

CASE NO.:

Appeal (civil) 7230 of 1999

Appeal (civil) 1163 of 2000

PETITIONER:

M/s. Escorts JCB Limited, Commissioner of Central Excise, Delhi

RESPONDENT:

Commissioner of Central Excise Delhi-II, M/s. Escorts JCB Limited

DATE OF JUDGMENT: 24/10/2002

BENCH:

S.N. Variava & Brijesh Kumar.

JUDGMENT:

JUDGMENT

Brijesh Kumar, J.

The appeals indicated above, arise out of judgment and order dated 24.8.1999 passed by the Customs Excise and Gold (Control) Appellate Tribunal (For short 'CEGAT'), operative part of which reads as under:

"In the result we dispose of this appeal by confirming the order of the Commissioner imposing a duty of Rs.29,65,532/- under Rule 9(2) of the Central Excise Rules, 1944 read with Section 11A of the Act, set aside that part of the order which imposed duty amount to Rs.98,219/- and reduce the penalty to Rs.10 lakhs under Section 11AC of the Act"

Escorts JCB Ltd., the appellant in Civil Appeal No.7230/99 and respondent in Civil Appeal No.1163/2000 (hereinafter to be referred to as 'the assessee') is aggrieved by the order confirming imposition of duty and levy of penalty. The Commissioner of Central Excise, appellant in Civil Appeal No.1163/2000 and respondent in Civil Appeal No.7230/99 (hereinafter to be referred to as 'The Revenue') is aggrieved by the order reducing the amount of penalty to Rs.10 lakhs as imposed under Section 11A of the Central Excise Act.

The Central Excise officers of Anti Evasion Branch, Faridabad on visit to the premises of the assessee found that the amount of "transit insurance" charges was not added to the value of the goods sold, hence issued a show cause notice dated 24.3.98 to the assessee saying that an open policy for transit risks in the name of M/s. Escorts JCB Ltd. and their bankers appear in the column for the name of Assured but there is no mention of the buyer or its name in the column for "insured". Notice also indicates that 'freight' and "transit insurance" were charged from the buyers but no central excise duty was paid on these two elements, and by not including above noted elements in the normal price as per Section 4 of the Central Excise Act 1944 and by mis-declaring the place of removal as factory gate instead of buyer's place where the goods were to be sold after their clearance

from the factory as described in sub clause (iii) and clause (b) of sub-Section 4 of the Central Excise Act 1944, the assessee has suppressed the necessary facts. It also said that Section 11A of the Act is attracted for extending the period upto 5 years for demanding the central excise duty. The assessee was also noticed as to why penalty under Section 11AC be not imposed upon it.

The assessee contested the show cause notice saying that the sale is affected at the factory gate at Ballabgarh in the State of Haryana. The freight and arranging for insurance during transit of goods have no material bearing on the point of place of sale or removal of goods. The Commissioner of Central Excise, Delhi II however confirmed the demand holding that the factum of "transit insurance" by the manufacturer shows that the transaction of sale is complete only on delivery of goods to the buyer otherwise there was no good reason for the manufacturer taking responsibility of the risk involved in transportation of the goods to the buyer's place. The case of the assessee that sale takes place and it is completed at the factory gate was not found acceptable and contrary to Section 2 (h) of the Central Excise Act. The appellate authority namely CEGAT upheld the view taken by the Commissioner, Central Excise in so far it related to completion of the transaction of sale at the buyer's place which is the main question for consideration in this appeal before us.

Shri Andhyarujina, learned senior counsel appearing for the assessee submits that the whole basis of the impugned decision that "transit insurance" by the assessee in itself would show that the rights in the property had not passed on to the buyer during transit but only on delivery of goods at the buyer's place, is unsustainable. It is submitted that the assessee manufactures Excavators Loaders at its factory at Ballabgarh, Faridabad, which are sold to various buyers. All sales are made at the factory gate. Some buyers arrange for the transportation of the goods as well as for transit insurance themselves but some require the appellant to arrange for transportation and transit insurance, in latter case the assessee recovers the freight charges and "insurance charges" from the buyers. Our attention has been drawn to various clauses of the terms and conditions of sale which has been placed on record as Annexure P-1 indicating that the prices are "ex-works" at Ballabgarh exclusive of freight, insurance, octroi etc. The first clause under the heading 'Terms of Payment' shows that 30% of the quoted price is payable in advance alongwith the order and the balance amount against delivery Ex-works Ballabgarh. The next clause under the heading "Delivery" provides that all deliveries are Ex-works Ballabgarh, Haryana. Under the heading 'Transit Risk and Insurance' it is indicated that risk of the goods will be that of the buyer from the time Escorts JCB Ltd. hands over the equipment to the buyer's representative or carrier or from the time goods leave Escorts JCB Ltd. premises. Under the heading 'Mode of Transport', delivery by train is indicated or in the alternative if the buyers so desire, by road, and in such an event, it would be necessary for the buyer to make the payment at Ballabgarh prior to despatch of goods. It is submitted that where the customers so desire or request the transit insurance and transport is arranged by the assessee for which they would separately charge the

customer. Our attention has also been drawn to some of the copies of the orders placed indicating that a request was made by the customers to the assessee for making arrangement for transport with transit insurance. Such orders also indicate acceptance of general conditions of sale. Some of the Transport receipts show despatch of the goods in the name of the customers as consignee and invoices indicate separate charge towards transit insurance and freight apart from value of the goods.

