CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.122 of 2012

(Arising out of Order-in-Appeal No.147-148-CE/GZB/2011-12 dated 27/07/2011 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Ghaziabad)

M/s Shatabdi Chemicals Pvt. Ltd., ...Appellant
(E-16, Udyog Kunj, Industrial Area, Hapur Road, Ghaziabad)

VERSUS

Commissioner of Customs, Central Excise &

Service Tax, Ghaziabad ....Respondent

(CGO Complex-I, Kamla Nehru Nagar, Ghaziabad)

APPEARANCE:

Shri Rakshit Verma, Advocate for the Appellant
Shri Manish Raj, Authorised Representative for the Respondent

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

FINAL ORDER NO.70276/2023

DATE OF HEARING : 18 October, 2023
DATE OF DECISION : 18 October, 2023

SANJIV SRIVASTAVA:

This appeal is directed against order in appeal No 147-148-CE/GZB/2011-12 dated 27.07.2011 of the Commissioner (Appeal) Customs Central Excise & Service Tax Ghaziabad. By the impugned order following has been held:

"ORDER

Accordingly, the appeal filed by Ms Shatabadi Chemicals Pvt. Ltd. (the first appellant) is partially allowed on the above discussed terms. However, I drop the penalty of Rs, 5000/- imposed upon Smt. Manju Gupta (the second appellant) under Rule 27 of the CER, 2002."

2.1 The Appellant is engaged in the manufacture of N-Butyl Acetate and Ethyl Acetate falling under Chapter heading 2915 of the Central Excise Tariff Act, 1985. The Appellant is registered with the Central Excise authorities vide Central Excise registration No.AAFCS2496QXM001.

2.2 During the course of audit by the officers during the period 13-11-2007 to 16-11-2007 following irregularities were noticed:

(i) the Appellant had collected and additional amount of Rs.11,52,755/- from its customers in lieu of which the differential duty amount to the tune of Rs.1,88,129/- was not paid by the Appellant.

(ii) that the Appellant had received less quantity of Special Denatured Spirit (SDS) but had taken excess Cenvat Credit to the tune of Rs.1,05,174/- on the full quantity on the basis of documents of purchase.

(iii) that the party had availed Cenvat Credit of Rs.37,139/-, against invoice no.22 dated 14.06.2005 issued by M's Polychem (p) Ltd., Delhi and Rs.13,194/- against invoice no.002 dated 18.04,2006 of M/s ShivangI Enterprises, Gurgaon (giving a total of Rs.50,333/-) on the rejected goods in contravention of Rule 16 of the Central Excise Rules, 2002

(iv) that the Appellant had availed 100% Cenvat credit on the capital goods purchased against invoice no. 805 dated 11.09.2004, 4009 dated 29.08.2004, 805 dated 21.02.2005, 22 dated 26.04.2005, 198 dated 21.07.2005, 341 dated 27.07.2005, 44 dated 02.12.2005 and 190 dated 17.02.2005 in contravention of Rule 2(a) of the Cenvat Credit Rules, 2004 which provides for 50% availment of Cenvat credit in the given financial year and rest 50% in the subsequent financial year and therefore, liable for reversal of Cenvat credit to the tune of Rs.47.093/-.

(v) that the Appellant had issued debit notes for Rs.84,434/- with regard to short supply during the period 2005-06 and thus liable for duty demand of Rs.13779/-

(vi) that the Appellant had imported "Butyl Acetate" against B/E no.180013 dated 07.02.2007, B/E No.118151 dated 2009.2005, B/E No. 117903 dated 31.08.2005 and B/E No. 118410 dated 05.09.2005 and had availed Cenvat Credit of CVD of Rs.24,85,638/-, Rs.49.714/- as Education Cess and Rs.3,29,474/- as additional duty (Rs.28,64,826/- in total) and that this Cenvat credit was irregular inasmuch as that the "Butyl Acetate" was Appellant's "Final product" and not "input".

2.3 A Show cause notice dated 27.04.2010, asking them to show cause as to why:

(1) The amount of CENVAT Credit of Rs 30,67,372/- {Rs 30,13,687/- (BED) + Rs 53,685/- (Education Cess)} wrongly availed, the Central Excise duty amounting to Rs 2,01,908/- (Rs 1,97,949/- (BED) + Rs 3,959/- (Education Cess)] not paid on differential sale value of goods sold through consignment agents during the financial year 2005-06 and 2006-07 and on the value of Rs 84,434/- for which Debit Notes issued with regard to supply of raw material, should not be demanded and recovered from them along with interest under Rule 14 of the CENVAT Credit Rules, 2004, read with provisions of Section 11A and Section11AB of the Central Excise Act, 1944 for contravening the provisions as envisaged in Rule 2 (k) (i), Rule 2 (a), Rule 4 of the Cenvat Credit Rules, 2004, Rule 4,8 & 16 of Central excise Rules, 2002 and Rule 7 of The Central Excise Valuation (Determination of Value) Rules,

2000 read with the provisions of Section 4 of Central Excise Act, 1944.

(2) Penalty should not be imposed upon them under Rule 25 of Central Excise Rules, 2002 read with Rule 14 and 15 of Cenvat Credit Rules, 2004 read with provisions of Section 11AC of the Central Excise Act,1944 for the contravention of the provisions as aforesaid.

2.4 This show cause notice was adjudicated as per order in original dated holding as follows:

"ORDER

a) I confirm the demand of duty amounting to Rs. 1,88,129/- [Rs. 1,84,440/- (BED) +Rs. 3,689/- (Ed. Cess)] and order for recovery of the same from the party under Section 11 A of Central Excise Act, 1944 along-with interest at appropriate rate under the provisions of Section 11 AB of the Act.

b) I confirm the demand of duty amounting to Rs. 13,779/- [Rs.13, 509/- (BED) + Rs. 270/- (Ed. Cess)] and order for recovery of the same from the party under rule 14 of the CENVAT Credit Rules, 2004 read with provisions of Section 11 A of Central Excise Act, 1944 along-with interest at appropriate rate under Section 11 AB ibid.

c) I disallow CENVAT credit amounting to Rs. 1, 05,174/- [Rs.1, 03,112/- (BED) + Rs. 2,062/- (Ed. Cess)] wrongly availed on account of the quantity short received of "Special Denatured Spirit" and order for recovery of the same from the party under rule 14 of the CENVAT Credit Rules, 2004 read with provisions of Section 11 A of Central Excise Act, 1944 along-with interest at appropriate rate under Secion 11 AB ibid.

d) I disallow CENVAT credit amounting to Rs. 50,333/- [Rs. 49,346/- (BED) + Rs. 987/-(Ed. Cess)] and order for recovery of the same from the party under rule 14 of the CENVAT Credit Rules, 2004 read with provisions of Section

11 A of Central Excise Act, 1944 along-with interest at appropriate rate under Section 11 AB ibid in contravention of rule 16 of the Central Excise Rules, 2002.

