CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.1686 of 2008

(Arising out of Order-in-Original No.MP(Dem-65/2007) 43 of 2008 dated 02.05.2008 passed by Commissioner of Central Excise & Service Tax, Allahabad)

M/s J. R. Organics Ltd. **.....Appellant**
(Captainganj Distellery, Captainganj, Distt.-Kushinagar U.P.)

VERSUS

Commissioner of Central Excise, Allahabad ....Respondent

(38, M.G. Marg, Civil Lines Allahabad-211001)

APPEARANCE:

Shri Atul Gupta, Advocate & Shri Prakhar Shukla, Advocate for the Appellant
Shri Sarweshwar T. Khairnar, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.- 70129/2023

DATE OF HEARING : 09 October, 2023
DATE OF DECISION : 09 October, 2023

SANJIV SRIVASTAV:

This appeal is directed against the Order-in-Original No.MP(Dem-65/2007) 43 of 2008 dated 02.05.2008 passed by Commissioner of Central Excise & Service Tax, Allahabad. By the impugned order following has been held:

"ORDER

1. (a) I confirm the demand of Central Excise duty amounting to Rs.1,43,34,224.00 (Rupees one crore forty three lakhs thirty four thousand two hundred and twenty four only) from M/s J R Organics Ltd, Captainganj Distillery, captainganj, *Distt Kushinagar under the provisions of Section 11A (2) of Central Excise Act,1944.*

(b) I order to appropriate the Central Excise duty amount to Rs.28,12,668.00 (Rupees twenty eight lakhs twelve thousand six hundred and sixty eight only) already paid by the said party.

2. I confirm the demand of interest on the above mentioned amount under the provisions of Section 11 AB of the Central Excise Act, 1944.

3. I impose a penalty of Rs. 1,43,34,224.00 (Rupees one crore forty three lakhs thirty four thousand two hundred and twenty four only) on the said party under the provisions of Section 11 AC of the said Act, read with Rule 25 of the Central Excise Rules, 2002."

1.2 The impugned order has been challenged by the appellant in this appeal. Appeal was earlier dismissed by the Tribunal vide Final Order No.71005/2018 dated 20.02.2018, holding as follows:

"6 Having considered the rival contentions and on perusal of facts on record, we find that there is no allegation in the Show Cause Notice that the appellant have valued their goods, transferred to other units, at value lesser than the value as per CAS-4 standards. Accordingly, we hold that the Show Cause Notice is vague and is not maintainable. Accordingly we set aside the impugned order and allow the appeal. the appellant shall be entitled for consequential benefits, in accordance with law."

1.3 Revenue challenged this order before the Hon'ble Supreme Court. Hon'ble Supreme Court as vide order dated 15.02.2019 in Civil Appeal No.1783/2019 remanded the order back to the Tribunal for doing as follows:-

> *"This appeal takes exception to the final order No.71005 of 2018 dated 20.02.2019 in the Appeal No.E/1686/2008-EX (DB) passed by the CESTAT, Regional Bench, Allahabad, whereby the show cause notice issued by the Central Excise Commissionerate dated 08.11.2017 came to be quashed on the solitary ground that the same was vague*

having failed to specifically mention that the respondent valued their goods, transferred to other units, at a value lesser than the value as per CAS-4 Standards.

We have heard counsel for the parties. In our opinion, the show cause notice opens with the statement which adverts to breach of cost accounting standards in the following words:

"Whereas M/s. J.R. Organics Ltd. Captainganj distillery, Captainganj have contravened the provisions of Section 4 of the Central Excise Act, 1944 (here-in-after referred to as 'the said Act') read with Rule 4, 6 and 11 of the Central Excise Rules, 2002 in as much as they have (Indulged in evasion of Central Excise duty by suppressing their assessable value and during the period April 2003 to March 2006 they have evaded Central Excise Duty to the tune of Rs.1,43,34,224=00 by way of not paying the duty on the specific values arrived at by their Cost Accountant based on cost accounting standards and in terms of Section 4 of Central Excise Act, 1944 read with Rule 8 and Rule 9 of Central Excise Valuation Rules 2000."

In any case, the respondent understood the purport of the show cause notice and had also submitted representation on the premise that the value of their goods in question was not lesser than the value as per CAS-4 Standards. That is the core issue to be considered by the Tribunal.

We hold that the Appellate Tribunal has misread the subject show cause notice. Hence, the conclusion reached on such erroneous basis cannot be sustained. The matter will show proceed before the Tribunal for consideration afresh on its own merits in accordance with law. Needless to observe that all consequential steps taken on the basis of the stated show cause notice will be subject to the final view taken by the Tribunal in the remanded proceedings. Accordingly, we set aside the impugned order and relegate the parties before the Tribunal for consideration of the *appeal afresh. All questions are kept open. The appeal is allowed in the above terms. No costs."*

1.4 This matter has been taken up for consideration as per the directions contained in the order of the Hon'ble Supreme Court.