The contention is that the fact that the assessee arranged for the transit insurance would in no way lead to an inference that the ownership in the goods was retained by the assessee during the period of the transit until the delivery of the goods at the place of the buyer. The terms and conditions of the sale are clear that the sale is Ex-works at Ballabgarh, Haryana. The payment is to be made before despatch of the goods from the factory premises. The machinery, handed over to the carrier/transporter is as good as delivery to the buyer in terms of Section 39 of the Sale of Goods Act apart from terms and conditions of sale. Section 39 of Sale of Goods Act reads as under:

**39. Delivery to carrier or wharfinger :**

(1) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to wharfinger for sale custody, is prima facie deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorized by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails to do, the goods shall be deemed to be at his risk during such sea transit.

The possession of the sold goods is handed over to the buyer at the factory gate. The transaction is full and complete and nothing remains to be done after the goods leave the factory premises. The relevant provision in this

connection is Section 4 of the Act, as it existed then is quoted 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 value, such value, shall, subject to the other provisions of this section, be deemed to be-

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

Provided that-

- (i)-----
- (ia)-----
- (ii)-----
- (iii)-----
- (b)-----

(2) -----

(3) -----

(4) For the purpose of this Section"

(a) -----

(b) "Place of removal" means:

(i) -----

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

(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory and from where such goods are removed.

From the perusal of the provision quoted above, it would be clear in the case in hand the place of removal of goods is factory premises since the transaction of sale, payment of price and handing over possession of the goods to the carrier after clearance is at the factory at Ballabgarh.

A perusal of the orders passed by the authorities and the CEGAT show that since transit insurance was arranged by the assessee, therefore it was inferred and held that the ownership of the goods was retained by the assessee until it was delivered to the buyer on the reasoning that otherwise there would be no occasion for the seller namely, the assessee to take risk of any kind of

damage to the goods during transportation. To us, the whole reasoning seems to be untenable. The two aspects have been mixed up - one relating to the transaction of sale of the goods and the other arranging for the transit insurance for the buyer and charging the amount expended for the purpose from him separately. In connection with the proposition that insurance can be taken by a third person on behalf of another, reliance has been placed by the assessee on "Chitty on Contracts" Twenty-Eight Edition Vol. 2 Special Contracts P.978 Chap. 41 Note 007 under the heading "Insurance of Another's interest". It is indicated that in varied facts and circumstances and subject to the statutory provisions of contract, it is possible to ensure the interest of another. Referring to a decision reported in [1947] K.B. 685 Prudential Staff Union versus Hall, it is observed that a seller in possession of the goods when the property and risks have passed may insure his buyer's interest. Referring to a decision reported in Hepburn versus A. Tomlinson (Hauliers) Ltd. H.L. (E) 1966 451, it has been submitted on behalf of the assessee that a bailee apart from its interest may also insure the interest of the owner of the property. There may be floating insurance policy covering not only the limited interest but the whole interest of the ownership of the customers in the normal course.

To substantiate the point further, a reference to Para 5-012 at Page 184 of Benjamin's Sale of Goods Fourth Edition has been made which is to the following effect:

"Insurance. The passing of property is rarely of relevance to insurance. A person can insure goods to their full value against any loss on behalf of anyone who may be entitled to an interest in the goods at the time the loss occurs, provided that it appears from the terms of the policy that it was intended to cover their interest. Also a buyer will have an insurable interest in goods if they are at his risk, whether or not the property has passed to him".

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

In one of the cases referred to and reported in 1983 E.L.T. 1896 (S.C.) Union of India and others etc. etc. versus Bombay Tyre International Ltd. etc. etc., the question involved was regarding deduction of transportation charges along with cost of insurance. It was held as follows:

"Therefore, the expenses incurred on

account of the several factors which have contributed to its value upto the date of sale, which apparently would be the date of delivery, are liable to be included. Consequently, where the sale is effected at the factory gate, expenses incurred by the assessee upto the date of delivery on account of storage charges, outward handling charges, interest on inventories (stocks carried by the manufacturer after clearance), charges for other services after delivery to the buyer, namely after-sales service and marketing and selling organization expenses including advertisement expenses cannot be deducted. It will be noted that advertisement expenses, marketing and selling organization expenses and after sale service promote the marketability of the article and enter into its value in the trade. Where the sale in the course of wholesale trade is effected by the assessee through its sales organisation at a place or places outside the factory gate, the expenses incurred by the assessee upto the date of delivery under the aforesaid heads cannot on the same grounds be deducted. But the assessee will be entitled to a deduction on account of the cost of transportation of the excisable article from the factory gate to the place or places where it is sold. The cost of transportation will include the cost of insurance on the freight for transportation of the goods from the factory gate to the place or places of delivery".

The assessee also referred to a decision reported in 2002 (49) RLT 506 - Associated Strips Ltd. & Anr. versus CCE, New Delhi. It is a decision of CEGAT. Considering several decisions of different Courts and the terms of the contract between the parties, it was held that sale of goods had taken place at the factory gate and therefore the place of removal was not the premises of the buyer. In view of the provisions of Section 23 and Section 39 of the Sale of Goods Act 1930 it was found that goods to be treated as delivered to buyer and property and possession of the goods passed on to buyer when the goods were handed over to transporter. In such a case element of freight and transit insurance were not to be included in the normal value of the goods. We approve of the view taken by the CEGAT.

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

In the result the Civil Appeal No.7230/1999 is allowed and judgment and order passed by the Commissioner of Central Excise and the CEGAT imposing duty and penalty is set aside. Consequently, Civil Appeal No.1163/2000 preferred by the Revenue does not survive any more and is rendered infructuous. It is dismissed as such. There would however be no order as to costs.

JUDIS