e) *I drop the demand of CENVAT credit amounting to Rs.47,039/- [Rs.46,117/- (BED) + Rs.922/- (Ed. Cess)] in respect of capital goods as the same has been taken by the party in accordance with rule 4 (2) (a) of the CENVAT Credit Rules, 2004.*

f) *I disallow CENVAT credit amounting to Rs. 28,64,826/- [Rs. 24,85,638/-(CVD), Rs. 49,714/- (Ed. Cess) and Rs. 3,29,474/- (Addl. Import Duty] and order for recovery of the same from the party under rule 14 of the CENVAT Credit Rules, 2004 read with provisions of Section 11 A of Central Excise Act, 1944 along-with interest at appropriate rate under Section 11 AB ibid in contravention of rule 2 (k) and rule 4 of the CENVAT Credit Rules, 2004.*

g) *I Impose penalty of Rs. 30,34,112/- [Rs. 13,779/- + Rs. 1,05,174/- + Rs. 50,333/- + Rs. 28,64, 826/-] under the provisions of rule 15 of the CENVAT Credit Rules, 2004 read with provisions of Section 11AC of the Central Excise Act, 1944 for contravention of the provisions as aforesaid.*

h) *I also impose penalty of Rs. 1,88,129/- under the provisions of Rule 25 of the Central Excise Rules 2002 read with provisions of Section 11AC of the Central Excise Act, 1944 for contravention of the provisions as aforesaid.*

i) *I Impose penalty of Rs. 5000/- on Ms. Manju Gupta, Director of M/s. Shatabdi Chemicals Pvt. Ltd. under rule 27 of the Central Excise Rules, 2002 for his alleged involvement in wrong availment of above mentioned amount of CENVAT credit and non-payment of duty in contravention of the Central Excise Act, 1944 and rules framed there under."*

2.5 Aggrieved appellant preferred an appeal before the Commissioner (Appeal), which has been disposed as per the impugned order.

2.6 Aggrieved appellants have filed this appeal.

3.1 We have heard Shri Rakshit Verma Advocate for the appellant and Shri Manish Raj Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits:

- in the present case, SCN has been issued merely on the basis of audit objections without carrying out any further independent investigation, hence, on this ground alone, the impugned order passed by the Commissioner (Appeals) is required to be set aside. Reliance is placed on the following decisions
  - Kirloskar Pneumatic Co. Ltd. [2010 (254) ELT 328 (Tri-Mum.)]
  - Ram Steel Rolling & Forging Mills [2006 (204) ELT 87 (T-Mum)]
  - Swastik Tin Works [1986 (25) ELT 798 (T-Mum)]
- The audit of the appellant was conducted from 13.11.2007 to 15.11.2007, however, the SCN has been issued in the instant case on 27.04.2010 i.e after a gap of almost two and half year by invoking extended period of limitation. The demand made by invoking extended period of limitation after two and half years of audit is not sustainable. Reliance is placed on the following decisions:
  - Orissa Bridge & Construction Corporation Ltd. [2011 (264) ELT 14 (SC)]
  - Shree Alloys Industries Pvt. Ltd. [2015 (39) STR 869 (Tri-Del.)]
- The factual ground on the basis of which the demand of Rs. 1,88,129/- has been confirmed is erroneous as the appellant has not received any excess consideration from its customers and has in fact received less consideration from its customers. This fact is further confirmed from the chart shown on Page-14 of the appeal memo wherein it can be clearly seen that the appellant has received less consideration to the extent to of Rs. 4,37,378/- and hence,

it implies that the appellant has already paid duty in excess. Furthermore, the appellant has placed on record the details of party-wise, invoice-wise supply and payment received with cheque numbers as Annexure-13 to the appeal memo and relevant ledgers maintained by the appellant pertaining to the said customers as Annexure-14 to the appeal memo

- The demand of Rs. 1,05,174/- has been confirmed on the ground that the appellant has availed excess cenvat credit of 'Special Denatured Spirit' (SDS) on account of short-receipt of goods. In this context, it is submitted that the appellant right from the stage of Show Cause Notice has submitted that the above-mentioned amount of Rs. 1,05,174/- has been wrongly determined by the department and the correct figures are as under:

Financial Year	Evaporation Loss in Ltrs	Assessable Value	Excise Duty	Education Cess	SHE Cess	Total Duty
2005-06	2548	40582	6493	130	NIL	6623
2006-07	1644	32212	5254	103	11	5368
Total	4192	72794	11747	233	11	11991

- the raw material 'SDS' is under the physical control of the State Excise department. The raw material is dispatched from the distillery in a sealed and locked tanker under the physical supervision of State Excise officer and the tanker is unlocked and raw material is decanted in the premises of the appellant only under the physical supervision of the State Excise officer. Thus, there arises no question of short-receipt of 'SDS' in the factory premises of the appellant. During the process of decanting of SDS, a negligible quantity of SDS evaporates from the tanker to the storage tank of the appellant which is recorded as evaporation loss.
- Such process loss comes out to 0.27% in 2005-06 and 0.328% in 2007-08 i.e. less than 0.5% in the entire

period. Here, it is pertinent to note that it has been consistently held in plethora of judgments that any minor process loss during the manufacture of finished goods does not require reversal of cenvat credit and some of those judgments are as follows

- Lubrizol India Pvt.Ltd. [2017 (352) ELT 365 (Tri-Mumbai)]
- Hindustan Zinc Ltd. [2014 (307) ELT 273 (AP HC)]
- Narendra Impex [2011 (265) ELT 332 (Guj. HC)]
- Hindustan Zinc Ltd. [2013 (294) ELT 378 (Raj)]
- Bajpur Co-operative Sugar Factory Ltd. [2008 (226) ELT 715 (Tri-Del.)]
- Bhilwara Spinning Ltd. [2008 (222) ELT 362 (Raj)]

➢ As regards the demand of Rs. 13,779/- pertaining to reversal of cenvat credit on account of issuance of debit note by the appellant due to short-receipt of material, the same has already been deposited by the appellant along-with interest on 31.03.2011 i.e. prior to the passing of the impugned order.