2.1 Appellant is engaged in manufacture of Ethyl alcohol Denatured Spirit (SDS) classifiable under 22072000 of the First Schedule to Central Excise Tariff Act, 1985.

2.2 Appellant was clearing the SDS produced by it to its sister concern at Barabanki on stock transfer basis after payment of duty at the transfer price determined by them. During course of audit a memorandum BBK/DW-112/4464 dated ½-03-04 issued by Shri S C Chajjar of appellant unit at Barabanki was recovered as per which the Cost Accountant R K Agarawal has certified the cost of SDS transferred to Barabanki unit during the period 2003-04 was Rs 15.34 per unit whereas the appellant has during the said period discharged the duty on the value of Rs 14.04 per unit.

2.3 The show cause notice dated 07.11.2007 was issued to the Appellant demanding duty of Rs.1,43,34,224/- for the period 2003-04 to 2005-06 disputing the transfer price determined by the appellant on the basis of the correspondences recovered from the premises of the appellant. It was alleged that the appellant had determined the transfer price, which is much lower than value that should have been determined as per Rule 8 & 9 of Central Excise (Determination of Price of Excisable Goods) Valuation Rules, 2000 and CAS-4. Extended period of limitation as per proviso to Section 11A(1) of the Central Excise Act was also invoked. Show cause notice also demanded the interest as per section 11 AB and proposed imposition of penalty as per Section 11AC of the Central Excise Act,1944.

2.4 This show cause notice was adjudicated as per the impugned order confirming the demand on duty and imposing equivalent penalty on the Appellant. Aggrieved this appeal has been filed.

3.1 We have heard Shri Atul Gupta Advocate alongwith Shri Prakhar Shukla Advocate for the Appellant and Shri Sarweshwar

T. Khairnar learned departmental Representative for the Revenue.

3.2 Arguing learned counsel for the Appellant submits that:-

- the demand for the period 2003-04 is based on the document which pertains to 2002-03 and the value has been determined on the basis of the certificate given by the Cost Accountant for that period.
- This document would not be a relevant document for determination of the value in terms of CAS-4 for the subsequent period.
- While determining the cost of production Cost Accountant has taken into account the interest and finances charges which are not includible in the value determined as per the CAS-4 as per the following decisions:
    - Nirma Ltd. vs. Commissioner of Central Excise, Vadodara-I, 2006 (200) E.L.T. 213 (Tri.-Mum.)
    - Hindalco Industries Ltd. vs. Commissioner of Central Excise, Allahabad 2009 (248) E.L.T. 391 (Tri.-Del.).
- As per the revised certificates given by the Cost Accountant which are available on page 25 to 27 of the paper book, it is evident that if interest and finance charges are excluded then the value as per CAS-4 for period 2002-03 will come to about Rs.10.26. This is much lower than the value at which Appellant have effected clearance during that period.
- The entire amount of duty which has been demanded under this show cause notice confirmed by the impugned order is admissible as credit to their sister concern at Barabanki. Hence entire demand is Revenue neutral and extended period of limitation could not have been invoked as have been held in the following submissions:-
    - Nirma Ltd. [2006 (200) E.L.T. 213 (Tri.-Mum.)]. Affirmed as reported at [2015 (325) E.L.T. 232 (S.C.)].

  - Hindalco Industries Ltd. [2009 (248) E.L.T. 391 (Tri.-Del.)]. Affirmed as reported at [2010 (254) E.L.T. A42 (S.C.)].
  - Coca-Cola India Pvt. Ltd. 2007 (213) E.L.T. 490 (S.C.).
  - Mafatlal Industries Ltd. [2009 (241) E.L.T. 153 (Tri.-Ahmd.)].Affirmed as reported at [2010 (255) E.L.T. A77 (S.C.)].
  - Anglo French Textiles [2018 (360) E.L.T. 1016 (Tri.-Chennai)]. Affirmed as reported at [2018 (360) E.L.T. A301 (S.C.)].
- ➢ Allegations in show cause notice have been made on the basis of value as per the CAS-4. Appellant used to determine the transfer price for their own purpose as has been indicated in the said memo it was not the value as determined as per CAS-4. Hence sole reliance on the said memo for making this demand is totally uncalled for.
- ➢ Department was in full knowledge of the manner or method of clearance affected by the Appellant. Hence extended period of limitation could not be invoked in the present case as have been held by in the following decisions:
  - Hindalco Industries Ltd. [2023 (5) TMI 720- CESTAT Kolkata].
  - Anand Nishikawa Co. Ltd. [2005 (188) E.L.T. 149 (S.C.)]
  - Accurate Chemicals Industries [2014 (300) E.L.T. 451 (Tri.-Del.)].
- ➢ The demand as such is not sustainable and so is the penalty imposed.
- ➢ Appeal be allowed in favour of the Appellant.

3.3 Arguing for the Revenue learned A.R. submits that:

- ➢ Undisputedly no document or record has been made available by the appellant for determination of the value as per CAS 4 for the period 2003-04.

- Value adopted for the Appellant for the clearance of the goods on costing basis for the period 2004-05 on the basis of previous years valuation is Rs.15.40. This value should have been adopted for determination of the value for clearance for during the period 2003-04. Appellant have not produced any documents to contradict this.
- Similarly for period 2005-06 appellant had adopted the value determined on the basis of cast of production for the year 2004-05. The value adopted clearance during the period on the basis of the appellant's own admission and documents of clearance is Rs.23.03. Central Excise duty for this period i.e. 2004-05 was to be determined on the value of Rs.23.03 as per the own admission of appellant.
- Appellant has paid duty by adopting a value of Rs.23.03 whereas Revenue has demanded duty by determining the value Rs.23.09 for this period 2005-06.
- Appellant has for the period 2003-04 and 2005-06 have admitted the duty liability and paid the entire amount as demanded by the show cause notice.
- On the issue of limitation it is clear that the appellant has not provided the relevant documents for the finalization of the value as per CAS-4 during the relevant period. These documents for the period 2003-04 have not been provided even now.
- Just because the amount of duty demanded would be admissible as Cenvat credit to their sister concern do not make the issue revenue neutral, as have been held by Larger Bench of this Tribunal in the case of Jai Yushin [2000 (119) E.L.T. 718 (Tribunal - LB)].
- Demand would not be hit by limitation.
- Appellant is working under a self-assessment regime and the law on the subject is very clear; they were at the end of the each financial year required to submit the documents for finalization of the transfer price to the sister concern which they have not done with the for intent to

evade payment of duty hence the penalty imposed on them is justifiable.

- Appeal should be dismissed.

4.1 We have considered the impugned order along with the submissions made in the appeal and during the course of arguments. We have also taken note of the direction contained in the Hon'ble Supreme Court decision.

4.2 We observe that that demand in the show cause notice is has been made on the basis of the Memo dated 01/02-03-2004 which reads as follows:

"Reg: Transfer Price of Alcohol

Based on the finalized (Audited) Captainganj Accounts for the Financial Year 2002-03 cost of production of Alcohol produced by Captainganj has been worked out as Rs 13.26 per Ltr. As per the Central Excise Rules we have to add 15% on the cost of production being notional profit and also we have to add 10 Paise per Ltr towards Denaturation Fee. Accordingly the transfer price for the Financial Year 2003-04 worked out of Rs15.34 per Ltr for the purpose of charging Central Excise Duty on Alcohol being transferred to BBK. Certificate issued by Shri R K Agrawal a practicing Cost Accountant is enclosed in original along with work sheet in original. additional sets of Xerox Copies of the same are also enclosed. As per the Cost Accountant Certificate, the cost of production is Rs13.26 per Ltr. While advising the Central Excise teh transfer price to be considered is Rs 15.34 per Ltr."

The text of the enclosed Cost Accountant Certificate is as follows:

"We hereby certify that teh figures and information given by M/s Somaiya Organics (India) Limited, Captainganj Distillery, Captainganj for the financial year ended 31st March 2003, the cost of production of Alcohol for Rs.13.26 (Rupees Thirteen and Paise Twenty Six only) per litre has been worked out as per books and accounts maintained by the company."

Similar certificates have been recovered for the year 2004-05 and 2005-06.

Further in his statement Shri S L Garg General Manager of the appellant has in his statement recorded on 27.09.2007 in reply to question No 5 admitted that for the purpose of payment of Excise duty the cost Accountant works out the value of their final product. In reply to question 8, he also stated that the clearances during the F Y 2003-04, 2004-05 and 2005-06 were made on the basis of previous year cost of production and they could not pay the differential duty based on the value worked out by the Cost Accountant due to financial hardship. He after seeing authenticated the chart showing differential basic excise duty of Rs 1,42,96,381/- and Education Cess of Rs 37,843/- payable for these years as detailed in table below:

Period	**Basic duty**	**Education Cess**
2003-04	56,55,637.00	-
2004-05	85,69,973.00	36,428.00
2005-06	70,771.00	1,415.00
TOTAL	**1,42,96,381.00**	**37,843.00**

In reply to question no 10 he admitted that in principle they agree to pay the government dues but they could not pay it on account of financial crunch and continuous closure of their unit.

4.4 It is the submission of the appellant that this memo and the Certificates of the Cost Accountant do not reflect the correct position. While working out the cost of production Cost Accountant as is evident from the working sheets attached that cost accountant has included the value of interest and finance charges. These were not to be included as per CAS-4. They have furnished revised costing sheets excluding these charges. The Costing Sheets and revised costing sheets for the respective years are reproduced below:

Statement of Cost of production relied in SCN

		2002-03	2004-05	2005-06	2002-03	2004-05	2005-06
	Production	26350754.8	6279484.40	7387327.8			
S No	Particulars	Total Cost (Rs)			Cost/Unit (Rs)		

1	Raw Materials		76206979.82	9412563.99			12.74
2	Power & Fuel		3786442.26	6914872.18			0.94
3	Acetaldehyde		755054.59	1165449.00			0.16
4	Stores & Chemical		2474523.56	1630014.17			0.22
5	Total		83223000.23	103835970.34			14.06
6	Repairs		2839225.05	836247.97			0.11
7	Salaries & Wages		11614956.16	18266306.34			2.47
8	Contribution to PF		1232664.00	2551136.57			0.35
9	Welfare Expenses		1187502.45	1575683.82			0.21
10	Tools Written Off		12093.40	11532.00			0.00
11	Effluent treatment			1730989.70			0.23
12	Depreciation		3991658.00	3970221.0			0.54
13	Total		20878099.01	28942117.4			3.91
14	Interest & Finance Charges		9443348.00	15880731.73			2.15
15	Rent		5123.00	74250.00			0.01
16	Rates & Taxes		0	60698.31			0.01
17	Car Expenses		93585.36	223861.51			0.03
18	Misc Expenses		6444340.28	5734935.66			0.78
19	Insurance Premium		824641.00	512986.00			0.07
20	Directors Remuneration		0	0			0
21	Director Traveling		0	0			0
22	Increase decrease in WIP		9696857.66	-2012581.20			-0.27
23	Total		25683254.30	20474882.01			2.77
24	Closing Stock			1857700.00			
25	Sales			4509774.00			
26	Total			6367474.00			
27	Opening Stock			457950.00			
28	Total		130608994.59	147343445.75		20.80	19.95
29	Profit @10/ 15%					2.08	22.94

30	Denaturing Fees					.15	0.10
31	Total					23.03	23.04

Revised Statement of Cost of Production

		2002-03	2004-05	2005-06	2002-03	2004-05	2005-06
Q1	Quantity Produced (BL)	26350754.8	6279484.40	7387327.80			
Q2	Quantity Dispatched (BL)						
	Particulars	Total cost (Rs)			Cost/unit (Rs)		
1	Materials Consumed	167851757.47	76962034.41	95291083.99	6.37	12.26	12.90
2	Direct wages and Salary	46941908.37	14035122.61	22393126.73	1.78	2.24	3.03
3	Direct Expenses	13784.643.02	3786442.26	6914872.18	0.52	0.60	0.94
4	Works Overhead	16704094.97	10147264.01	8691990.84	0.63	1.62	1.18
5	Quality Control Cost	0	0	0	0.0	0	0
6	R & D Cost	0	0	0	0.0	0	0
7	Administrative Overheads	22023795.38	6537925.64	6093745.48	0.84	1.04	0.82
8	Total (1 to 7)	2670306199.21	111468788.93	139384819.22	10.14	17.75	18.87
9	Add Opening stock (WIP)	6048115.82	10882569.69	1185712.03	0.23	1.73	0.16
10	Less Closing stock (WIP)	3056184.26	1185712.03	3198293.23	0.12	0.19	0.43
11	Total (8+9-10)	270298130.77	121165646.59	137372238.02	10.26	19.30	18.60
12	Less: Credit for recovery	0	0	5909524.00	0	0	0.80
13	Packin Cost	0	0	0	0	0	0
14	Cost of Production (11-12+13)	270298130.77	121165646.59	131462714.02	10.26	19.30	17.80
15	Free Inputs Received	0	0	0	0	0	0
16	Amortized Costs	0	0	0	0	0	0
17	Cost of Production (14+15+16)	270298130.77	121165646.59	131462714.02	10.26	19.30	17.80
18	Add Opening Stock Finished Goods	0	0	0	0	0	0
19	Less Closing Stock Finished Goods	0	0	0	0	0	0
20	Cost of Production (17+18-19)	270298130.77	121165646.59	131462714.02	10.26	19.30	17.80

From the perusal of the above certificates it is evident that both the charts are not made on the same basis. It is not the interest and finance charges which are making the difference but from the chart for year 2005-06 which is most comprehensive both as relied in SCN and as subsequently submitted by the appellant the cost of material consumed which in the chart relied in SCN is Rs 14.06 per unit is reduced to Rs 12.90 per unit. Number of other heads which were earlier added while determining the cost of production do not figure separately in the subsequent chart or are merged in some other head. Hence we are not in position to give much weightage to the charts submitted subsequently. We had asked for the documents on which these charts had been prepared but the same could not be produced as the unit had closed down.

4.5 The value in this case was to be determined as per CAS 4. and the assessable value as per Rule 8 of the Central Excise Valuation Rules, 2000 the cost of production X 110% (10% being the notional profit to be added). Further as per the procedure prescribed for determining the assessable value of goods as per Rule 8, the value of the goods at the time of clearance has to be determined on the basis of the previous year finalized accounting records and subsequently after the closure of the financial year redetermined on the basis finalized records of the year during which the clearances are made. This has been admitted by the appellant General Manager Shri S L Garg in his statement recorded under Section 14 of the Central Excise Act, 1944. reference is also made to Guidance Note On Cost Of Production For Captive Consumption (Under Rule 8 Of The Central Excise Valuation (Determination Of Price Of Excisable Goods) Rules, 2000) Issued By The Institute Of Cost And Works Accountants Of India wherein following has been stated:

"In cases where goods are cleared based on the cost of production worked out as per the audited accounts of the previous audited period, it is advisable to prepare a fresh certificate of cost of production based on the audited accounts of the period for which the goods are cleared and the differential duty is paid or taken credit of as the case may be."

From the papers available in the paper book it is evident that the appellant had adopted the following values for the clearance of goods at the time of removal of the goods from their factory for captive clearance.

Financial Year	Value adopted at time of Clearance
2003-04	14.03
2004-05	15.40

2005-06	23.03

In terms of the above the final value as per Rule 8 of the Valuation Rules, 2000 read with above guidance note and also as per own admission of the appellants General Manager, the values for the Financial Year 2003-04 and 2004-05 will be Rs 15.40 per unit and Rs 23.03 per unit respectively.

4.6 The show cause notice and the adjudication order demand the duty from the appellant during the financial year 2003-04 by fixing the value at Rs 15.34 per year and for the year 2004-05 at Rs 23.03 per year. Appellant has admitted the duty liability and also paid the same for the year 2003-04. In the guidance notice referred by us earlier following has been stated in respect of interest and finance charges:

"5.16 Interest and Financial Charges :

Interest and financial charges being a financial charge shall not be considered to be a part of cost of production.

Notes: Interest and financial charges are finance cost, hence shall not be considered as a part of cost of production. This will include interest on bank borrowings, amortisation of discounts or premium related to borrowings, amortisation of ancillary cost incurred in connection with the arrangements of borrowings, finance charges in respect of finance leases and exchange differences arising from foreign currency borrowings to the extent they are regarded as an adjustment to the interest costs."

No information has been made available for the year 2003-04 in respect of any of the costing data. For the year 2004-05 taking the information available as in the cost sheet for that year which has been relied on by the revenue we are inclined to give the benefit by reducing the interest and finance charges from the cost of production so determined. Thus for the Financial Year the cost of production and the assessable value as per Rule 8 is determined below:

Quantity Produced	6279484.40
Total Cost of Production as per the Cost Sheet	130608994.59
Interest and Finance Charges as per the Cost Sheet	9443348.00

Redetermined Cost of production	121165646.59
Cost Per unit	19.30
Total Cost as per Rule 8 (110%)	21.23

We also note that during the financial year 2005-06 appellant has at the time of clearance of the goods itself discharged the duty by determining the value at Rs 23.03 per unit revenue has redetermined the value at Rs 23.09 per unit in the show cause notice. The difference in the value on which duty has been demanded being meager has been admitted by the appellant and they have discharged the total differential duty demanded for this period.

4.7 We also note that the Commissioner as by the impugned order while confirming the demand has ordered for appropriation of Central Excise duty amounting to Rs.28,12,668/-. In their reply to show cause notice appellants have themselves stated as follows:

6.2 That before ….

(iv) That the noticees pay duty of excise on the basis of previous year's cost of production in the manner prescribed. They submit the copy of the certificate of cost given by the Cost Accountant to the Jurisdictional Superintendent Range. The differential duty is paid by them accordingly. Their Barabanki unit takes CENVAT credit to the extent of differential duty paid on SDS on the basis of certificate of cost given by the Cost Accountant. Copies of letters submitted to the Jurisdictional Superintendent along with the copies of certificates are enclosed and respectively marked as Annexure 1.1, 1.2 and 1.3.

(v) That the noticees suddenly slipped into financial crunch and had to close down their unit. They apprised the Joint Commissioner Central Excise Allahabad, their problems and requested for grant of time to deposit the differential duty. copies of letter submitted to the Joint Commissioner in this regards are enclosed and marked as Annexure 2.1, 2.2.

(vi) That it is admitted in the impugned show cause notice that they deposited Rs 28,12,688/- till 31.10.2007 in the process of discharging their duty liability. …"

Further as per the chart available on page 52, appellant have themselves indicated that they have paid the differential duty as demanded in the show cause notice. The said chart is reproduced below:

Details of monthwise differential Duty from 2003-04 to 2005-06, Due to rate difference:

Financial Year	Month	Arrear Amount		Supplementary Invoice	
		C Ex Duty	Edu Cess	No	Date
2003-04	April	1108831.00	---	393	30.09.2006
	May				
	June	386502.00		403	31.10.2006
		211067.00		1	03.09.2007
	July	545169.00		2	21.09.2007
	August	561099.00		22	16.10.2007
	September	491725.00		60	12.07.2007
	October	271865.00		149	31.01.2008
	November	0			
	december	352098.00			
	January	705530.00			
	February	551038.00		189	28.02.2008
	March	470762.00		190	03.04.2008
Total		5655686.00			
2004-05	April	1016920.00		192	25.03.2008
		1781135.00		193	31.03.2008
	May	1170739.00		**Unpaid**	
	June	2549013.00			
	July	590862.00	7199.00		

	August	1064529.00	21280.00		
	September	362575.00	7249.00		
	October	0	0		
	November	0	0		
	december	0	0		
	January	0	0		
	February	0	0		
	March	34139.00	682.89		
	Total	8569912.00	36410.89		
2005-06	April	0	0	191	03.04.2008
	May	0	0		
	June	0	0		
	July	5716.00	109.00		
	August	4333.00	82.00		
	September	2402.00	47.00		
	October	0	0		
	November	0	0		
	December	8047.00	159.00		
	January	15117.00	292.00		
	February	16623.00	323.00		
	March	18564.00	363.00		
	Total	70802.00	1375.00		

Tribunal while staying this order has noted that Appellant have already paid an amount of Rs.85,25,918/- towards central excise duty and Rs.37,843/- towards education cess. From this chart it is quite evident that appellant has admitted and paid the entire differential duty liability for the year 2003-04 and 2005-06. There is a short payment only in the year 2004-05. It is also noted that the appellant sister concern was taking the CENVAT Credit of the differential duty paid by them on the basis of the supplementary invoice and the certificate issued by the range Superintendent in respect of the differential payment of duty.

4.8 Thus year wise we compute the differential duty demanded and paid by the appellant as per chart available in the paper book on page 52.

Financial Year	Demand as per SCN	Paid as per page 52	Duty determined as per para 4.6	Differential to be paid
2003-04	5655637.0	5655637.0	5655637.0	0
2004-05	8606401.0	2798055.0	6613705.0	3815650.0
2005-06	72186.00	72186.00	72186.00	0
Total	14334224.0	8525878.0	12341528.00	3815650.0

4.9. As we hold that as per the procedure followed by the appellant they were paying the differential duty on the basis of the Cost Accountant Certificate issued on the basis of finalized/ audited financial/ cost records in our view the relevant date for computation of period of limitation under section 11A of the Central excise Act, 1944 should be as per clause (iv) of Explanation 1 (b) of the said section which reads *"in case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof."* Accordingly the show cause notice has to be treated as one being issued within the normal period of limitation for making the demand.

4.10 Hon'ble Supreme Court has in case of Steel Authority of India Limited [2019 (366) E.L.T. 769 (S.C.)] held as follows:

48. *The question which we are necessarily called upon to decide is when price is revised upward with retrospective effect and the excise duty on the same is paid immediately on a future date whether interest is payable under Section 11AB from the first day of the month succeeding the month in which the duty* *ought to have been paid under the Act. To keep the matter in focus, the exact question is which is the month in which the duty ought to have been paid.*

49. *Under the Rules, goods become exigible to duty on removal. Assessment is to be done by assessee itself by way of self-assessment. In a case where duty is payable on the basis of the value, the assessee is to apply the rate of duty to the value and pay the duty on or before the sixth day of the month succeeding the month in which removal of the goods takes place. Undoubtedly, if the removal takes place in March, the payment is to be made by 31st of March.*

50. *We have also noticed what happens if there is provisional assessment. In the case of provisional assessment, the assessee entertains a doubt regarding the actual value or the rate of duty. He applies and he is permitted under the order to remove goods on a provisional assessment. The assessment is thereafter finalized. When the provisional assessment is finalized, the assessee becomes liable however to pay interest from the first date of the month succeeding the month for which the amount is determined. We have no doubt in our mind that under Rule 7(4), the expression "succeeding the month for which such amount" is determined refer to the month of removal of the goods. When the provisional assessment has such consequences, it would occasion an invidious discrimination to place an interpretation on Section 11AB by which those assesses who go in for provisional assessment under Rule 7 are called upon to pay interest upon finalization of the assessment with reference to the date of removal in a case where the value is fully determined as a result of escalation clause being worked resulting in an upward revision of prices and under Section 11AB payability arises with reference to the date of decision to grant escalation. In other words, the law will have to be interpreted in a manner that it is fair and equal to similarly situated group of assessees. Legislative intention, in this regard, also cannot be otherwise. Legislature has clearly in Section 11AB spelt out the time with reference to* *the Act and the Rules. Under Section 11AB in the case of short-levy or short payment inter alia, the expression "month in which the duty has become payable" under the Act and the rules must be understood as the month in which the duty is payable under the Rules made under the Act. Thus, if goods are removed in the month of January ordinarily payment must be made by the 6th of February. If the duty is not paid by the 6th of February, Section 11AB must be understood as mulcting the assessee with liability to pay interest from the first day of March in the example we have given. If the assessee went in for provisional assessment under Rule 7, it becomes liable from the 1st day of the month following the month for which the amount is determined.*

51. *The expression "the month in which the duty ought to have been paid" under this Act, when it is read alongwith Rule 8, which declares that the duty on the goods removed from the factory or warehouse during a month is to be paid on the 6th day of the following month would mean that the Legislature has understood the expression "the month in which the duty ought to have been paid" under the Act in the same sense as it is declared in Rule 8.*

52. *In this regard it is also pertinent to notice the finding in the order of the original authority that perusal of the Circular dated 1-7-2004 makes it unambiguously clear that the price was understood as provisional price. This belies quite clearly the case of the appellant that the price was final. Could the assessee in the light of the Circular even for a moment in the same breath contend that the assessee was unhesitatingly ready and able to determine the price and hence the value. We would think that it certainly presented a situation where the assessee should have resorted to Rule 7.*

53. *As we have already noted, SAIL has paid the differential duty of Rs. 142.78 crores even without waiting for any notice under Section 11A(1). The assessee volunteered and made* *payment in October 2006. We find merit in the finding by the authority that this is a case where therefore the payment made by the assessee is to be treated as one falling under Section 11A(2)(b). This meant also that there was no need for determination of the duty within the meaning of Section 11A(2)(a) or issuance of notice under Section 11A.*

59. *We are here concerned in these cases with one of the ingredients of assessment, namely, valuation. There is no dispute regarding the quantity removed. There is no issue relating to rate of duty. The dispute is relating to the correct value. To appreciate it better, let us take an example of an assessee who deliberately undervalues the goods which he removed. This results in assessee arriving at an amount which would not be the correct amount. He pays this incorrectly assessed amount. Would it be a case of short-levy or short payment? If short-levy is to be understood as confined to cases where the assessment is not the full assessment, taking into account the parameters involved correctly, namely, rate of duty, valuation and quantity it could be classified as a case of short-levy as one of the components of proper assessment namely, valuation has been incorrectly arrived at. The payment in such a case is made in terms of the incorrectly assessed figure. The payment matches the assessment. In fact, it is worthwhile to recall that under Rule 10 of 1944 Rules which we have adverted to, the expression "short-payment" is not used. Instead the words duty has not been paid in full, has been used. No doubt, in a case where in law though the amount which is paid is in harmony with the amount which is assessed, it is not the amount which ought to have been paid by the assessee. The absence of full payment of duty or short payment has indeed also in one sense taken place. In a case where there is an escalation clause goods are cleared on a provisional price. Consequently, the value is provisional. There is a subsequent escalation with retrospective effect. It will affect the valuation which was employed in the self-assessment by the assessee* *which would necessarily be provisional. Enhancement of the value will date back to the dates of removal in view of the retrospective operation. Admittedly the liability for payment of differential duty has arisen. Upon the true value, in a case of retrospective escalation of price though later agreed being received and consequential differential duty being admittedly payable, it would result in Section 11A read with Section 11AB applying.*

60. *It is true that the statutory authority has found it to be a case of short payment. In the notice issued claiming interest it is stated there is short-levy (see page 89 Vol. II SLP paper book). Proceeding on the basis that it is a case of short-levy, Section 11A read with Section 11AB is attracted and the interest clock ticks from the date as we have found namely as provided in Rule 8 read with Section 11AB. If the concept of short payment is stretched to include all amounts which ought to have been paid, it may also be treated as a case of short payment though juridically it may be true that it may strictly fall under short-levy.*

61. *While it may be true that interest cannot be demanded by way of damages or compensation and it is also further true that unless there is a substantive provision providing for payment of interest in a fiscal statute, interest cannot be demanded, we would think in the context of the Act and the Rules in question, under Section 11AB, particularly, when there is no dispute relating to liability to pay the differential duty and we notice that absence of dispute is a fair acknowledgement of the fact that the facts of the present cases are unlike the situation in MRF decision where the price was fixed at the time of removal, interest is payable as provided in Section 11AB and from the point of time indicated therein. But in these cases, the price was variable under the escalation clause which was very much within the knowledge of the assessee and the demand for interest is sustainable.*

62. *As far as the scope of the second explanation of Section 11A(2)(b) is concerned, it contemplates payment voluntarily by the assessee. It is without any notice being issued under Section 11A. There is also reference to liability on the part of the assessee to pay interest under Section 11A(2)(b), not only on the amount which is paid within the meaning of Section 11A(2)(b) but on any short payment as may be determined by the excise officer. This only means that payment can by an assessee of any of the four amounts with which we are more concerned namely, non-levy, non-payment, short-levy or short-payment. Since there is no notice under Section 11A and non-determination of the amount as such pursuant to which the amount is paid it may happen that there may be shortfall in the amount which is paid by the assessee in comparison to what the assessee is legally required to pay. The short payment which is therefore referred to in the second Explanation to Section 11A(2)(B) can only be the aforesaid short payment and it is not referring to the short payment of duty which was originally occasioned and which is the subject matter of Section 11A(2)(b) and Section 11AB.*

63. *We are of the view that the reasoning of this Court in the order referring the cases to us (to this Bench) that for the purpose of Section 11AB, the expression "ought to have been paid" would mean the time when the price was agreed upon by the seller and the buyer does not square with our understanding of the clear words used in Section 11AB and as the rules proclaim otherwise and it provides for the duty to be paid for every removal of goods on or before the 6th day of the succeeding month. Interpreting the words in the manner contemplated by the Bench which referred the matter would result in doing violence to the provisions of the Act and the Rules which we have interpreted. We have already noted that when an assessee in similar circumstances resorts to provisional assessment upon a final determination of the value consequently, the duty and interest dates back to the month "for* *which" the duty is determined. Duty and interest is not paid with reference to the month in which final assessment is made. In fact, any other interpretation placed on Rule 8 would not only be opposed to the plain meaning of the words used but also defeat the clear object underlining the provisions. It may be true that the differential duty becomes crystallised only after the escalation is finalized under the escalation clause but it is not a case where escalation is to have only prospective operation. It is to have retrospective operation admittedly. This means the value of the goods which was only admittedly provisional at the time of clearing the goods is finally determined and it is on the said differential value that admittedly that differential duty is paid. We would think that while the principle that the value of the goods at the time of removal is to reign supreme, in a case where the price is provisional and subject to variation and when it is varied retrospectively it will be the price even at the time of removal. The fact that it is known, later cannot detract from the fact, that the later discovered price would not be value at the time of removal. Most significantly, Section 11A and Section 11AB as it stood at the relevant time did not provide read with the rules any other point of time when the amount of duty could be said to be payable and so equally the interest. We would concur with the views expressed in SKF case (supra) and International Auto (supra). We find no merit in the appeals. The appeals will stand dismissed."*

The demand of interest in terms of section 11AB is upheld.

4.10 No substantial reason has been stated in the show cause notice or the adjudication order, for invoking the extended period and for imposition of penalty under Section 11AC. Show cause notice alleges as follows:

"From the foregoing facts, it appear s that M/s J R Organics Ltd. Unit Captainganj distillery district - Kushinagar have suppressed the vital facts regarding value of denatured ethyl alcohol with the department and undervalued it with the intention to defraud the government of its legitimate revenue amounting to rs

1,43,34,224.00 in contravention of provisions of Section 4 of Central Excise Act, 1944 read with Rule 4,6 & 11 of the Central Excise Rules, 2002 and Rue 8 and 9 of Central Excise Rules,2000."

Commissioner has in the impugned order observed as follows:

"... Section 11AC of the Central Excise Act, 1944 stipulates that 'where any duty of excise has not been paid or erroneously refunded by reasons of fraud, collusion or any willful mis-statement or suppression of facts or contravention of any provisions of this Act or of the rule made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of the section 11A, shall also be liable to pay a penalty equal to the duty so determined." Since the party has contravened the provisions of Section 4 of the Act,ibid and suppressed the vital fats of undervaluation of their final product as they have mis-stated the value in their returns/ invoice etc they are liable to penalty under the provisions of Section 11AC of the Act read with Rule 25 of the Central Excise Rules, 2002."

From the discussions as above we observe that the appellant was following the procedure as laid down by making the payment of duty on the basis of the cost of production determined on the basis of the finalized accounting records of the previous year and subsequently paying the differential duty on the basis Cost Accountant certificate issued on the basis of the finalized accounting records of current year. When this is prescribed and also is an accepted procedure for payment of duty on the goods consumed captively we do not see any merits in the findings recorded by the Commissioner for imposing penalty under Section 11AC read with Rule 25. We set aside the said penalty.

5.1 In view of the above, appeal filed by the Appellant is partly allowed to the extent of modifying the impugned order by

- ➢ setting aside the penalties under section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002;

- appropriating duty paid Rs 56,55,637/- + Rs 72,186/- by the Appellant for the period 2003-04, 2005-06 respectively, towards the demand made in the show cause notice and confirmed by the impugned order;
- demand of differential duty for the year 2004-05 is modified to Rs 66,13,705/- (Rs 65,48,222/- (C Ex Duty) + Rs 65,482/- (Edu Cess). Amount of Rs 27,98,055/- paid by the appellant for this period is appropriate against this amount upheld.
- differential duty for the year 2004-05 to the extent of this amount not paid by the Appellant is upheld.
- demand for interest under Section 11AB is upheld.

(Dictated and pronounced in open court)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS