to Rs.4,00,56,518/- from various buyers on which central excise duty amounting to Rs.49,76,818/- was not paid by them, which was recoverable from them.

2.2 It was further observed during the course of audit of record of Appellant No.1 by the officer of Central Excise Audit that Appellant No.1 had also wrongly availed cenvat credit amounting to Rs.18,65,514/- in F.Y. 2012-2013 in respect of inputs which was initially received from M/s.Hindalco, Renukut, and subsequently, cleared/sold by them to their other unit at Silvassa under commercial invoices, without charging central excise duty or reversing the cenvat credit in terms of Rule 3 (5) of the CCR, 2004.

3. The Appellant No.1 was issued Show Cause Notice bearing No.V.76/15-18/DEM/OA/17-18 dated 05.09.2017 wherein it was proposed to :

I. Demand and recover the central excise duty amounting to Rs.49,76,818/- under Section 11A of the Central Excise Act, 1944 by invoking the extend period of limitation, along with interest under Section 11AB/11AA of the Central Excise Act, 1944.

II. Impose penalty under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944.

III. Disallow and recover the cenvat credit amounting to Rs.18,65,514/- under Rule 14 of the CCR, 2004 read with Section 11A of the Central Excise Act, 1944 by invoking the extended period of limitation, along with interest under Rule 14 of the CCR, 2004 read with Section 11AA of the Central Excise Act, 1944.

IV. Impose penalty under Rule 15 of the CCR, 2004 read with Section 11AC of the Central Excise Act, 1944.

3.1 The Appellant No.2, i.e. Director of the Firm, was also called upon to show cause vide the notice, supra as to why penalty should not be imposed upon him under Rule 26 of the Central Excise Rules, 2002.

4. The said SCN was adjudicated vide OIO NO. AHM-CEX-003-ADC-AJS-002-18-19 dated 10.07.2018, wherein the demand for central excise duty amounting to Rs.49,76,818/- along with interest and penalty was dropped. The demand for cenvat credit amounting to Rs. 18,65,514/- was confirmed along with interest and penalty equivalent to the cenvat credit. Penalty of Rs.18,65,514/- was also imposed on Appellant No.2.

5. Being aggrieved, both the appellants filed an appeal with the Commissioner (Appeals-I), Central Excise, Ahmedabad. The department too filed appeal before the Commissioner (Appeals), Ahmedabad in respect of the demand for central excise duty amounting to Rs.49,76,818-. The Commissioner (Appeals), Ahmedabad decided the appeals vide OIA No. AHM-EXCUS-003-APP-04-06-19-20 dated 23.05.2019 whereby he allowed the appeals filed by Appellant No.1 and Appellant No.2 and set aside the demand for cenvat credit as well as the penalties imposed. The departmental appeal was allowed by way of remand.

6. In the denovo proceedings, the case was decided vide the impugned order wherein the demand for central excise duty against Appellant No.1 was confirmed along with interest and penalty. Penalty of Rs.5,00,000/- was also imposed on Appellant No.2 under Rule 26 of the Central Excise Rules, 2002.

7. Being aggrieved with the impugned order, Appellant No.1 and Appellant No.2 have filed the instant appeal on the following grounds :

i. The impugned order is non-reasoned and non-speaking and is passed in gross violation of the principles of natural justice. In their detailed submissions various judgments and orders were relied upon which directly dealt with the issue under consideration. However, the adjudicating authority has totally ignored the binding precedents and has not even dealt with the same.

ii. The demand notice was barred by limitation. Their records were regularly audited during the disputed period and the department was well aware of clearances of goods to the State Electricity Boards under contract, which included fixed transportation cost. The departmental auditors had never objected to the aforesaid clearances. In such case, demand for extended period is clearly not sustainable.

iii. The issue was decided in their favour in their own case by the adjudicating authority. A SCN to recover duty on transportation charges was dropped vide OIO No.41/D/2008-09 dated 12.03.2009. This order was passed in the case of M/s.Bharat Aluminizing Corporation which was later on merged with their company. Hence also, it is submitted that the bona fide belief that the transportation charges are not required to be added in the assessable value, cannot be faulted with.

iv. The conditions of the tender itself shows that the value for purpose of payment of central excise duty shall be factory gate price and the tenderer has to arrange for transportation/insurance, which shall be chargeable on equalized basis and payable in addition to value of goods. This condition is uniform throughout the country for supplying goods to State Electricity Boards as well as Central Government supplies.

v. The department had issued SCNs for recovery of duty in the same issue, which were dropped by the Hon'ble Tribunal/Commissioner (Appeals) and the adjudicating authorities. These orders have not been appealed before higher forum and have attained finality.

vi. The issue is directly covered by the judgment of the Hon'ble Supreme Court in the case of Ispat Industries Ltd. – 2015 (324) ELT 670 (SC). The adjudicating authority has wrongly relied upon the judgment in the case of Roofit Industries Ltd. They rely upon Para 32 and 33 of the

judgment in the case of Ispat Industries Ltd. and in particular the last line in Para 32.

vii. It was held that as a matter of law, the place of removal only has reference to places from which the manufacturer is to sell the 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.

viii. In para 23 also, it is clearly observed that on or after 14.05.2003, the position as it can be obtained from 28.08.1996 to 01.07.2000 has been reinstated. Even Rule 5 as substituted in 2003 also confirms that cost of transportation from the place of removal to place of delivery is to be excluded.

ix. Freight is includible in the assessable value only if the goods are sold from depot or consignment agent premises or any other place or premises from where the excisable goods are to be sold. In the present case, the goods are sold on ex-works basis and hence, as per the ratio laid down in the Ispat judgment, freight/insurance charges are not to be added in the assessable value.

x. The aforesaid judgment is followed in the case of Shashi Cables Ltd. – 2017 (357) ELT 937 and the departmental appeal was rejected. The facts of the case are identical to that in the present case.

xi. The ratio laid down in Ispat is also followed in Contimeter & Electricals by the Hon 'ble Tribunal – 2019 (9) GSTL 382. The facts of the case are identical to that in the present case.

xii. In the case of EMCO Ltd. the Hon'ble Supreme Court remanded the matter back to the Tribunal and the Hon'ble Tribunal has dropped the proceedings following the judgment in the case of Ispat Industries Ltd.

xiii. The Ispat judgment was also followed in the case reported at 2019 (1) TMI 1098 and 2019 (3) TMI 848.

xiv. In such clear pronouncement of law by the Hon 'ble Tribunal, the adjudicating authority could not have relied upon the departmental circular for confirmation of demand.

xv. It is settled law that when there are judgments on one or other side, are available on the same issue, the bona fide belief on the part of appellants cannot be defaulted with. Hence also demand for extended period is not sustainable.

xvi. The present case being of interpretation of statutory terms which has reached upto the Apex Court in various cases, even a token penalty is not imposable.

8. Personal Hearing in the case was held on 30.05.2022. Shri Nirav P. Shah, Advocate, appeared on behalf of both the appellants for the hearing. He reiterated the submissions made in appeal memorandum. He relied upon Board's Circular No. 1065/4/2018-CX dated 08.06.2018 to contend that the demand is barred by limitation. He submitted copy of Tribunal's judgment in Aditya Birla Chemicals (India) Ltd. – 2021 (376) ELT 390 (Tri.-Kolkata). He argued that since issue involved interpretation, no penalty is imposable. He further stated that he would submit a written submission enclosing copies of relevant tender documents.

9. The appellants filed additional written submissions on 31/05/2022 wherein, it was, inter-alia, submitted that :

- The conditions of the Tender itself shows that value for the purpose of payment of central excise duty shall be ex-works price and as per the conditions in the Tender, the Tenderer has to arrange for the transportation, which shall be chargeable on equalized basis and payable in addition to the value of the goods. Copy of one such Tender is submitted.
- As per the terms of Tender at Sr.No.11 read with Sr.No.53 and 54, the goods and its packing material both shall be as per ISI specifications and the same shall be inspected at the Supplier's premises and thereafter the goods can be dispatched. Hence, entire manufacturing is completed at their factory before removal. Even as per Sr.No.42, the supplier will have to emboss/engrave the words 'Property of UGVCL' on the goods before removal. So upon completion of inspection, the goods becomes property of buyers.
- As per the terms of the Tender at Sr.No.30, 80% of the ex-works price along with taxes, duties and F&I will be paid upon receipt and balance 20% is payable after 45 days credit period.
- As per Sr.No.48 of the terms of Tender, and in particular Note (5), the date of delivery is the date on which the material as being ready for inspection/dispatch which also suggests that once the goods are ready

for inspection/dispatch, the buyer considers the same as date of delivery.

- As per Schedule 'A' to Sr.No.48 read with Sr. No.52, excise duty will be paid on ex-works price. Freight is required to be quoted separately on equalized basis after excise duty.
- Their records were audited throughout the period by the department and the department was aware of the valuation process followed by tem. No objection was raised pertaining to valuation of goods.
- The present case being of interpretation of statutory terms which has reached upto the Apex Court in various cases, they cannot be faulted with. Not only extended period is not invokable, but penalty also cannot be imposed. They rely upon the judgments in the case of Padmini Products – 1989(43) ELT 195 (SC); Jaiprakash Industries Ltd. – 2002 (146) ELT 481 (SC); Sunil Metal Corporation – 2009 (16) STR 469; Graphite India Ltd.- 2017 (358) ELT 263.
- The department heavily relies upon the judgment in the case of Roofit Industries for confirming demand. The facts in the case of Roofit are totally different than the present case and hence, the Roofit ration is not applicable to the present case.

10. I have gone through the facts of the case, submissions made in the Appeal Memorandum, submissions made at the time of personal hearing and additional written submissions as well as material available on records. The issues before me for decisions are :

I. Whether Appellant No.1 is liable to pay central excise duty on the freight and insurance charges when the delivery is on FOR basis at the buyer's destination or otherwise ?.

II. Whether penalty has been correctly imposed on Appellant No.2 or otherwise ?.

11. I find that the impugned order has been passed in remand proceedings ordered vide OIA No.AHM-EXCUS-003-APP-04-06-19-20 dated 23.05.2019 passed by the Commissioner (Appeals), Ahmedabad. The demand against Appellant No.1 was dropped by the adjudicating authority in earlier round of litigation vide OIO No. AHM-CEX-003-ADC-AJS-002-18-19 dated 10.07.2018

on the grounds that though the terms of the contract are FOR, the other terms and conditions are not similar to that in the case of Roofit Industries, supra. The adjudicating authority held that the property of goods had passed on to the buyer at the factory gate, which is the place of removal, and not at the buyer's destination.

11.1 The department had challenged the said OIO before the Commissioner (Appeals), Ahmedabad, who vide the OIA, supra observed that under Clause 26 read with Clause 48 of Contract dated 16.07.2015, the prices are inclusive of inland road freight, which was, however, not considered in the said OIO. However, as the contract agreement were not part of the appeal memorandum filed by the department and also considering the fact that the demand was not bifurcated on the basis of contract, the case was remanded back to the adjudicating authority with a direction to consider the clauses of both the sample contracts and also address the issues raised in the departmental appeal while deciding the issue.

12. In the remand proceedings, the adjudicating authority has in terms of the directions of the remand order considered the Contract Agreement dated 16.07.2015 and 04.07.2016 and recorded his finding at Para 5.17 of the impugned order that in both the contracts the terms and conditions are same. Further, the adjudicating authority has at Para 5.14 of the impugned order held that "*orders placed with the assessee were by UGVCL and PPVCL i.e., order dated 16.05.2015 and 04.07.2016 respectively. From the discussions made on the terms and condition of contract, it becomes clear that the goods were to be delivered on FOR destination at the place of 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, packing and forwarding charges, inland freight, inland transit insurance*". The adjudicating authority was of the view that the judgment of Roofit Industries was applicable in the case. Accordingly, the adjudicating authority has confirmed the demand for Central Excise duty by holding that the sale actually took place at the place of buyer on delivery of the goods.

13. Before delving into the merits of the case, I find it necessary to refer to the legal provisions in this regard. It is observed that the valuation of

excisable goods is in terms of Section 4 of the Central Excise Act, 1944 and sub-section (1) reads as below :

> "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 removal, the assessee and the buyer are not related and the price is the sole consideration, be 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."

13.1 It would also be relevant to refer to Rule 5 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, which reads as :

> "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."

13.2 I find that for determining the includibility or otherwise of freight charges in the assessable value, it is crucial to determine the place of removal of the goods i.e. the place where the goods are sold. The appellant have contended that in terms of the conditions of the Acceptance of Tender No. UGVCL/SP/II/CPC/15-16/34-55AAACond/Prem/AT/2877 dated 16.07.2015, the value for the purpose of central excise duty is the factory gate. I find that the appellant are primarily contending that the place of removal is the factory gate. The appellant have along with their additional written submission submitted a copy of Acceptance of Tender No. UGVCL/SP/II/CPC/15-16/34-55AAACond/Prem/AT/2877 dated 16.07.2015 issued by UGVCL, Mehsana. I have perused the said document and the Paras which are relevant to the issue on hand are reproduced as below :

- ***Para 19 Acceptance of Stores and Approval :*** *"The goods shall be subject to the approval of the concerned consignee after receipt of the stores at site.*

All or any stores and materials to be supplied at F.O.R. Destination, against the contract will be subject to their acceptance by the consignee ...".

- ***Para 26 " Inland Freight** : The prices are inclusive of Inland Road Freight charges. The goods shall be dispatched freight paid.*
- ***Para 27 Inland Transit Insurance** : "The prices are inclusive of Inland Transit Insurance. The goods shall be duly insured with your underwriters at your cost.*

  *All the materials will be required to be **supplied up to Destination** against all transit risks, such as damage, loss, theft, fire, etc.*
- ***Para 28 Mode of Dispatch** : "As the prices are FOR Destination, the materials may be dispatched through any convenient mode of transport and up to F.O.R. Destination of UGVCL'S Stores".*
- ***Para 30 Terms of Payment:** "80% of the Ex-works price with 100% taxes, duties and F&I price of each consignment will be paid to you by this office on receipt against TRC within 30 days after verifying the invoices and other related documents..".*
- ***Para 48 Prices** : "The prices matched by you in your tender for the supply of the above materials are accepted on a variable price basis **for delivery F.O.R. Destination**. The prices are inclusive of packing and forwarding charges".*

13.3 From the above terms of the Tender, it is evident that the prices are on F.O.R. Destination basis. Further, in terms of the Para 28 of the Tender, the delivery is Destination of UGVCL's stores. I further find that Schedule 'A' to the Tender clearly indicates the Ex-works price as well as F.O.R Destination Price at which the goods are sold by the appellant to the buyer. In addition to the price of the goods, the purchase order also separately indicates the amount of Freight, Central Excise duty and VAT involved in the goods ordered.

13.4 I find from the terms of the Tender that there is no room for any doubt as to the place of removal of the goods from where they are sold. The term 'FOR' stands for 'Free on Road' and FOR – Destination indicate that the goods are sold Free on Road at UGVCL's Stores. Therefore, the goods, in terms of the purchase orders between the appellant and his buyer, are sold at

the destination of the buyer i.e. UGVCL's Stores. I further find that as per Para 28 of the Tender, the mode of transport is at the convenience of Appellant No.1. Additionally, in terms of Para 27 of the Tender, the transit insurance of the goods is to be arranged by Appellant No.1 and it is also stipulated that Appellant No.1 would be responsible for short shipment and damages in the course of transit. This makes it abundantly clear that the title of the goods has not been passed on the buyer at the factory gate of the appellant and it remains with the appellant till the goods are delivered at the buyer's destination. Consequently, I find that the freight charges are includible in the assessable value of the goods as the point of sale/place of removal of the goods is not at the factory gate of the appellant but it is at the destination of the buyer.

14. The contention of the appellants that in terms of the conditions of the Tender, the value for the purpose of payment of central excise duty shall be the ex-works price and, therefore, freight is not includible in the assessable value is not legally tenable as the terms of the same Tender clearly stipulate that the prices are on F.O.R destination basis. In such circumstances, the valuation, for the purpose of payment of central excise duty, has to be determined in terms of the Central Excise Act, 1944 and the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Accordingly, when the place of removal is the buyer's destination, the freight incurred for transportation of the goods upto the place of removal is includible in the assessable value for levy of central excise duty.

15. The appellants have relied upon the judgment of the Hon'ble Supreme Court in the case of Commissioner of Cus. & C.Ex., Nagpur Vs. Ispat Industries Ltd reported at 2015 (324) ELT 670 (SC) wherein the Hon'ble Supreme Court had held that :

> **"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.
>
> ....
>
> ....
>
> **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**." [Emphasis supplied].

15.1 It is observed from the above judgment that the Hon'ble Supreme Court have in their judgment distinguished the judgment in the case of Roofit Industries on facts. In the above case before the Hon'ble Supreme Court, the clearance and sale of goods was on Ex-works basis and where the title of the goods had passed on to the buyer at the factory gate of the manufacturer. However, in the instant appeal, the terms of the Tender clearly specify that the prices are F.O.R buyer's destination. Such being the case, the reliance placed by the appellant on the judgment of the Hon'ble Supreme in the case of Ispat Industries is misplaced.

15.2 I further find that in the case of EMCO Ltd. – 2015 (322) ELT 394 (SC), the Hon'ble Supreme Court had, in Para 18 of their judgment, held that the decision as to which is the 'place of removal' would depend upon the facts of each case. In the instant case, the goods were transported using the transportation at the convenience of Appellant No.1. Further, the transit insurance was also on the appellant's account. Further, in terms of Para 19 of the Tender, the goods supplied by the appellant are subject to the approval of the buyer after receipt at site and the buyer has the right to reject the goods without assigning any reasons. All these terms and conditions of the Tender make it amply clear that the title of the goods is retained by the appellant till the goods are delivered at the buyer's destination. In view thereof, the freight charges for transportation of the goods from the place of removal to the destination of the buyer are includible in the assessable value of the goods.

15.3 Considering the facts of the case, I find that the judgment of the Hon'ble Supreme Court in the case of Roofit Industries Ltd. – 2015 (319) ELT 221 (SC) is applicable to the present case. In the said case the Hon'ble Supreme Court had held that :

> **"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 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 Valuation Rules.
>
> **13.** 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.
>
> **14.** 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 Sale of Goods Act, the property in goods was transferred at that time only. Section 19 reads as under :
>
> > "19. Property passed 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."

> **15.** These are clear finding of facts on the aforesaid lines recorded by the Adjudicating Authority. However, the CESTAT did not take into consideration all these aspects and allowed the appeal of the assessee by merely referring to the judgment in the case of *Escorts JCB Ltd.* Obviously the exact principle laid down in the judgment has not been appreciated by the CESTAT.
>
> **16.** As a result, order of the CESTAT is set aside and present appeal is allowed restoring the order passed by the Adjudicating Authority."

15.4 As observed in the preceding paragraphs, in the instant case the prices are on F.O.R buyer's destination, the goods are transported by the appellant using transporters decided by them and by paying transit insurance at their cost. Further, the acceptance of the goods are subject to approval of the buyer after receipt at site and the buyer has the right of rejection. Further, as per the Terms of Payment of the Tender, 80% would be released to the appellant upon receipt of the TRC and the balance 20% after receipt of the goods and its inspection at the buyer's site. All these indicate that the ownership of the goods vest with the appellant till they are delivered at the designated premises of the buyer. In view of these facts, I am of the considered view that the judgment of the Hon'ble Supreme Court in the case of Roofit Industries Ltd., supra is squarely applicable to the facts of the present case.

15.5 I further find that the judgment in the case of Roofit Industries Ltd. was relied upon in the case of Nalari Ferro Alloys Pvt. Ltd. – 2019 (366) ELT 643 (Meghalaya), wherein the Hon'ble High Court had in their judgment held that :

> **"12.** The centre of controversy is as to whether transportation and insurance charges are to be excluded or included in the assessable value of goods same depends on the factual position linked with place of removal of goods. The place of removal of goods depends upon the facts of each case and conditions of sale. Once it is contended by the appellant that sale was subject to inspection to be done by the customers at their end and payment was to be made by the customers after receipt of material(s) and testing/final approval with a condition that if the materials were not found as per the ordered specification, same will be rejected and lifted back by the appellant at his own cost. Therefore, in such a situation, place of removal is at the place of buyer on the delivery of goods subject to the satisfaction of specification and testing."

15.6 The appellant have also relied upon various judgments of the Hon'ble Supreme Court in their support. In this regard, I find that there are conflicting judgments wherein in some cases the ratio of the judgment in the Roofit Industries Ltd. case has been followed and in some cases the judgment

in the case of Ispat Industries Ltd. was followed. At the same time, it is also important to note that the judgment of the Hon'ble Supreme Court has not been reversed even in the case of Ispat Industries Ltd. Consequently, the ratio of the judgment in the case of Roofit Industries Ltd. also holds good. The judgments, therefore, have to be applied and followed considering the facts of each case. The contents of the Board's Circular dated 08.06.2018 are also on these lines.

15.7 In view of the provisions of Section 4 of the Central Excise Act, 1944, Rule 5 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, the evidences on record and the judgments of the Hon'ble Supreme Court, I am of the considered view that the adjudicating authority has rightly held that freight charges are includible in the assessable value and consequently confirmed the demand for Central Excise duty.

16. The appellants have also raised the issue of limitation and have contended that their records were audited throughout the period by the department and the department was aware of the valuation process followed by them. They have also relied upon Circular No.1065/4/2018-CX dated 08.06.2018 issued by the CBIC wherein it was stated that extended period should not be invoked.

16.1 I find that the demand in the instant case pertains to the period from August, 2012 to June, 2017. The appellants have submitted copies of the Audit Reports issued by the Department. On examining the same, I find that the records of Appellant No.1 for the period from January, 2013 to March, 2016 were audited by the department during the course of three audits conducted from time to time. Therefore, on this very ground, it cannot be alleged that Appellant No.1 had suppressed facts from the department leading to invocation of the extended period of limitation. Further, the CBIC had at Para 7 of Circular No. Circular No.1065/4/2018-CX dated 08.06.2018 clearly directed that

> "7. ***No extended period :*** Any new show cause notice issued on the basis of this circular should not invoke extended period of limitation in cases where an alternate interpretation was taken by the assessee before the date of the Supreme Court judgment as the issue is in the nature of interpretation of law."

16.2 I find that the dispute in the present appeal pertains to the period before and after the judgment of the Hon'ble Supreme Court in the case of Roofit Industries Ltd. and Ispat Industries Ltd. Further, the issue involved in the present dispute is clearly of interpretation of the provisions of the Central Excise Act, 1944 and the Valuation Rules. Accordingly, the extended period of limitation is not invocable in terms of the Board's circular. Therefore, I am of the considered view that the demand of central excise duty is to be restricted to the normal period of limitation. Accordingly, I set aside the demand for the extended period of limitation and uphold confirmation of demand for the normal period of limitation.

17. As regards penalty imposed on Appellant No.1 under Section 11AC of the Central Excise Act, 1944, as there is no suppression, wilful mis-statement etc. and the extended period is held to be not invocable, the appellant are not liable to penalty equivalent to the duty involved. They are, however, liable to penalty in terms of Section 11AC (1) (a) of the Central Excise Act, 1944. The quantum of penalty payable by Appellant No.1 is, accordingly, ten percent of the central excise duty confirmed and held payable as at Para 14.2 above or Rupees five thousand, whichever is higher. The Appellant No.1 is also liable to pay interest in terms of Section 11AA of the Central Excise Act, 1944.

18. Regarding the imposition of penalty on Appellant No.2, I find that the adjudicating authority has imposed penalty of Rs.5,00,000/- under Rule 26 of the Central Excise Rules, 2002. I find that the issue involved in the present case is that of interpretation of the provisions of the Central Excise Act and Rules. The short payment or non payment of central excise duty on account of interpretation of law does not render the goods liable for confiscation. For a better appreciation, the relevant part of Rule 26 (1) of the Central Excise Rules, 2002 is reproduced as below :

> "Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable for confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods….".

18.1 From a plain reading of the above provisions of Rule 26 (1), it is clear that for penalty to be imposed under this rule, the goods should be liable for confiscation. In the instant case, I find that there is no proposal for

confiscation of any goods and neither is there any proposal for holding the goods cleared by Appellant No.1 as being liable for confiscation. In the absence of either of these proposals, the provisions of Rule 26 of the Central Excise Rules, 2002 are not attracted to the facts of this case and accordingly, the penalty imposed on Appellant No.2 is not legally sustainable, and, accordingly, is set aside.

19. In view of the facts discussed herein above, I set aside the demand of central excise duty for the extended period and uphold the demand for the normal period of limitation. The Appellant No.1 is also liable to pay interest under Section 11AA of the Central Excise Act, 1944. Further, the penalty imposed on Appellant No.1 is reduced to the extent of ten percent of the central excise duty payable, or rupees five thousand, whichever is higher, in terms of Section 11AC (1) (a) of the Central Excise Act, 1944. Accordingly, the appeal filed by Appellant No.1 is partly allowed to the above extent. I set aside the penalty imposed on Appellant No.2 and allow the appeal filed by Appellant No.2.

20. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

The appeals filed by the appellants stands disposed of in above terms.

(Akhilesh Kumar)
Commissioner (Appeals)
Date: .06.2022.

Attested:

(N.Suryanarayanan. Iyer)
Superintendent(Appeals),
CGST, Ahmedabad.

OFFICE OF THE COMMISSIONER CENTRAL GST (APPEALS) AHMEDABAD

BY RPAD / SPEED POST

To

M/s.Prem Conductors Private Limited,
Block No.210, Santej-Vadsar Road,
Santej, Taluka : Kalol,
Gandhinagar-382 721. — Appellant No.1

Shri Pradip A. Mehta, Director
M/s.Prem Conductors Private Limited,
Block No.210, Santej-Vadsar Road,
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Gandhinagar-382 721.

The Additional Commissioner, Respondent
CGST & Central Excise,
Commissionerate : Gandhinagar

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2. The Commissioner, CGST, Gandhinagar.
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