➢ demand of Rs. 28,64,826/-, has been confirmed on the ground that the appellant has wrongly availed cenvat credit on imported Butyl Acetate" as the same final product is manufactured by the appellant and therefore, the same is not an input. In this context, it is submitted that there is no denying to the fact that the disputed goods i.e. "Butyl Acetate"; is the final product of the appellant, however, during the year 2002, anti-dumping duty was imposed on "Butyl Alcohol" which is one of the main raw material for manufacture of "ButyI Acetate". Due to imposition of anti-dumping duty on the raw material, the prices of such raw material went up to the extent of Rs. 7- 9/per kg on account of which market was flooded with imported Butyl Acetate which was available at a very low price as compared to indigenously manufactured Butyl Acetate. In order to maintain its business in the market, the appellant also started importing Butyl Acetate and informed the department vide letter dt. 09.02.2002

- The appellant started importing the Butyl Acetate in bulk form and started clearing the same in small packages as per the requirements of the customer. Here, it is pertinent to note that the disputed product i.e. Butyl Acetate falls under the Chapter 29 of the First Schedule to the Central Excise Tariff Act, 1985 and as per Note 10 to such Chaoter-29, the activity of labelling or re-labelling of containers or repacking from bulk packs to retail packs or adoption of any other treatment to render the product marketable amounts to manufacture Thus, the activity carried out by the appellant with respect to repacking of the disputed goods from bulk form to retail packages/ form amounts to manufacture and therefore, the imported Butyl Acetate becomes the input for the appellant in respect of which cenvat credit has been rightly availed by the appellant.
- Butyl Acetate was imported in bulk quantity by the appellant, vide Bill of Entry dt. 05.09.2005 from which it can be clearly seen that the appellant imported 70 MTS (Metric Tonnes) of the disputed product classified under HSN 2915 and the Bill of Entry itself states "No. of Pkgs.: 1 BLK" meaning thereby in bulk form. Now, with respect to clearance of such goods, it can be seen that in the ER-1 return for them month of September 2005, 68625 quantity has been cleared and by the appellant in retail form. This fact is further established by the RG-1 register and copy of invoices issued during the relevant period wherein it can be clearly seen that the disputed goods have been removed in retail packages only.
- Reliance is also placed on the decision in case of Sanrad Chemicals & Essential Oils Pvt. Ltd. [2010 (260) ELT 268 (Tri- Mumbai)] wherein it was held that the activity of repacking of bulk packs into smaller retail packs was undertaken in respect of organic compounds of Chapter

29, essential oils of Chapter 33 and miscellaneous chemical products of Chapter 38, amounted to manufacture.

- Appeal should be allowed in their favour.

3.3 Arguing for the revenue learned authorized representative submits while reiterating the findings recorded in the impugned order submits:

- A perusal of the findings of the adjudicating authority reveals that the adjudicating authority has clearly mentioned that as per the ledger accounts maintained by them they have collected excess value from their customers against the sale of their goods through the consignment agents shown as sales commission which is part of assessable value. The party has not produced any substantive evidence before the Commissioner (Appeals) particularly the account ledgers and the terms of sale/ agreement with the said consignment agents/ commission agents. Thus, he confirmed the demand of Rs 188129/- along with interest.
- As regards the demand of Rs.105174/-on the shortage of input namely SDS he finds that the party has also admitted the fact of short receipt of SDS in their factory. The party have submitted that correct figures of evaporation loss as 2548 ltrs and 1644 ltrs during 2005-06 and 2006-07 respectively as against the shortage pointed out by the Audit as 34518 ltrs and 2308 ltrs during the said period respectively. Since it has been a fact on record that receipt, dispatch and consumption of SDS is under the physical control of the State Excise Department, therefore the receipt shown in the said record cannot be ignored and denied. He found that the party had neither challenged the authenticity of the said records verified by the Central Excise Officers during the audit nor have they produced the same before in during the appeal proceedings as an evidence.

- The rejection of credit of duty amounting to Rs. 24,64,826/- availed and utilized in respect of imported 'Butyl Acetate' by the appellant holding the same as one of their final products and not an input cannot be faulted with.
- With regards the demand of Rs 13,779/- impugned order observes that appellant had not contested the same before the Commissioner (Appeal).
- The demand has been correctly confirmed against the first appellant invoking the longer period of limitation in view of proviso to Section 11A(1) of the CEA, 1944.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Impugned order records the following findings:

5.1 "I have carefully gone through the case record, memorandum of appeal and the submissions made at the time of personal hearing now proceed to take up each issue as under:

5.2 As regards the demand of duty of excise amounting to Rs. 1,88,129/- in respect of excess amount collected as sales commission from their customers, the first appellant have contended that contrary to the allegation they have actually received lesser amount from their customers than the value declared on the invoices. A perusal of the findings of the adjudicating authority reveals that the adjudicating authority has clearly mentioned that as per the ledger accounts maintained by them they have collected excess value from their customers against the sales of their goods through the consignment agents shown as sales commission which is part of assessable value. I find that to contradict such a finding of the adjudicating authority, the first appellant has not produced any substantive evidence before me particularly the account ledgers and the terms of sale/agreement with the said consignment *agents/ commission agents. Instead, they have only produced some uncertified details of invoices raised and payments received from the consignment agents/ commission agents in question without declaring /producing the details of sales commission, other expenses involved in such sales and the terms of agreement with the said intermediaries for sale of their goods. Thus, I do not find any infirmity in the order passed by the adjudicating authority and the demand of Rs. 1,88,129/- confirmed against the first appellant is upheld along with the interest in view of the provisions of the Section 11A read with Section 11AB of the CEA, 1944.*

5.3 As regard the demand of Rs. 1,05,174/- on the shortage of input namely 'SDS', I find that the first appellant has also admitted the fact of short receipt of 'SDS' in their factory, however, they have submitted that correct figures of evaporation loss as 2548 Ltrs and 1644 Ltrs during 2005-06 and 2006-07 respectively as against the shortage pointed out by the audit as 34518 Ltrs and 2308 Ltrs during said period respectively. Since, it has been a fact on record that receipt, dispatch and consumption of 'SDS' is under the physical control of the State Excise Department, therefore, the receipt shown in the said records can not be ignored and denied. I find that the first appellant has neither challenged the authenticity of the said records verified by the Central Excise Officers during the audit nor have they produced the same before me during the appeal proceedings as an evidence to show that actual quantity received short was lesser than the value for which demand has been confirmed against them during the period in question. Further, the first appellant has also made a contention that the said losses occurred during the process of decanting in their premises and such minor invisible losses should be allowed as a loss during *the course of manufacture. I observe that as per condition laid down under sub-rule (1) of Rule 3 of the Cenvat Rules, Cenvat Credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of manufacture. I find that since the 'SDS' is dispatched in duly locked and sealed container and also decanted in presence of the State Excise Official, as such there is, no reason to deny the authenticity of the said records on the basis of which the shortage' has been pointed and demand of Cenvat credit availed has been confirmed in the instant case. Further, there is vast difference between the unsubstantiated figures of losses which occurred during the process of decanting in their premises as shown by the first appellant in comparison to the figures as relied upon by the department on the basis of the authentic State Excise Records. Therefore, I am inclined to accept the findings of the adjudicating authority and uphold the demand of the duty of Rs.1,05,174/- along with the interest under Rule 14 of the Cenvat Rules read with Section 11A and 11AB of the CEA 1944.*

5.4 As regards the demand of duty of Rs. 50,333/- confirmed in respect of rejected/retured goods, I find that the first appellant has received Ethyl Acetate against Invoice No. 22 dated 14.06.05 issued by Ms. P.D. Polychem (P) Ltd., Delhi and Invoice No. 2 dated 18.4.06 issued by M/s. Shivangi Enterprises, Gurgaon which is one of their final product. The adjudicating authority has held that the provisions of Rule 16 are not applicable in this case because the said returned goods were similar to their final products and invoices on the basis of which the credit has been taken indicate that the same were manufactured by some other persons not by the first appellant. I observe that provision under sub-rule (1) and (2) of Rule 16 of the Central Excise Rules, 2002 reads as under,-

(1) "Where any goods on which duty had been paid at the time of removal thereof are brought to any factory for being re-made, refined, re-conditioned or for any other reason, the assessee shall state the particulars of such receipt in his records and shall be entitled to take CENVAT credit of the duty paid as if such goods are received as inputs under the CENVAT Credit Rules, 2002 and utilise this credit according to the said rules,

(2) If the process to which the goods are subjected before being removed does not amount to manufacture, the manufacturer shall pay an amount .equal to the CENVAT credit taken under sub-rule (1) and in any other case the manufacturer shall pay duty on goods received under sub-rule (1) at the rate applicable on the date of removal and on the value determined under sub-section (2) of section 3 or section 4 or section 4A of the Act, as the case may be."

On perusal of the above provisions, I find that the use of words 'any goods' and 'any factory' in the sub-rule (1) makes it amply clear that the duty paid goods even produced or manufactured by other manufacturers can be brought into any other factory for the purposes specified therein and credit of duty paid may be availed by such other manufacturer as inputs under the Cenvat Rules. The only conditions which need to be fulfilled are that the said manufacturer shall record the particulars of such receipt in his records and pay the duty or amount equal to the credit availed, as applicable, in view of the provisions of sub-rule (2) at the time of removal of the said goods. I find that there is no dispute over the duty paid character of the goods i.e. Ethyl Acetate brought from M/s. P.D. Polychem (P) Ltd., Delhi and M/s. Shivangi Enterprises, Gurgaon against *the invoices in question. It is also not under dispute that the goods have not been accounted for by the first appellant and the appropriate duty has not been paid at the time of the subsequent removal of the said returned goods from their factory. As such, I hold that the demand of duty of Rs.50,333/- confirmed by the adjudicating authority against the appellant is not proper and legal and the issue is actually revenue neutral. My view further gets strengthened with the decision of Hon'ble CESTAT in the case of [2007(216) ELT 284 G (Tri.)] in which not only credit of third party goods brought into\the factory, has &been allowed to the manufacturer in view of rule 16 of the CER, 2002 but also allowed rebate on the same, removal of the same for export. Thus, I hereby drop the demand of Rs. 50,333/- confirmed-in respect of rejected/ returned goods*

5.5.1 As regard to the issue relating to the recovery of the Cenvat Credit of Rs.28,64,826/- involved on the imported 'Butyl Acetate' which is also one of their final product, the first appellant has mainly contended that they had already informed the department vide their letter dated 2.09.02 describing their compulsion of importing the finished goods in bulk and the same were sold as such by paying duty on higher side in view of value addition at their end. In view of this letter, the first appellant has contended that the department was pre-informed which never raised any objection to their intention as such. The longer period of limitation under proviso to Section 11A(1) of the CEA, 1944 was not invokable in their case and demand is time barred. 1 find that according to the Chapter Note 10 of the Chapter 29 of the Central Excise Tariff Act, 1985, the process of labeling or re-labeling of containers and repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable *to the consumer, amounts to 'manufacture'. In view of the plain reading of this Chapter Note, I find that there remains no doubt that a manufacturer of 'Butyl Acetate' is entitled for availing credit of duty paid even on the 'Butyl Acetate' falling under Chapter 29 of the Central Excise Tariff Act, 1985, if the same is procured/ imported in bulk for subjecting the same to the processes as given in the said Chapter Note. I find that in view of definition as given in Rule 2(k) of the Cenvat Credit Rules, 2004, input means all goods used in the factory by the manufacturer of the final product. In view of this definition also, the final product can become an 'input' only if the same is used by the manufacturer in its factory for the production of other final products. Otherwise, the Cenvat Credit Rules, 2004 do not provide any where for allowing availment and utilization of credit of duty paid on final products brought into the factory which do not fall in the category of 'inputs'. As such, to allow the credit of duty paid on "Butyl Acetate" imported by the first appellant, I observe that it needs to be ascertained actually in which form they imported and sold the said goods.*

5.5.2 In the defence reply before the adjudicating authority, the first appellant had mentioned that initially it was planned to refine the imported material and produce some derivative there from and the credit was taken as inputs. Although, I find that there is no mention of such an intention in the letter dated 2.09.02. Further, a perusal of the said letter dated 2.9.02 indicate that it does not reveal full facts as regard to the form and packing in which the said 'Butyl Acetate' was to be imported, as such the contention of the first appellant that they had pre-informed the department about their intention, does not appear to be correct. They appear to have suppressed the vital material facts from the department as regard to the form and packing details of *the imported "Butyl Acetate" in the said letter. Moreover, the said letter dated 2.9.02 only describes some circumstantial compulsions for the import of said goods which were prevalent at the relevant time. The first appellant's contention to make applicable such declaration to an assessment which relates to a different period September05 and February'07 i.e. after a lapse of a period of three years and more, can not be accepted. Further, under the self assessment procedure, a manufacturer of excisable goods is required to detemine the correctness of credit availed and to utilize the same towards payment of duty of excise on final products. Since, documents against which such credit is availed under the Cenvat Credit Rules i.e. purchase invoices/Bills of Entry, and sale invoices are not filed with the department along with the ER-1 returns, therefore, I find that the department was not ever made fully aware of the facts as regards to the form and packing in which the said 'Butyl Acetate' was imported and sold by the first appellant. Further, I find that the fact regarding wrong availment of credit on finished goods came to the notice only at the time of audit of the records of the first appellant by the Central Excise Officers*

5.5.3 Further, from the copy of ER-1 return for the month of September' 05 as relied upon by the first appellant, find that the clearance of the quantity under Chapter Head 2915,90 has been shown as 68625 (unit of quantity not mentioned therein) in the first row for the said clearance. Further, In first column, they have put (**) marks, the meaning of which has been indicated as "ButyI Acetate (maxpure) imported" below the said table in the said ER-1 return which indicates that the first appellant has shown some clearance of imported "Butyl Acetate" on the payment of duty of excise in the said return. Similarly, in the ER-1 for the month of

February07, the appellant has shown clearance of some imported material on payment of duty of excise, however the exact description of the goods cleared from the factory has not been indicated in the said return, as such it cannot be concluded that they have made clearance of "Butyl Acetate" only. Thus, I find that return filed by the first appellant for the month of September05 only indicates the clearance of imported ' Butyl Acetate' on the payment of duty, however, the same also don't declare the nature of packing in which such imported "Butyl Acetate" shown as manufactured goods have been sold by them. Further, in both the returns, the value of the clearance of the imported Butyl Acetate and their own manufactured Butyl Acetate and the duty paid thereon has been clubbed by them and as such, it could not be ascertained from the said returns as to whether they correctly reversed the amount of Cenvat Credit at the time of removal of imported ' Butyl Acetate'. Moreover, both these returns also do not reveal separately as to how much quantity of Imported 'Butyl Acetate' and their own manufactured 'Butyl Acetate' has been removed on the payment of duty. As such, the fact of exact clearance of imported 'Butyl Acetate' and reversal of credit also cannot be determined from the said returns. From the facts and documents relied in the instant case it is evident that the jurisdictional Superintendent of Central Excise vide his letters dated 26.12.07, 19.02.08, 26.03.08, 7.5.08 and 17.7.08 directed the first appellant to make the compliance of the audit objections and pay the dues. However, they neither contested the audit objection by producing the relevant record as evidence nor they paid the duty involved in the said objections. I find that the Bills of Entry, Invoices/Packing lists in respect of the purchase and sale of the imported goods by the first appellant could have only shown in what form and packing the *said goods were imported and sold for the purpose of verifying eligibility of credit on the said goods and also for verifying proper reversal/utilization of credit availed on the said goods in view of provisions of Rule 3(5) of the Cenvat Credit Rules. I observe that Smt. Manju Gupta, Director of the first appellant was also summoned under Section 14 of the CEA, 1944 by the jurisdictional Superintendent of Central Excise to appear before him and produce several documents relating to the issue pointed out by the audit party, but she neither appeared before him nor made available the requisite records/documents. From the facts available and discussed above, I notice that the appellant neither submitted the vital documents like Bills of Entry/ Invoice and Packing lists etc despite being asked to do so during investigation stage and even the same have not been submitted and relied either before the adjudicating authority or before me to verify and confirm their stand as to whether credit of duty was admissible to them on the import of said Butyl Acetate'. Thus, it appears that the first appellant is deliberately not producing the said documents so as to avoid the determination of the for and packing of the import. As if it is noticed that the goods in question have been imported in the form and packing meant for retail sale to the consumers without subjecting to any process in view of Chapter Note 10 of Chapter 29 of the Central Excise Tariff Act, 1985, then, I am of the view that the credit of duty paid on the same cannot be availed and utilized in view of the provisions of Rule 2(k), Rule 3 and Rule 4 of the Cenvat Rules. One other contention of the first appellant that even the trader registered with the department can avail credit on any goods and transfer the same to their customers. I find that this plea is not applicable to the present case, since the traders only transfer the credit to the duty paid on the purchased goods with one to one co-relation* *between the purchase and sale in terms of provisions under CER-2002 and are not authorized under the CENVAT Rules to avil the credit of the duty paid on the purchases and utilize the same towards clearance of any other goods. Therefore, in view of foregolng discussion, I uphold the decision of the adjudicating authority as regards the rejection of credit of duty amounting to Rs. 24,64,826/- availed and utilized in respect of imported Butyl Acetate by the first appellant holding the same as one of their final products and not an input. Further, also uphold that the demand has been correctly confirmed against the first appellant invoking the longer period of limitation in view of Proviso to Section 11A(1) of the CEA, 1944.*

5.6 As regard the demand of Rs. 13,779/- confirmed in respect of debit notes issued by them for the short supply of raw material during 2005-06, I find that the first appellant has not contested the issue before me and as such, I have no reason to interfere with the findings of the adjudicating authority on this issue,

5.7.1 As regard the penalty imposed, the first appellant has challenged the penalty and contended that the demand raised merely on the basis of audit objection after elapse of period of almost 3 years without further investigation was invalid and time barred. They have further contended that they were filing ER-1 retums regularly during the period in question and the facts were already in the knowledge of the department. I don't agree with the said contention. I find that period of limitation under Section 11A of the CEA, 1994 has to be determined by applying the meaning of the 'relevant date' given in the said section which, I find, no where provides that the date of audit could be considered as the 'relevant date' for the purpose of computing the period of limitation. As regards, the penalty of Rs. 1,88,129/- imposed under the provisions of Rule 25 of the CER,2002 read with

Section 11AC of the CEA, 1944,1 find that the demand of duty amounting to Rs. 1,88,129/- has been raised and confirmed by the adjudicating authority in respect additional consideration received by the first appellant in respect of sale of their finished goods through commission/ consignment agents. This issue was noticed and further looked into by the department before the issue of the show cause notice in question only after being pointed out by the Audit party. Further, the said receipt of the additional consideration over and above the invoice price has never been disclosed by the first appellant in any of their returns. As such, I find that the vital information regarding the receipt of the additional consideration was suppressed by the first appellant in the monthly ER-1 returns with the sole intent to undervalue their goods and thereby evade the payment of the appropriate duty thereon. As such, I uphold the penalty of Rs.1,88,129/- imposed by the adjudicating authority under Rule 25 of the CER, 2002 read with Section 11AC of the CEA, 1944.

5.7.2 Further, as regards the penalty of Rs. 30,34,112/- imposed under the provisions of Rule 15 of the Cenvat Rules read with Section 11AC of the CEA, 1944,I find that the issue of the irregular availment and the utilization of the CENVAT Credit again came to the notice of the department only after being pointed out by the audit party of the Central Excise, Ghaziabad. The same was never disclosed to the department in the monthly ER-1 returns. Further, I have observed that the vital documents relevant to the admissibility of Cenvat Credit have also not been tendered /produced by both the appellants during investigation with the deliberate intent to hide/suppress the form and nature of packing in which the goods were procured and sold. As such, the charge of suppression of facts, availment and utilization of Cenvat Credit in gross contravention of provisions of *the CENVAT Credit Rules with the deliberate intent to evade payment of duty of excise stands proved against the first appellant. However, since the total demand of wrongly availed and utilized Cenvat Credit now stands reduced to Rs. 29,83,779/-. In view of foregoing discussion and findings, therefore, I hereby also reduce the penalty imposed upon the first appellant to Rs. 29,83,779/- under Rule 15 of the Cenvat Rules read with Section 11AC of the CEA, 1944."*

4.3 Appellant has contested the demand by raising the preliminary objection to effect that the demand has been made on the basis of the audit objection and is not sustainable on this ground itself. To ascertain the facts enquiries were made with the jurisdictional officers. Assistant Commissioner CGST Division III, Ghaziabad has vide his letter dated 16.08.2022 addressed to Joint Commissioner (AR) has informed as follows:

Subject- Shatabdi Chemical Pvt Ltd Vs C.C.E Ghaziabad Excise Appeal No. E/122/2012.

Please refer to your letter bearing C.No. E/122/2012 dt - 07.07.2022 addressed to the Addl. Commissioner, CGST & C.Ex. Commissionerate, CGO Complex-II, Kamla Nehru Nagar, Ghaziabad and a copy of the same endorsed to this office, on the captioned subject.

Earlier, in compliance of your office letter bearing C.No.E/122/12/80 Dated- 25.11.2021 a reply has been sent vide letter C.No.20-CE/SCN/ER 4/R-V/D-1/16/16-17/Pt dated: 15.12.2021(copy enclosed) informing non availability of desired documents in this office.

Now, in reference to your above cited letter dated-07.07.2022 to Addl. Commissioner for compliance in subject case. The Adjudication Branch (Hq) has supplied the concerned case file to this office vide letter C.No. V(15)Adj/GZB/Mise/11/19/PT/3033 dated-02.08.2022 and on the basis of laid documents in the file the relevant records abstract which are as under-

A. Copy of SCN bearing No. 14/ADC/GZB/2010 dt 27.04.2010 (copy enclosed), issued by the Additional Commissioner, Central Excise, Ghaziabad (Page No. 20 to 25),

B. Copies of RUDs to SCN (copies enclosed), issued by Superintendent Central Excise, Range-II, Division-V, Ghaziabad vide F.No. 20- CE/ Shatabdi/R-I1/Div-V/07, as follows

RUD-1:- Letter even C. No. 604 dt -26.12.2007 (Page No. 11),

RUD-2:- Letter / Reminder-1 even C.No.74 dt -19.02.2008 (Page No. 10),

RUD-3:- Letter / Reminder-I1 even C.No. 124 dt -26.03.2008 (Page No. 9),

RUD-4:- Letter / Reminder-IIl even C.No.205 dt -07.05.2008 (Page No. 8),

RUD-5:- Letter even C.No.303 dt -17.07.2008 (Page No. 7),

RUD-6:- Letter dated- 20.02.2008 submitted by Director of M/s Shatabdi Chemical (P) Ltd to the department (Page No. 6) wherein they have committed that "the errors & omissions, if any, are being checked in order to correct the exaggerated figures; to arrive at the correct figures with reference to the service tax as well Central Excise duty and will be submitted to you very shortly along with the detailed reply of the captioned audit note";

RUD-7:- Letter dt - 16.05.2008, submitted by Director of M/s Shatabdi Chemical (P) Ltd before the superintendent in Range-ll, Division-V, Ghaziabad which is acknowledged on 16.05.2008 (Page No. 5),

RUD-(8/1-2) :- Copy of Summon dt - 06.04.2010, issued by the Superintendent, Range-I1, Division-V, Ghaziabad to Mrs. Manju Gupta, Director of M/s Shatabdi Chemical (P) Ltd. (Page No. 4), *RUD-(8/2):- Schedule dt 06.04.2010 giving list of documents sought by the Superintendent, Range-II, Division-V, Ghaziabad (Page No. 3), RUD-9:- Letter dt- 15.04.2010 issued by the Superintendent, Range-Il, Division- V, Ghaziabad to Deputy Commissioner, Central Excise Division-V, Ghaziabad (Page No. 2).*

The above cited RUD's reference was taken in said SCN however some other relevant documents were also found in case files received from Adjudication Branch, these are as under-

C. *Copies of Leger Sheets reflecting the Cr. and Dr. entries of transaction between M.s Shatabdi Chemical Pvt Ltd and buyers & summary of Invoice Value and Payment received thereof, as detailed hereunder-*
   - *(i) Shree Krishna Dyes and Chemicals/ GOC - SKDC (Page No. 50 to 57)*
   - *(ii) Bansal Trading Company / GOC - BTC (Page No. 58 to 79)*
   - *(iii) Pooja Chemicals (Consignment)/GOC-Pooja Chemicals (Page No. 80 to 82)*
   - *(iv) Salvochem (Consignment) / GOC-Salvocam (83 to 87)*
   - *(v) Kajaria Chemicals / GOC -Kajaria (Page No. 88 to 92)*
   - *(vi) Vishnu Corp (Consignment) GOC-V.Corporation (Page No. 93 to 106)*
   - *(vii) V.S Interchem (P) Ltd (Page No. 107 to 109)/ GOC-V.S Interchem*

D. *Copies of ER-1 / Annexure -10 etc - 04/2006, 04/2005, 10/2004 11/2004, 03/2005, 06/2005, 07/2005, 08/2005 & 12/2005. Copies of Invoices - 805 dt.11/09/04 (M/s NKITECH Pvt. Ltd), 4009 dt 29.08.2004 (M/s Paras Motors Mig. Co. Unit-*

2), 850 dt 21.02.2005 (M/s Navyug Electric Motors and Pumps Ltd), 022 dt -(M/s Flow serve), 198 dt 21.07.2005 (M/s Ashu Sales Pvt Ltd), 0341 dt 27.07.2005 (M/s Netel India Ltd), 44 dt 02.12.2005 (M/s Ecogreen Gensets Pvt Ltd) (Pages 110 to 140).

E. Reply to SCN by M/s Shatabdi Chemicals Pvt Ltd dated 22.11.2010, addressed to the Addl. Commissioner, CGST Commissionerate Ghaziabad and Annexure thereof (Page 141 to 166),

F. Copy of Audit Report FAR No.157/07-08 (Annexure-N) dt- 18/12/2007 issued by the Superintendent (Audit), Central Excise: Ghaziabad. (Page No. 174 to 176)

However, this is further to submit that with regards to calculation sheet, as earlier reported, letter vide C.No. 20-CE/SCN/ER-4/R-V/D-1/16/16-17 dt.15.12.2021, no calculation sheet is available in office records and as per the records apparently there is no reference to a calculation sheet in the case. Whatever remaining documents are being forwarded to your office are photocopies as made available by the Adjudication branch Head Quarters, CGST Commissionerate, Ghaziabad.

The above cited facts, documents and information are being forwarded herewith for effective hearing in said case. This is for information and necessary action at your end please.

From the above letter it is evident that the department is not in position to provide the calculation sheet as per which the demand as made in the show cause notice and subsequently confirmed by the authorities below. Hence we proceed in the matter in absence of the said calculation sheets. However we also note that the enquiries and the investigations were being made in the matter and the matter was corresponded with the appellant. Thus it is not correct to to say that the show cause notice has been issued simply on the basis of the audit objection alone. It was only after making necessary enquiries and investigations in the matter the show cause notice has been issued. Relevant correspondences in the matter have been made the part of relied upon documents. In view of the above we do not find any merits in the submissions made by the appellant relying upon the decisions in case of:

- Kirloskar Pneumatic Co. Ltd. [2010 (254) ELT 328 (Tri-Mum.)]
- Ram Steel Rolling & Forging Mills [2006 (204) ELT 87 (T-Mum)]
- Swastik Tin Works [1986 (25) ELT 798 (T-Mum)]

4.4 On the issue of limitation appellant have submitted that show cause notice was issued after lapse of more than two and half years from the audit and hence time barred. We also do not find any merits in this submission for the reason as the matter was under investigation and correspondence with the appellant throughout. It was only after completion of investigation that the show cause notice has been issued. In the case of Orissa Bridge and Construction Corporation Ltd, relied upon by the appellant, Hon'ble Supreme Court has observed as follows:

> ***"4.*** *The second point on which the show cause notice was contested by the appellant was on the point of limitation. In the impugned order, it is mentioned that appellant's activities were detected by the revenue on 24-8-1987 and show cause notice was issued on 4th December, 1989.*
>
> ***5.*** *On the previous date of hearing, we adjourned this case to enable the counsel for the revenue to seek instructions as to why the show cause notice was issued after two years and 4 months approximately of the inspection carried out by the authorities. Counsel appearing for the revenue informs us that file is misplaced and is not traceable.*
>
> ***6.*** *Keeping in view the facts and circumstances of the case and without laying any proposition of law, we hold*

> *that the department was not justified in invoking the extended period of limitation under Section 11A of the Central Excises and Salt Act, 1944 (for short, 'the Act') and accordingly, finding of the Tribunal on this point is reversed. We hope that the department shall initiate some action against the erring officer/official for issuing show cause notice to the assessee after a gap of approximately two years and four months from the date of inspection at the factory of the assessee."*

In the present case the facts point to the delay on the part of the appellant in responding to the queries and summons issued by the department in pursuance of the audit objection. It was not the case of the type being dealt by the Hon'ble Supreme Court. Further in the above decision, Hon'ble Supreme Court has clearly observed they are not laying any proposition in law, and had decided the issue on the fact of that case.

4.5 On the merits we find that the demand has been made against the appellant on four counts:

(i)	Short payment of duty on excess consideration received from the customers on sale made through consignment agents.	1,88,129
(ii)	Excess availment of CENVAT credit on SDS, due to short receipt.	1,05,174
(iii)	Debit notes issued by the appellant on account of short receipt.	13,779
(iv)	Wrong availment of CENVAT Credit on imported "Butyl Acetate"	28,64,826
	Total	31,71,908

4.6 From the submissions made in the appeal and during the course of arguments we find that the appellant is not challenging the demand at (iii) in the table above. In fact they have paid this amount along with applicable interest. Impugned order also records similarly. Since there is no contest to this demand we are not pronouncing on the confirmation of this demand.

4.7 From the ledger accounts maintained by the appellant of their consignment agent we find that appellants have received amount which is lesser that the amount indicated in the invoices issued for the supplies made through the said consignment agent. The extract from the ledger is reproduced below:

Amount in Rs			
Consignment Agent	Total Invoice Value	Realization	Difference
Solvochem	40,84,057	40,47,593	-36,464
Vishnu Corporation	1,23,66,909	1,22,53,287	-113622
Sri Krishna Dyes	1,04,11,232	1,02,73,605	-1,37,627
V S Interchem	8,04,021	8,04,021	0
Kajaria Chemicals	48,63,039	48,63,039	0
Pooja Chemicals	70,18,199	68,37,973	-1,80,226
Bansal Trading	1,60,42,402	1,60,72,963	30,561
Total	5,55,89,859	5,51,52,481	-4,37,378

From the above it is quite evident that the appellant had received the amount as indicated in the ledgers which is less than the total invoice in all other cases except in the case of M/s Bansal Trading. However if totality the amount received is less than the total invoice value for all the consignment agents. These figures were also made available to the authorities below, and authorities have rejected the same without recording any reasons for the same. The copies of ledgers were also produced, authorities if were having different opinion should have drawn their extracts from the ledger to substantiate the case of revenue, rather than summary rejection. We do not find any merits in the impugned order confirming this demand.

4.8 Demand made at (ii) in the table above is in respect of alleged short receipt of SDS by the appellant. We do not find any merits in this demand and agree with the appellant submission that the very minor shortage (of 0.27 % during the Financial Year 2005-06 and on 0.328% during the Financial Year 2006-07) is on account of process losses (evaporation losses). In the case of Lubrizol India Pvt. Ltd. [2017 (352) ELT 365 (Tri-Mumbai)] following has been held:

> "5. *I find that shortage of 6 MTs of intermediate input comes to 0.3% of total stock of 2500 MTs handled during the financial year. This shortage cannot be taken as actual shortage for the reason that nature of input is such there are always chances of evaporation and handling and process loss. It is not the case of department that such shortage has been cleared clandestinely therefore whatever input were received by the appellant either input lying in the stock or consumed in the production. There is no disposal otherwise of this shortage. The judgments cited by the ld. Counsel directly support the case that in case of minor variations in the stock and in the fact there is no evidence of removal of such input from the factory, Cenvat credit cannot be disallowed. I am therefore of the view that merely for smaller quantity found short by the internal auditor and reported in 3CD report, credit cannot be denied. Therefore impugned order is set aside. Appeal is allowed."*

In the case of Associated Cement Companies Ltd [2006 (197) ELT 215 (T-LB)] following was held:

> *"7. We find a lot of force in the above reasoning of the Assistant Commissioner. Admittedly, the respondents have paid for the entire quantity of the inputs including the moisture content. Duty has also been paid on the said consignment on the total weight, no claim has been made by the assessee from their suppliers on account of this loss of moisture. As such, it is the total quantity of the inputs and total quantum of duty paid on the said inputs, which has to be taken into consideration for the purposes of the modvat credit in terms of Rule 57A. The credit cannot be variated. Subsequently, on account of moisture loss as it is admittedly not the loss of the inputs prior to their use. Denial of credit can only be considered when the inputs themselves are lost prior to their use.*
>
> *8. We take note of Tribunal decision in the case of P.K.P.N. Spinning Mills Ltd. v. Commissioner of Central Excise, Coimbatore - 1997 (89) E.L.T. 588 (Tri.) wherein under similar facts and circumstances it was held that an assessee would be entitled to full duty paid at the suppliers end and in respect of full quantity, which was received at their premises without any loss of moisture of the fibre on*

> *the way. Modvat credit is available to the extent of duty, which was attributable to the goods received in the factory. Inasmuch as full quantity has been received the Modvat credit attributable to the weight of the moisture lost in transit from the suppliers end to the assessees end cannot be denied. The said decision was not taken note of by the single member bench of the Tribunal while deciding the issue in the case of Adhesives & Chemicals."*

Hon'ble Gujarat High Court has in the case of Narendra Impex [2011 (265) ELT 332 9Guj)] held as follows:

> ***"8.****Thus, the undisputed facts of the case are that except for the 3-CD Income Tax Return, there is no evidence on record to indicate that there was in fact shortage of raw material on account of short receipt thereof; and that the assessee had availed credit of duty as reflected in the invoices for the inputs. It was also found that during the process of blow moulding some process loss was likely to occur during and that the loss claimed by the assessee was not on the higher side. Thus, it is not in dispute that there is no diversion of goods covered under the invoices in question and that the entire inputs received have been used as inputs in the end product manufactured by the assessee and have not been put to any other use. The mode of proof of quantity and payment of duty on inputs received and used as input is by producing invoices. Unless the invoices are found to be wrong or diversion of inputs received under any invoice to any other use is found, the assessee is entitled to avail of the cenvat credit in terms of the invoices issued by the supplier. In the absence of any evidence to indicate short receipt of material, merely because there is some discrepancy between the quantity stated in the invoice and that shown in the 3-CD report, it cannot be presumed that there was in fact short receipt of raw material."*

In view of the decisions as above we do not find any merits in this demand and set aside the same.

4.9 Appellant had imported 'Butyl Acetate" classifiable under Chapter 29 of Central Excise tariff Act, 1985 in bulk and have cleared the same in retail packets after repacking the same. The said activity as per chapter note 10 to the said chapter amounted to manufacture. The chapter note is reproduced below:

> *"10. In relation to products of this Chapter, labelling or relabelling of containers or repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to 'manufacture'.*

4.10 Taking note of the above chapter note in the case of Sanrad Chemicals & Essential Oils Pvt. Ltd. [2010 (260) ELT 268 (Tri- Mumbai)] following was held:

> *"**2.** During the period of dispute (April, 2001 to October, 2004), the appellant was engaged in the activity of converting bulk packs of excisable goods to smaller retail packs. During the said period, they undertook this activity in respect of goods falling in Chapters 29, 33 and 38 of the CETA Schedule. They did not pay duty on the retail packs. In a show-cause notice issued by the department, they were directed to pay duty on such retail packs for the aforesaid period. This demand was contested. In adjudication of the dispute, the original authority confirmed demand of duty of Rs. 9,01,534/- against the appellant under Section 11A of the Central Excise Act and imposed equal amount of penalty on them under Section 11AC of the Act. Interest on duty was also demanded under Section 11AB of the Act. An earlier deposit of Rs. 4,75,882/- was appropriated towards the above demand. The adjudicating authority also denied CENVAT credit to the extent of Rs. 4,25,652/- to the appellant in respect of bulk goods (inputs). The appeal filed by the assessee against the order of adjudication was rejected by the Commissioner (Appeals). Hence the present appeal.*
>
> ***3.** The activity of repacking of bulk packs into smaller retail packs was undertaken in respect of organic*

> *compounds of Chapter 29, essential oils of Chapter 33 and miscellaneous chemical products of Chapter 38. No duty was paid on these smaller retail packs. At this stage, the appellant has, fairly, acknowledged the applicability of the relevant Chapter Notes (embodying 'deemed manufacture') in respect of the goods falling in Chapters 29 and 38. As per the relevant Chapter Notes, "the repacking of goods from bulk packs to retail packs, re-labelling of the containers or the adoption of any other treatment to render the products marketable to the consumer" amounted to 'manufacture'. The appellant, today, accepts this legal position and, accordingly, admits duty liability in respect of the repacked goods falling in Chapters 29 and 38. We are contextually told that duty on these goods was paid prior to issuance of the show-cause notice."*

4.11 In view of the above there cannot be any doubt that the imported Butyl Acetate in bulk was an input for the manufacture of the finished goods namely Butyl Acetate in retail packs. In fact appellant has in his ER-1 returns shown the clearance of the said goods in retail packs and on payment of duty. Once the appellant was paying duty on the finished goods then their can be no question for denial of the CENVAT Credit. In case of Ajinkya Enterprises [2013 (294) ELT 203 (Bom)] Hon'ble Bombay High Court has held as following:

> *"7. According to the Revenue once a Circular was issued by the C.B.E. & C. on 2nd March, 2005 thereby withdrawing the earlier Circular dated 7th September, 2001, it was clear that the activity of decoiling the HR/CR sheets did not constitute manufacture and, therefore, the assessee could not have taken credit of duty paid on HR/CR coils. It is further argued that if the process of decoiling the HR/CR coils did not constitute manufacture, then, obviously no duty was payable on clearance of the decoiled HR/CR coils and consequently the assessee could*

not taken credit of duty paid on HR/CR coils. Merely because, the assessee had paid duty though not payable, it cannot be said that the credit of input duty has been correctly taken. It is contended that the assessee had applied to the Board seeking regularization of the credit which was wrongly taken, but the Board has rejected the request made by the assessee. In these circumstances, it is submitted that the CESTAT ought not to have interfered with the order passed by the authorities below.

8. We see no merit in the above contentions. As rightly contended by the representative of the assessee appearing in person, till 1st March, 2005 the Revenue has accepted that the activity carried on by the assessee constituted manufacturing activity in view of Board Circular dated 7th September, 2001 and accordingly held that the assessee is entitled to take credit of duty paid on HR/CR coils. It is only because, the Board, on 2nd March, 2005 has withdrawn the Circular dated 7th September, 2001 the Revenue is claiming that the activity carried on by the assessee does not amount to manufacturing activity. The question is, whether on the facts of the present case, the Revenue, based on the Circular dated 2nd March, 2005, is justified in calling upon the assessee to reverse the credit or pay the amount to the extent of the credit liable to be reversed, with interest and penalty?

9. It is relevant to note that the Board in its Circular dated 7th September, 2001 had only held that the activity of cutting/slitting of HR/CR coils into sheets or strips constitutes manufacture. Admittedly, the assessee had carried on additional activities such as pickling and oiling on the decoiled HR/CR coils, which is a complex technical process involving huge investment in plant and machinery. Since these additional activities were not considered by the Board in its Circular dated 7th September, 2001, the withdrawal of the said Circular cannot be a ground to hold *that the activity carried on by the assessee did not constitute manufacturing activity. It is only on 24th June, 2010, the Board has issued a Circular to the effect that the process of pickling does not amount to manufacture. Therefore, during the relevant period, that is, during the period from 2nd March, 2005 to 31st December, 2005, it could not be said that the issue was settled and that the assessee paid duty on decoiled HR/CR coils knowing fully well that the same were not manufactured goods. If duty on decoiled HR/CR coils was paid bona fide, then availing credit of duty paid on HR/CR coils cannot be faulted.*

10. Apart from the above, in the present case, the assessment on decoiled HR/CR coils cleared from the factory of the assessee on payment of duty has neither been reversed nor it is held that the assessee is entitled to refund of duty paid at the time of clearing the decoiled HR/CR coils. In these circumstances, the CESTAT following its decision in the case of Ashok Enterprises - 2008 (221) E.L.T. 586 (T), Super Forgings - 2007 (217) E.L.T. 559 (T), S.A.I.L. - 2007 (220) E.L.T. 520 (T) = 2009 (15) S.T.R. 640 (Tribunal), M.P. Telelinks Limited - 2004 (178) E.L.T. 167 (T) and a decision of the Gujarat High Court in the case of CCE v. Creative Enterprises reported in 2009 (235) E.L.T. 785 (Guj.) has held that once the duty on final products has been accepted by the department, CENVAT credit availed need not be reversed even if the activity docs not amount to manufacture. Admittedly, similar view taken by the Gujarat High Court in the case of Creative Enterprises has been upheld by the Apex Court [see 2009 (243) E.L.T. A121] by dismissing the SLP filed by the Revenue."

4.12 In view of discussions as above we do not find any merits in the impugned order to the extent of the demand made at Sl No (i), (ii) & (iv) in the table in para 4.5 above and set aside the same to that extent. The demand made at Sl No (iii) not being contested is upheld. We also note that appellant has already paid this demand along with interest.

4.13 As the demand has been set aside on the merits we are not considering the issue on limitation and also on the penalties imposed which are set aside.

5.1 Appeal is allowed.

(Operative part of the order pronounced in open court)

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

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp